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Mortgage Lenders, Brokers and Servicers Can Learn Valuable Lessons from FTC Record $7.5 Million Civil Penalty for Illegal Telemarketing

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Advertising mortgage loans can be a tricky business, especially for companies not familiar with the myriad of complex federal laws that govern such advertising. One of the nation's leading refinancers of veteran's home loans learned that the hard way. Mortgage Investors Corporation will pay a $7.5 million civil penalty, the largest fine the Federal Trade Commission (FTC) has ever collected for allegedly violating Do-Not-Call provisions of the agency's Telemarketing Sales Rule, 16 CFR 310 (Telemarketing Rule). In addition to the precedent-setting fine, this case also represents the first action brought by the FTC to enforce the Mortgage Acts and Practices - Advertising Rule (Regulation N) (MAP Rule), which allows the FTC to collect civil penalties for deceptive mortgage ads. Both of these rules apply to mortgage brokers, mortgage lenders, mortgage servicers, and real estate brokers; also, advertising agencies, home builders, lead generators, rate aggregators, and others. The FTC, States and private parties can seek civil penalties under the FTC Act of up to $16,000 for each telemarketing call made in violation of either rule. In addition, although not involved in Mortgage Investors, the Telephone Consumer Protection Act (TCPA) regulates telephone calls and fax advertising for commercial purposes, if they use automated dialing devices or artificial or prerecorded voice messages as defined in the TCPA.

Violation of the Telemarketing Rule

According to the FTC Complaint, Mortgage Investors' telemarketers called more than 5.4 million numbers listed on the National Do-Not-Call Registry to offer home loan refinancing services to current and former U.S. military consumers, in violation of the Telemarketing Rule. Further, they failed to remove consumers from its company call list upon demand.

The Telemarketing Rule prohibits what it defines as abusive telemarketing acts and practices, including for example:

- Initiating any outbound telephone call to a person when that person's telephone number is on the "do-not-call" registry, unless one or both of the following conditions are present.
- The seller has obtained consent to make the call to the called party by express written agreement the called party has not stated that he or she does not wish to receive outbound telephone calls.
- Initiating any outbound telephone call that delivers a prerecorded message.

The FTC is authorized to enforce the Telemarketing Rule. Also, it can be enforced by any person who has been damaged by at least $50,000 and by the attorney general or other authorized officer of any State.

Violation of the MAP Rule

The Mortgage Investors telemarketers also allegedly led service members to believe that low interest, fixed-rate mortgages were available at no cost, often quoting rates that they implied would last the duration of their loan. In reality, however, Mortgage Investors only offered adjustable-rate mortgages in which consumers' payments would increase with rising interest rates and would require consumers to pay closing costs. In addition, Mortgage Investors allegedly misled consumers about its affiliation with the Department of Veterans Affairs (VA). The FTC charged Mortgage Investors with false and misleading acts or practices in violation of Section 5 of the FTC Act and the Map Rule.

The MAP Rule prohibits the making of any material misrepresentation, expressly or by implication, in any commercial communication, regarding any term of a mortgage credit product, including for example:

- Whether the difference between the interest owed and the interest paid is added to the total amount due from the consumer.
- The extent to which payment for taxes or insurance is included in the loan payments, loan amount, or total amount due from the consumer.
- Any comparison between any rate or payment that will be available for a period less than the full length of the mortgage credit product and any actual or hypothetical rate or payment.
- The existence, number, amount, or timing of any minimum or required payments, including but not limited to misrepresentations about any payments or that no payments are required in a reverse mortgage or other mortgage credit product.

The FTC and the new federal Consumer Financial Protection Bureau (CFPB) are both empowered to enforce the MAP Rule. Each state is also authorized to enforce the MAP Rule through its attorney general.

Potential Application of the TCPA

Another federal statute similarly applies to unsolicited telemarketing calls and unsolicited fax broadcast advertising for mortgage credit products and other commercial products and services. This is the TCPA 47 USC § 227 that is enforced by the Federal Communications Commission (FCC) under its regulations, 47 CFR § 64 . The TCPA and the FCC regulations contain many legal restrictions on telemarketing and fax advertising. For example, they make it unlawful:

- To make any telephone call for commercial purposes to wireless or cell phone lines by use of automated telephone dialing systems or an artificial or prerecorded voice (other than for emergency purposes or with prior express consent). 47 USC § 227(b)(1)(A)(iii)
- To use a telephone fax machine, computer or other device to send unsolicited advertisements). 47 USC § 227(b)(1)(C)

The TCPA and the FCC regulations contain many restrictions on telemarketing and fax advertising.

- To initiate any telephone call to a residential line using an artificial or prerecorded voice to deliver a message without the prior written consent of the called party, unless a specific exception applies (for example the consent defense or the defense of an established business relations with the called party). 47 USC § 227(b)(1)(B)

47 CFR § 64.1200(a)(2)

In addition to enforcement by the FCC, private parties can also enforce and recover damages for violation of the TCPA – and that arguably presents the greatest potential risk to defendants that engage in telemarketing. Plaintiffs' counsel have brought numerous class action suits on behalf of call recipients for calls made to wireless or cell phone lines by use of automated telephone dialing systems or an artificial or prerecorded voice. In a class action the penalties often rise to bet-the-company amounts of damages, totaling many millions of dollars. Violations can yield damages equal to the greater of $500 or actual damages per violation, triple damages for willful violations, and virtually unlimited class action liability.

Agreed Order To Enforce Violations

Under the agreed final order, Mortgage Investors and its officers are barred from denying consumers' future requests to be placed on entity specific Do-Not-Call lists; calling consumers on the National Do-Not-Call Registry; misrepresenting in any advertising or marketing any terms related to mortgage credit products including rates, closing costs, fees, interest, duration, and savings; and misrepresenting its affiliation with any government entity or organization including the Veterans Administration.

The Department of Justice filed the complaint and agreed final order on behalf of the FTC in the U.S. District Court for the Middle District of Florida on June 25, 2013. As of this writing, the court has not signed the proposed order but, given the parties' agreement, there is every reason to believe that it will be signed and will become effective in the very near future.

Key Takeaways

The key takeaways in connection with the Telemarketing Rule, the MAP Rule and the TCPA are:

- Avoid violating any of these acts to avoid the trouble, costs, public embarrassment and significant potential damages.
- Screen telemarketing call lists to remove cell phone numbers from any list of numbers that will be dialed by an automatic telephone dialing system.
- Before implementing any new or changed telemarketing campaign or fax advertising campaign, have the campaign and call scripts thoroughly reviewed by counsel with deep experience in compliance with all three acts.
- Train your marketing and telemarketing staff rigorously and frequently on compliance.
- Monitor your vendors, subcontractors and advertising agencies for compliance.
- Create a corporate policy (or add to an existing ethics policy) requiring all employees, vendors and contractors to comply with all three acts.
- Engage a law firm with deep experience in compliance with the Telemarketing Rule, MAP Rule and the TCPA for ongoing compliance review and consultation.
- Have experienced counsel carefully craft any documentation designed to illustrate a consumer's consent to receive solicitations or a current business relationship with the called party.

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About the Authors

Paul Van Slyke is a member of the advertising and marketing, intellectual property, and privacy and data security practices. Paul has extensive experience in trademark, copyright, advertising, promotions, media, technology, privacy, data security and publishing law.

Martin Jaszczuk is the head of Locke Lord's TCPA Class Action Litigation Section. A TCPA defense lawyer who has tried over 100 cases since his early days as a criminal lawyer, Mr. Jaszczuk focuses his practice on the defense of class action lawsuits brought under the Telephone Consumer Protection Act.

Brett Foster is counsel in the Dallas office of Locke Lord. Prior to joining the firm in 2012, he accumulated over 20 years of experience as Operations Counsel and Chief Compliance Officer for both large and small savings banks, mortgage bankers, servicers and consumer finance companies.

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