



COMPLIANCE & CONTROL



IN MORTGAGE MARKETING

**Intelligent Technology
Rises To The Challenge**

You're faced with a dilemma. On the one hand, with the battle for the borrower intensifying as the mortgage market tightens again, you need to use every marketing means at your disposal to drive high-quality business to the point-of-sale. On the other hand, a tidal wave of legislation and regulation is seriously impacting how you can and can't communicate with your target audiences. Until now relatively little attention has been paid to the laws and rules that bear upon mortgage marketing. The FTC's latest volley dramatically changes that!



MORTGAGE ACTS AND PRACTICES (MAP)

The FTC's "Mortgage Acts and Practices – Advertising Final Rule" that became effective August 19, 2011 adds a new component (Part 321) to the pre-existing MAP Rule. Of particular interest to us here is section 321.3, which outlines 19 areas where mortgage advertising misrepresentations have been prevalent – including loan terms, fees and costs, and the consumer's potential for savings or approval – and which "prohibits any material misrepresentation, whether made expressly or by implication, in any commercial communication, regarding any term of any mortgage credit product."

In addition, to support the rule's enforceability, section 321.5 sets out "recordkeeping requirements" defining various categories of records that persons covered by the rule are required to retain. Specifically:

"For a period of 24 months from the last date the person made or disseminated the applicable commercial communication regarding any term of any mortgage credit product, covered persons must retain ... copies of all materially different commercial communications as well as sales scripts, training materials, and marketing materials, regarding any term of any mortgage credit product, that the person made or disseminated during the relevant time period."

A "person" is defined in section 321.2(f) of the new rule as "any individual, group, unincorporated association, limited or general partnership, corporation, or other business entity" – in other words, everyone who's reading this paper!

THE BIGGER COMPLIANCE PICTURE

In addition to MAP, there's an array of other mortgage-specific regulations that constrain marketing activity, notably certain provisions of the SAFE Act. Looking beyond the mortgage arena, we find yet more regulations (at both the federal and state level) that come into play. The bottom line is that we are now operating in an environment where mortgage marketing attracts greater scrutiny than ever before – not only by regulatory authorities, but also by trade associations and consumer groups.

What follows is not intended to be a comprehensive or authoritative survey of the law as it currently stands. The writer is not a lawyer and in any case this is a vast subject. It's simply an indication of the scope and type of pitfalls that await the unwary. The writer is aware of cases of loan originators, even at larger financial institutions, doing things they shouldn't every day – such as making non-compliant credit offers.

LICENSING AND LEGAL DISCLOSURE

The Secure and Fair Enforcement for Mortgage Licensing (SAFE) Act of 2008 "is designed to enhance consumer protection and reduce fraud by encouraging states to establish minimum standards for the licensing and registration of state-licensed mortgage loan originators". The major consequence of the Act was the establishment of the National Mortgage Licensing System (NMLS) and Registry. An originator's NMLS number must now be displayed in specific relationship to their name and contact information on all outbound marketing communications.

In addition, marketing communications must incorporate the relevant legal disclosure per jurisdiction in which the company operates. How and where this information is displayed is typically indicated in state law, down to details such as minimum point size. Originators must, of course, be licensed to operate in a particular state before they can communicate with anyone living in that state.



DATA PROTECTION AND PRIVACY

The Financial Services Modernization Act (commonly known as Gramm-Leach-Bliley, or simply GLB) became federal law in 1999. Title V of the Act covers issues of data privacy, including giving consumers certain opt-out rights regarding their non-personal public information. It is clear from the Act's language that the responsible party is deemed to be the financial institution rather than individual sales agents or marketing executives.

The Telephone Consumer Protection Act of 1991 was the first to introduce controls on the unwelcome attentions of telemarketing operators. In 2003 came the Do-Not-Call Implementation Act, which established the FTC's "National Do Not Call Registry". The Do-Not-Call Improvement Act followed in 2007, which tightened a key provision in the consumer's favor: they need only register once, for life. Many states have introduced complementary measures, including Do Not Mail legislation that typically creates a consumer registry at the state level.

The CAN-SPAM Act of 2003 sets rules for the commercial use of email, which it defines as "any electronic mail message the primary purpose of which is the commercial advertisement or promotion of a commercial product or service". Among the law's key provisions are prohibitions on the use of false or misleading header information and deceptive subject lines plus, perhaps most significantly, the requirement for a clear and conspicuous mechanism for the recipient to opt out of future emails, either selectively or in their entirety – which many do, raising serious questions about the effectiveness of email as a business-to-consumer marketing medium.

COPYRIGHT LAW

We all know that we can't reproduce copyrighted language – at least not without first obtaining permission from the copyright holder. What many don't know is that photographs and other images of celebrities (alive or dead) are also typically protected under copyright law or under various "rights of publicity" laws, which can vary from state to state. In general, unless specific permission is granted, you may not use the image of a celebrity in marketing communications of any kind. Even if you own both a photograph of a celebrity and the copyright of the photograph, it still doesn't give you the right to do anything with it in the absence of proper approval by the celebrity or their licensing agent.

Although not a copyright issue as such, it's also necessary to guard against the use of offensive language and graphics in marketing communications. These too can lead to legal entanglements – or at least they can become a source of serious embarrassment to the mortgage banker.



BRAND MANAGEMENT

Regulatory compliance is one thing, but professionalism and adherence to corporate brand standards must also be assured. The topic is raised here since this is a natural although non-legal extension of the other issues discussed in this paper: the solutions are going to come from similar processes of management control to those that meet the challenges of compliance.

MORTGAGE MARKETING COMPLIANCE

For some mortgage bankers – anxious to avoid costly law suits or simply to maintain (or restore) their reputation for transparency and professionalism – the response to the ever-tightening regulatory environment has been to issue policy statements to loan originators and/or require them to obtain approval before doing anything.

Clearly this approach has been rendered inadequate by the MAP Final Rule. Apart from which, blanket prohibitions were never likely to be effective. In the first place they run counter to human nature: people forget – and punishment after the fact is too late since the damage is already done. More significantly, speed to market is lost. Windows of opportunity open and close so quickly in today's roller-coaster mortgage market that even a brief delay can be disastrous. In any case, this is a highly inefficient solution: expensive to administer and wasteful of human resources.

In summary, the challenge is to stay legal without sacrificing competitive advantage. So what solutions are available? Options will be explored in the next section of this paper when, in particular, we will address the question of technology's role. What if there was a way to get the marketing compliance issues handled that at the same time brings with it the benefit of superior operational efficiency?

RISING TO THE CHALLENGE

It's clear that the tentacles of regulation are now reaching into all aspects of mortgage operations, not least the marketing side. The days are long gone when a mortgage banker could turn loan originators loose to do their own marketing. In the new world this is simply too dangerous.

Management has to take an active role in ensuring the company's brands and its products are correctly and compliantly represented in the marketplace. Outbound communications with prospects, customers and referral partners – whether driven from the center or by originators – must be controlled, without inhibiting genuine creativity and individual initiative.

So how does a mortgage banker establish a controlled environment that ensures sales and marketing people are adhering to all relevant regulations, but at the same time still allows ingenuity and enterprise to flourish? Simple oversight of all outbound marketing - including variable communication content, such as personalized copy and graphics – is a good start, but it's not enough.

What's needed is rules-driven technology – a compliance-centric corporate marketing solution - that handles the regulatory requirements, thereby minimizing reliance on human intelligence.

In the writer's view, this technology needs to provide graded levels of control over the players in the marketing process. Management simply has to decide what degree of control to exercise in relation to each of the system's key functions.

The levels of management control might follow the pattern below, working down from the most to the least restrictive:

1. **PROHIBITION:** Different types of users can be prevented from accessing specific system functions by means of a customizable "permissions" capability.
2. **AUTHORIZATION:** Marketing materials created by users at lower levels in the corporate hierarchy cannot be implemented until approved at the center.
3. **ALERTS:** A defined set of fields is monitored and changes reported via an online feed, enabling quick action to remedy any departure from company policy.
4. **OVERSIGHT:** Users at higher levels in the hierarchy can "impersonate" users at lower levels, giving management an instant window on the activities of originators.
5. **REPORTING:** A dashboard of mission-critical metrics provides information that allows management to hold users at lower levels accountable for their performance.
6. **AUDIT TRAIL:** Online access to a real-time log of actions taken by users, including copies of all outbound marketing communications (per the MAP Final Rule).

Finally, in order to close the circle on this vital issue, management should implement a regime of regular instruction and training on both current law and how the company's marketing technology enables compliance – ensuring that everyone involved remains fully conversant with their role and responsibilities in mitigating the inherent risks.



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www.turningpoint.com | 888.887.7880
2301 East Yeagr Drive Suite 4 | Chandler AZ 85286



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