

How The New MAP Rule from the FTC Affects You

By John Dolgetta, Esq.

On August 19, 2011, the Federal Trade Commission (“FTC”) issued the Mortgage Acts and Practices – Advertising Rule, also known as the “MAP” rule (the “MAP Rule” or the “Rule”). The MAP Rule “..., among other things: prohibits any misrepresentation in any commercial communication regarding any term of any mortgage credit product; and imposes certain recordkeeping requirements.” The MAP Rule affects all individuals or entities that engage in dissemination of information about mortgages (in virtually any form or format), specifically residential mortgages and related mortgage products, in a commercial setting. It is important to note that real estate agents and brokers are included under the scope of this Rule if they engage in disseminating information relating to mortgages affecting dwellings as defined under the Rule.

If you or your office maintain a mortgage calculator on your website or handout the latest rates publically posted by your three favorite lenders or consistently recommended mortgage broker, and provide to consumers lists of the mortgage products and the current rates last offered by such lenders, you will fall under the new MAP Rule. Failure to comply has severe consequences.

The National Association of Realtors (“NAR”), in a letter to the FTC, requested that real estate agents and brokers be excluded from the Rule’s scope. However, the FTC refused to do so. (To review a copy of the letter from NAR to the FTC visit http://www.realtor.org/wps/wcm/connect/2d679c8044b54d749a7fda5d6aeab3b5/NAR_cmt_on_Mort_Ad_Rule_11_15_2010_FINAL.pdf?MOD=AJPERES&CACHEID=2d679c8044b54d749a7fda5d6aeab3b5.) Very simply, the FTC rejected NAR’s request and basically indicated in its commentary that “[t]hese types of individuals and entities, as well as others, can make direct or indirect misrepresentations to consumers about mortgage credit products, causing consumers harm.” Therefore, any real estate professional that provides or makes any “commercial communication” regarding a “mortgage credit product” will be covered and will be required to adhere to the requirements of the MAP Rule. (A copy of the FTC’s MAP Rule and the FTC’s helpful commentary can be found at:

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

The Legislative Intent and Background of the MAP Rule

The MAP Rule originated out of the Credit Card Act, which was signed into law by President Obama on May 22, 2009. This Act sets forth the FTC’s rulemaking power in connection with the MAP Rule (which rule making authority was first provided for in the Omnibus Appropriations Act signed into law on March 11, 2009). The Credit Card Act specified that the “...FTC rulemaking ‘shall relate to unfair and deceptive acts or practices regarding mortgage loans, which may involve loan modification and

foreclosure rescue services.” In essence, the MAP Rule was issued in order to specifically regulate unfair or deceptive practices engaged in by any individual or entity including lenders, mortgage brokers, home builders, and also extending to real estate agents and brokers when advertising or providing information about mortgage products. As of July 21, 2011, under the Omnibus Appropriations Act, the rulemaking authority of the FTC was transferred to the Consumer Financial Protection Bureau (visit <http://www.consumerfinance.gov> for additional information). The Consumer Financial Protection Bureau, the FTC and the individual States’ attorneys general are all responsible for the enforcement of the MAP Rule. The Rule specifically provides that “any attorney general or other officer of a state authorized by the state to bring an action under this part may do so....”

The terms “unfair” and “deceptive” as explained in the Commentary are defined in the Federal Trade Commission Act (the “FTC Act”). In order to determine whether an act is unfair according to the FTC Act the following three prongs must be met: “[f]irst, the practice must be one that causes or is likely to cause substantial injury to consumers. Second, the injury must not be outweighed by countervailing benefits to consumers or to competition. Third, the injury must be one that consumer could not reasonably have avoided.” Deception is explained in the FTC’s Deception Policy Statement of 1984. It provides that “...an act is deceptive if: (1) [t]here is a representation, omission of information or practice that is likely to mislead consumers acting reasonably under the circumstances; and (2) that representation, omission, or practice is material to consumers.”

Key Terms Used in the MAP Rule

The Rule utilizes certain specific terms which are critical and need to be understood. The Rule prohibits misrepresentations in a commercial communication about any term of a mortgage credit product. A “commercial communication” is broadly defined as follows:

“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, whether it appears on or in a label, package, package insert, radio, television, cable television, brochure, newspaper, magazine, pamphlet, leaflet, circular, mailer, book insert, free standing insert, letter, catalogue, poster, chart, billboard, public transit card, point of purchase display, film, slide, audio program, transmitted over a telephone system, telemarketing script, upsell script, training materials provided to telemarketing firms, program-length commercial (“infomercial”), the Internet, cellular network or any other means. Promotional materials and items and Web pages are [also] included in the term “commercial communication.”

It is clear from this broad definition that almost anything could be a “commercial

communication” and, therefore, all persons and entities must be extremely careful when making any statement that could potentially be a commercial communication in connection with a mortgage product.

Another critical term is “mortgage credit product.” A “Mortgage Credit Product” is defined as “...any form of credit that is secured by real property or a dwelling and that is offered or extended to a consumer primarily for personal, family or household purposes.” The term “dwelling” as defined in the Rule means a residential structure that contains one to four units, whether or not the structure is attached to real property.” This also includes a condominium, cooperative unit, mobile home, manufactured home, or trailer. This MAP Rule does not apply to commercial mortgages or commercial real property (i.e., property used primarily in connection with a business).

The Rule prohibits any person from making any material misrepresentations relating to a number of items, such as interest rates, annual percentage rates, fees associated with the loan, costs related to ancillary products offered with the mortgage, payments of principal and interest and real estate taxes, prepayment penalties, variable interest rate features, amortization features, the amount of the loan, the source of commercial communications, a consumer’s ability to obtain a mortgage and numerous other items relating to the dissemination of the information relating to a mortgage credit product and features associated with the product. “Person” is defined very broadly as “...any individual, group, unincorporated association, limited or general partnership, corporation or other business entity.” As explained in the commentary this definition also extends to real estate agents, brokers and brokerage firms as well.

Real Estate Brokers, Agents and Brokerage Firms Must Be Extremely Careful

Many real estate professionals are disseminating information about mortgage credit products on a daily basis and need to be mindful as to what information is being provided to the consumer (the recipient does not necessarily have to be a client or customer as these terms are customarily used in the real estate industry). In the event a real estate agent, broker or brokerage firm provides specific information about a mortgage credit product he, she or it runs the risk of violating the MAP Rule and making a material misrepresentation. A misrepresentation can be either an express or implied one. With an ever-increasing number of brokerage firms moving toward a “one-stop shop” business model and also providing mortgage services, or having affiliated business arrangements with lenders or lending arms, the risk that a violation will occur is more likely.

In its letter to the FTC, NAR also requested that the MAP Rule expressly exclude “...informational or educational statements that real estate brokers and agents may make.” The FTC again refused to do so on the basis that a “...communication is not ‘commercial’ unless it ‘is designed to effect or create interest in purchasing goods or services.’ Thus, a statement that is purely informational and is not designed to effect or

create interest in purchasing goods or services would not be covered by the Rule.” While the FTC’s rationale seems straightforward, usually any type of information provided to a consumer by an agent or broker could cause that consumer to purchase goods and services, i.e., purchase a specific mortgage credit product through a lender or mortgage broker recommended or introduced to the consumer by the broker or agent. The more the broker or agent become involved in assisting a consumer with a residential mortgage product, the more he or she runs the risk of being in violation of the MAP Rule. It is imperative that a broker or agent carefully review any commercial communication before it is made, or have their attorney review same, and should also consider using a proper disclaimer as recommended by the FTC in its Rule.

The FTC Rule Allows for a Disclaimer

The FTC points out that “[a] disclaimer or qualifying statement may correct a misleading impression, but only if it is sufficiently *clear and prominent* [emphasis added] to convey the qualifying information effectively, i.e., it is both noticed and understood by consumers.” The preamble goes on to explain “[i]n many circumstances, reasonable consumers do not read the entirety of an ad or are directed away from the importance of the qualifying phrase by the acts or statements of the seller.” The FTC discourages the use of fine print or similar “video superscripts” in a video ad indicating that such types of disclaimers will not protect against claims of misrepresentation.

Real estate professionals, therefore, should always include a disclaimer when providing any information to consumers about the terms of a mortgage credit product. The disclaimer language should be provided in a font that is at least as large, if not larger, than the rest of the advertisement text. The FTC seems to suggest, by its use of the words “clear and prominent,” that it would be a good idea to bold or highlight the disclaimer language as well. The FTC Rule recommends that the disclaimer should be placed in a location that is easily visible and obvious to the consumer receiving the information about a mortgage credit product. The following is model disclaimer language (which has been revised slightly) published in the online periodical entitled *Letter of the Law* prepared by the National Association of Realtors® on its website (www.Realtor.org):

This communication is provided to you for INFORMATIONAL PURPOSES ONLY and should not be relied upon by you in any manner whatsoever. [INSERT NAME OF BROKERAGE FIRM, BROKER OR AGENT, AS APPLICABLE] is not a mortgage lender or mortgage broker and therefore, you should contact [INSERT NAME OF THE ENTITY PROVIDING THE MORTGAGE PRODUCT(S) IDENTIFIED] directly to learn more about its mortgage products and your eligibility for such products or you should contact any other lender or mortgage broker directly for any such information.

It is highly recommended that the disclaimer be tailored to the specific type of information that is being provided to a consumer and it should be included in any

commercial communication made to the consumer. If a real estate agent or broker is making a communication or is providing other services beyond transmitting very general mortgage information, you will need to tailor your disclaimer to specifically cover those particular services. The MAP rule provides that it is a violation for “any person to obtain, or attempt to obtain, a waiver from any consumer of any protection provided by or any right of the consumer under this part.”

Recordkeeping Requirements and Harsh Penalties

Under the Rule, any “person”, including real estate agents, brokers and brokerage firms must keep records of all covered commercial communications for a period of twenty-four (24) months from the date that any such communication was made or disseminated to the consumer. This would include any and all materials, in any form, relating to all communications made in connection with a mortgage credit product. The Rule requires that “[a]ny person subject to this [Rule] may keep the records...in any legible form, and in the same manner, format, or place as they keep such records in the ordinary course of business.”

In a podcast provided by NAR entitled “Legal Podcast: The Mortgage Acts and Practices Rule's Impact”, Thomas B. Pahl, Assistant Director, Division of Financial Practices, Federal Trade Commission, discussed how the Mortgage Acts and Practices (MAP) rule will impact real estate professionals who provide information to consumers about mortgage products. (A copy of the podcast is available at www.realtor.org). Mr. Pahl indicated that any violation under the MAP Rule could subject a person to civil penalties of up to \$16,000 per day per violation. He indicated that the courts would have discretion as to the severity of the penalty depending upon the scope of the violation. Any violation under the MAP Rule could potentially be devastating to a violator. The MAP Rule presents a very real concern for all entities and persons disseminating the type of covered mortgage information and real estate professionals need to ensure that they strictly adhere to its provisions.

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