



## Financial Services Update

June 10, 2015

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#### Federal Regulatory Developments

FTC Revises FAQs Regarding Endorsement and Testimonial Guides

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#### WBK News

**Jason McElroy** will discuss “Mastering Research Techniques for Regulatory Compliance” and “Supervisory Findings and Best Practices to Prevent Them” during the Optimal Blue Client Conference on June 17 in Nashville, TN. [MORE INFO](#)

**Weiner Brodsky Kider PC** recently held exclusive TRID Workshops for clients which provided an overview and understanding of the key elements of TRID, and how the rule will affect the policies, procedures and training implemented by mortgage lenders. The firm now has made available the **WBK TRID Workbook**, which covers integrated disclosure readiness as the workshops did, from pre-application to post-closing under TRID. [Purchase a copy for \\$250.](#)

## **SUMMARIES**

### **Federal Regulatory Developments**

#### **FTC Revises FAQs Regarding Endorsement and Testimonial Guides**

The FTC previously promulgated regulations providing guidance about the application of Section 5 of the FTC Act to advertisements using endorsements and testimonials. The Guides include general principles that the FTC uses in evaluating endorsements and testimonials in advertising as well as illustrations of application of the same. To help clarify its positions in the Guides, the FTC has published informal responses to frequently asked questions on the subject. The FTC most recently updated these questions and responses to address the latest trending issues regarding endorsements and testimonials.

The fundamental issues raised in the Guides and FAQs remain the same. For example, endorsements must be truthful and not misleading. There also must be clear and conspicuous disclosure in certain instances, such as: (i) if a connection exists between an endorser and advertiser that consumers would not expect that would affect how they evaluate the endorsement, or (ii) if the advertiser does not have proof that the consumer will generally achieve what the endorser is representing as his or her experience if the consumer uses the product as advertised.

However, the FAQs have been updated to reflect ongoing developments in the means of advertising (e.g., bloggers with relationships to sponsoring advertisers, social media posts or YouTube video reviews, disclosures in a Twitter universe, etc.) and expansions on issues previously addressed (e.g., wording to use in particular disclosures). As before, how an endorsement must be handled often will depend on the specific situation at hand. For example, whether disclosure is required for “likes” on Facebook as part of a paid campaign may depend on the circumstances. However, the FAQs provide that an advertiser that buys fake “likes” (e.g., those from non-actual consumers) would be engaged in a deceptive practice and possibly face enforcement action.

The full set of revised FAQs can be found on the FTC’s website at:

<https://www.ftc.gov/tips-advice/business-center/guidance/ftcs-endorsement-guides-what-people-are-asking>.

#### **FCC To Vote on Proposed Rulings Regarding TCPA Interpretation**

The FCC recently released a fact sheet outlining proposed rulings that, if adopted by the FCC, would address several petitions from the industry that sought to clarify various questions related to enforcement of the Telephone Consumer Protection Act (TCPA). The FCC will vote on the proposal at its open meeting on June 18, 2015. Although the proposal itself has not been made public, the FCC’s fact sheet outlines several proposed actions that, in the FCC’s own words, are intended to “close loopholes and

strengthen consumer protections already on the books.” The FCC further described the proposal as “one of the most significant FCC consumer protection actions since it established the Do-Not-Call Registry with the FTC in 2003.”

According to the fact sheet, the proposed rulings would clarify the following areas involving TCPA protections to consumers:

Right to Revoke Consent. The proposal would clarify that consumers have the right to revoke their consent to receive robocalls and robotexts in any reasonable way and at any time. This aspect of the proposal applies to wireless and landline home service.

Treatment of Reassigned Numbers. The proposal would clarify that consumers who inherit a phone number would not be subject to a barrage of unwanted robocalls to which a previous subscriber of the number consented. If a phone number has been reassigned, callers must stop calling the number after one call. This aspect of the proposal applies to wireless and landline home service.

Definition of “Autodialer.” According to the fact sheet, an “autodialer” is any technology with the *capacity* to dial random or sequential numbers. The fact sheet notes that this definition is intended to ensure that robocallers cannot skirt consumer consent requirements through changes in calling technology design or by calling from a list of numbers. This aspect of the proposal applies to wireless service.

Limited Exception for Urgent Circumstances. The proposal affords a very limited exception for urgent circumstances. According to the fact sheet, free calls or texts to alert consumers to possible fraud on their bank accounts or remind them of important medication refills would be allowed. Although these are examples of potentially exempt purposes, the fact sheet is clear that calls or texts for marketing or debt collection would not be covered by the exception. In addition, consumers would have the ability to opt out of even these permitted calls and texts. This aspect of the proposal applies to wireless service.

Do-Not-Disturb Technology. The fact sheet states that carriers could offer robocall-blocking technologies to consumers. According to the fact sheet, the proposal would give the “go-ahead” for carriers to implement market-based solutions that consumers could use to stop unwanted robocalls.

According to the fact sheet, unwanted calls and texts are the number one consumer complaint to the FCC. The FCC also noted that it receives thousands of complaints every month on both telemarketing and robocalls. The fact sheet states that through its proposed rulings, the FCC intends to confirm the consumer’s ultimate right to control the calls he or she receives.

The FCC's fact sheet can be found here: <https://www.fcc.gov/document/fact-sheet-consumer-protection-proposal>.

### **Adding Your Logo to the Home Loan Toolkit**

The CFPB issued instructions on how creditors and other housing professionals can customize the Home Loan Toolkit by adding their logo to the cover of the booklet. The Toolkit will replace the current Settlement Cost booklet and must be used with the Loan Estimate and Closing Disclosure for applications received on or after August 1, 2015.

The instructions provide the legal requirements for adding a company's logo, including information about the required disclaimer language that must be included on the inside front cover as well as a trademark licensing agreement. The CFPB also provides practical instructions for working with the PDF file to add the logo and required disclaimer language.

Notably, the instructions and agreement apply only to the Home Loan Toolkit, not to other CFPB publications. In addition, other than changes permitted by regulation, those who use the content with a CFPB trademark cannot revise the content without express written permission from the CFPB.

The instructions for adding your logo to the Home Loan Toolkit are available at: [http://files.consumerfinance.gov/f/201505\\_cfpb\\_using-your-logo-with-your-home-loan-toolkit-instructions.pdf](http://files.consumerfinance.gov/f/201505_cfpb_using-your-logo-with-your-home-loan-toolkit-instructions.pdf).

The Toolkit may be downloaded or ordered from the CFPB's website: <http://www.consumerfinance.gov/learnmore/#respa>.

### **DOJ Issues Another FHA-Based False Claims Act Settlement**

On June 1, 2015, the U.S Department of Justice announced a \$212.5 million settlement with a regional bank to settle allegations of False Claims Act violations relating to the origination of FHA loans.

The Department of Justice alleged that First Tennessee Bank, N.A., through its subsidiary First Horizon Home Loans Corporation, failed to comply with origination, underwriting, and quality control requirements. According to the Department of Justice's press release, First Tennessee admitted that it certified for insurance loans that did not meet underwriting guidelines, that its underwriting quality decreased as the company's FHA production increased, and that the company was aware of these deficiencies through quality control reports but failed to report them to HUD. As a result, the Department of Justice alleged that the company knowingly filed claims for loans that should not have been insured, in violation of the False Claims Act.

The Department of Justice did not release a copy of the settlement agreement. The Department of Justice's press release is available here:

<http://www.justice.gov/opa/pr/first-tennessee-bank-na-agrees-pay-2125-million-resolve-false-claims-act-liability-arising>

## Litigation Developments

### Federal Court Enjoins SEC Administrative Hearing for Violation of Appointments Clause

The U.S. District Court for the Northern District of Georgia recently entered an order prohibiting the Securities and Exchange Commission from moving forward with an administrative trial, ruling that the administrative law judge presiding over the administrative hearing was not appointed by an appropriate official, in violation of the Appointments Clause of Article II of the Constitution.

In *Hill v. SEC*, the plaintiff made four separate arguments that the SEC administrative hearing process was unconstitutional. The federal judge ruled that three of these arguments – that congress impermissibly delegated authority to the President in creating the SEC administrative process, that the administrative trial violated the 7th amendment right to a jury trial, and that the administrative law judge’s tenure impermissibly restricted the President’s authority to fire him – lacked merit.

However, the federal judge found the Plaintiff’s argument that the proceeding violated the Appointments Clause was valid. The Appointments Clause requires certain officers of the United States to be appointed by the President, a court of law, or a designated head of an agency. So called “inferior officers” are also subject to this requirement. In making her ruling, the judge found that the administrative law judges at the SEC are “inferior officers,” and are thus subject to the Appointments Clause. Because the SEC admitted in its briefing that the administrative law judge at issue was not appointed, the federal judge determined the plaintiff was likely to succeed on the merits of this argument and enjoined the administrative proceeding from moving forward.

The court noted, however, that the SEC could easily remedy this problem by bringing the matter in federal court, or having the administrative hearing presided over by an appointed officer, such as one of the SEC commissioners.

WBK regularly defends financial services companies in administrative proceedings and federal courts throughout the United States.

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