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Seller Beware: Lessons Learned from 2015 Deceptive Advertising Enforcement in the Consumer Finance Space

Consumer Financial Services Alert

By Ori Lev and Anjali Garg

I. Introduction

Federal regulators took a close look at advertisements for consumer financial products and services in 2015, bringing over 25 enforcement actions totaling over \$975 million in penalties and consumer redress. In the majority of these actions, regulators evaluated: (1) how advertisements characterize the product being offered, including the nature of the product and the terms and conditions applicable to the advertised features; (2) how well those that offer consumer financial products and services oversee their vendors that advertise directly to consumers, including telemarketers and retailers at the point of sale; and (3) whether advertisements obscure their true source.

In this client alert, we outline the legal standard that regulators use when evaluating whether advertisements are deceptive, and offer our top five lessons learned from 2015 enforcement actions against those that advertise consumer financial products and services.

II. Legal Standard for Deceptive Advertising

It is apparent from recent enforcement activity that regulators' concerns with advertising extends beyond the traditional print, television, and radio mediums, and includes information contained on websites, sales practices at the point of sale, and customer service scripts. Determining whether an advertisement is "deceptive" is inherently subjective; however, regulators consistently rely on the standard articulated under the Federal Trade Commission ("FTC") Act in 1983. An act or practice is deceptive if it entails a material representation, omission, or practice that is likely to mislead consumers acting reasonably under the circumstances.¹

In assessing whether an act or practice is "likely to mislead," the FTC, the Consumer Financial Protection Bureau ("CFPB" or the "Bureau"), and the courts look to the net impression of the information presented to the consumer. As part of this assessment, regulators have taken the position that any material term or condition of a product, or any fact that must be disclosed to make the net impression not misleading, must be stated clearly and conspicuously. Under the Truth in Lending Act ("TILA"), regulators will also examine whether required disclosures in advertisements are stated clearly and conspicuously. TILA

¹ See FTC Policy Statement on Deception (Oct. 14, 1983), *appended to Cliffdale Assocs., Inc.*, 103 F.T.C. 110, 174 (1984).

Seller Beware: Lessons Learned from 2015 Deceptive Advertising Enforcement in the Consumer Finance Space

also requires that advertisements include certain disclosures when certain trigger terms are used in an advertisement.²

Regulators consider a misrepresentation, omission, or practice “material” if it “is likely to affect a consumer’s choice of or conduct regarding a product.” Certain information is presumed material — including, for example, the price or cost of a product or service. Under the deception standard, regulators do not have to prove that consumers were actually harmed as long as the act or practice was likely to mislead consumers.

2015 enforcement actions and guidance issued by the FTC, CFPB, and banking regulators provide key insights into the evolution of deceptive advertising standards.

III. Top Five Lessons from 2015 Enforcement Actions

a. Explain the Product

In 2015, regulators took issue with how institutions characterized various consumer financial products in their advertisements, and whether the advertisements clearly explained the true nature of the product. In a June 2015 CFPB study on reverse mortgage advertisements, for example, the Bureau found that some consumers did not understand from certain television and print advertisements that a reverse mortgage is a loan that would need to be repaid in the future.³ The CFPB noted that most reverse mortgage ads did not include an interest rate, or only displayed an interest rate in very fine print, thereby confusing consumers. The CFPB’s message: if it looks like a loan and functions like a loan (and is a loan), it should be advertised as a loan.

Two enforcement actions further demonstrate the Bureau’s position. In August 2015, the CFPB filed a complaint against a company that advertised what the CFPB considers to be a loan product as a “pension buyout” and “pension advance” and actively denied that the product was a loan.⁴ In addition to a deception claim, the CFPB alleged that by denying the product was a loan, the defendant obscured the true nature of the transaction and took unreasonable advantage of consumers, thus rendering the practice unfair and abusive. The CFPB also brought an action in February 2015 against a company that the Bureau claims deceptively advertised what appeared to be a general use credit card with a low annual percentage rate and membership fee. The Bureau alleged that consumers actually received a paper membership card that only enabled consumers to purchase products on closed-end credit from the respondent.⁵

In light of these recent actions, institutions should consider whether their advertisements accurately describe the products they are offering or if the advertisements create confusion regarding the nature of the product. Call monitoring and consumer focus groups/studies may provide insight on how consumers interpret the institutions’ marketing materials.

² 12 C.F.R. § 1026.24.

³ Consumer Fin. Prot. Bureau, A Closer Look at Reverse Mortgage Advertisements and Consumer Risks (June 2015), available at http://files.consumerfinance.gov/f/201506_cfpb_a-closer-look-at-reverse-mortgage-advertising.pdf.

⁴ Complaint, *Consumer Fin. Prot. Bureau v. Pension Funding et al*, No. 8:15-cv-1329 (C.D. Cal. Aug. 20, 2015).

⁵ Stipulated Final Judgment and Order, *Consumer Fin. Prot. Bureau v. Union Workers Credit Services, Inc.*, No. 3:14-cv-04410 (N.D. Tex. Feb. 3, 2015).

Seller Beware: Lessons Learned from 2015 Deceptive Advertising Enforcement in the Consumer Finance Space

b. Clearly and Conspicuously Disclose Terms and Conditions

In addition to clearly identifying the product being offered, institutions should clearly and conspicuously disclose product terms and conditions. Regulators continue to scrutinize how such terms and conditions are disclosed. In 2015, regulators held parties accountable for various disclosure display issues, including font size, font color as compared to the background color of the advertisement, how long disclosures appeared on television ads, the cadence and speed of oral disclosures, the appearance of an asterisk or other symbol directing consumers to disclosures, and whether required TILA disclosures appeared in a “block of text” that a consumer would overlook.

In March 2015, the FTC engaged in an automobile sales and leasing sweep, holding dealers responsible for alleged violations of the Consumer Leasing Act, TILA, and the prohibition on deceptive acts and practices for advertisements that displayed low monthly payments and low down payments for automobiles.⁶ The FTC determined that required disclosures on television, print, web, and social media advertisements were not clear and conspicuous. In some cases, the advertisements actually contained disclosures, and sometimes the disclosures were in close proximity to the relevant terms. The FTC alleged, however, that the disclosures were in extremely fine print and difficult to read as compared to the prominent claims of low monthly payments or low down payments.

In a CFPB complaint filed against a payment processor, the Bureau alleged that the company intentionally omitted information about fees associated with a biweekly mortgage payment plan. The company’s mailers allegedly did not mention the fees, and its sales scripts allegedly actively discouraged customer service representatives from disclosing information about certain fees, including instructions, in some cases, to mention the fees only if consumers “persist to ask about fees.”⁷ In a May 2015 CFPB action against a company advertising mortgage products, the Bureau took issue with how the company characterized interest rates and alleged that the company failed to disclose that the rates were adjustable.⁸

In developing a robust advertising compliance management system, institutions should consider all consumer touchpoints as risk areas for deceptive advertising, and monitor for compliance accordingly.

c. Honor the Advertisements

Once the terms and features of the products have been advertised, institutions must honor what has been offered. In a number of 2015 enforcement actions, regulators examined (1) whether the advertised features and terms were actually available to consumers, and (2) whether the advertised features were substantiated.⁹

Regulators will compare advertisements to the actual products and services that consumers receive in evaluating a deception claim. In the FTC’s March 2015 sweep of auto dealers, the

⁶ Press Release, *FTC, Multiple Law Enforcement Partners Announce Crackdown on Deception, Fraud in Auto Sales, Financing and Leasing* (Mar. 26, 2015), available at <https://www.ftc.gov/news-events/press-releases/2015/03/ftc-multiple-law-enforcement-partners-announce-crackdown>.

⁷ Complaint, *Consumer Fin. Prot. Bureau v. Nationwide Biweekly Administration, et al*, No. 3:15-cv-02106 (N.D. Cal. May 11, 2015).

⁸ *In the Matter of RMK Financial Corp.*, No. 2015-CFPB-0007 (Apr. 9, 2015).

⁹ See also, Fed. Trade Comm’n, *FTC Policy Statement Regarding Advertising Substantiation* (Mar. 11, 1983), available at <https://www.ftc.gov/public-statements/1983/03/ftc-policy-statement-regarding-advertising-substantiation>.

Seller Beware: Lessons Learned from 2015 Deceptive Advertising Enforcement in the Consumer Finance Space

FTC claimed deception in certain advertisements that displayed rates that most consumers could not qualify for, with the qualification requirements appearing in miniscule text at the bottom of the ads. The FTC also noted that many of the advertisements contained other terms that were not available or not generally available to consumers. In the FTC's crackdown on automobile sales and leasing ads, the FTC also alleged that ads containing cars with features such as sunroofs and spoilers that cost more than the displayed rates and terms were deceptive.

In an April 2015 consent order with a bank, the CFPB alleged deception where the advertisements indicated that the bank would not charge consumers overdraft fees in connection with ATM and one-time debit card transactions unless the consumer opted in, but charged those fees anyway.¹⁰ In a May 2015 action, the CFPB alleged that a payment processor advertised a special offer where consumers could obtain deferred interest or money back on a future purchase, and then failed to honor the advertised promotional benefits.¹¹ In a July 2015 CFPB action against a payment processor and mortgage servicer, the CFPB claimed that the interest rate savings for a biweekly mortgage payment program displayed in website and direct mail advertisements were "unsubstantiated by the facts and therefore are deceptive."¹²

Institutions should properly vet advertisements to ensure that the advertised rates and terms are actually available to consumers and that the company's business practices align with advertised offers.

d. Ensure Proper Vendor Oversight

Providers of consumer financial products and services continue to be held responsible for deceptive sales tactics of retailers and vendors marketing the providers' products. In 2015, regulators took action against a number of financial institutions arising out of failed oversight of retailers and other vendors or inadequate training and monitoring of those who market the products.

In a June 2015 Office of the Comptroller of the Currency ("OCC") action against a bank, the OCC held the bank responsible for the conduct of a telemarketer, alleging that the bank's vendor misled consumers into purchasing a more expensive identity protection product during telemarketing calls.¹³ In a July 2015 joint CFPB and OCC consent order regarding a bank's credit card add-on products, the regulators took issue with how in-store retail associates marketed and explained the bank's products.¹⁴ The regulators alleged that the bank failed to ensure that the retailers provided the proper terms and conditions to consumers when enrolling them for a store credit card and associated add-on products. Finally, in an August 2015 CFPB action against a company that administered health care financing products, the Bureau held the company responsible for failing to properly train and

¹⁰ *In the Matter of Regions Bank*, No. 2015-CFPB-0009 (Apr. 28, 2015).

¹¹ *Complaint, Consumer Fin. Prot. Bureau v. PayPal and Bill Me Later*, No. 1:15-cv-01426 (D. Md. May 19, 2015).

¹² *In the Matter of Paymap*, No. 2015-CFPB-0017 (July 28, 2015); *In the Matter of LoanCare*, No. 2015-CFPB-0018 (July 28, 2015).

¹³ *In the Matter of Wells Fargo Bank, N.A.*, No. AA-EC-2015-13 (June 3, 2015).

¹⁴ *In the Matter of Citibank, N.A., et al*, No. 2015-CFPB-0015 (July 21, 2015); *In the Matter of Citibank, N.A., et al*, No. AA-EC-2015-52 (July 21, 2015).

Seller Beware: Lessons Learned from 2015 Deceptive Advertising Enforcement in the Consumer Finance Space

monitor health care providers on how to sell the company's loan products, because the health care providers failed to explain the costs of a deferred-interest product.¹⁵

Institutions can ultimately be held responsible for the actions of vendors and service providers that market on their behalf.¹⁶ Institutions should therefore ensure that they have a proper vendor monitoring system in place that could include call monitoring, training, mystery shopping, and review of consumer-facing materials, such as sales scripts and brochures.

e. *Disclose the Source*

In 2015, regulators actively pursued deception claims against institutions that did not properly disclose the source of the advertisements. The advertisements implied an affiliation with government agencies, unions, universities, and, in one case, a veterans organization. In most of these actions, the regulators alleged that the advertisements were formatted in a way that obscured the "true source" of the ad and were, therefore, deceptive.

In a February 2015 sweep, the CFPB brought three actions against mortgage advertisers, alleging that the companies' advertisements suggested the companies were or were affiliated with a government entity in violation of the Mortgage Acts and Practices — Advertising Rule¹⁷ and the prohibition on deceptive acts and practices.¹⁸ The CFPB scrutinized the logos and verbiage contained on envelopes, whether the name of the actual lender was obscured, and whether the lenders' websites implied a government affiliation. In an April 2015 CFPB action, the Bureau brought similar claims against another lender and cited recorded phone calls indicating that borrowers thought they were calling a government agency as further evidence of the allegedly misleading nature of the company's advertisements.¹⁹

In a CFPB action against a lender in February 2015, the Bureau alleged that a lender's marketing materials made it appear that they were sent by a veterans organization that endorsed the lender, and that those materials and phone scripts that also contained an endorsement failed to disclose the financial relationship between the two parties.²⁰ As part of the prospective relief, the respondent must ensure adherence to the FTC's *Guide Concerning the Use of Endorsements and Testimonials in Advertisements* ("Endorsement Guide").

In May 2015, the CFPB brought a deception claim against a payment processor alleging that the company's advertisements misrepresented the company's affiliation with the consumer's mortgage lender, where the respondent's direct mail ads contained the name of the consumer's mortgage lender or servicer and where customer service representatives were directed to obscure the processor's (lack of) relationship with the consumer's lender or servicer.²¹

¹⁵ *In the Matter of Springstone Financial*, No. 2015-CFPB-0021 (Aug. 19, 2015).

¹⁶ See, e.g., Consumer Fin. Prot. Bureau, Bulletin 2012-03: Service Providers (Apr. 13, 2012), available at http://files.consumerfinance.gov/f/201204_cfpb_bulletin_service-providers.pdf.

¹⁷ 12 C.F.R. § 1014.3(n).

¹⁸ Complaint, *Consumer Fin. Prot. Bureau v. All Financial Services*, No. 1:15-cv-00420 (D. Md. Feb. 12, 2015), *In the Matter of American Preferred Lending*, No. 2015-CFPB-0005 (Feb. 12, 2015); *In the Matter of Flagship Financial Group*, No. 2015-CFPB-0006 (Feb. 12, 2015).

¹⁹ *In the Matter of RMK Financial Corp.*, No. 2015-CFPB-0007 (Apr. 9, 2015).

²⁰ *In the Matter of NewDay Financial*, No. 2015-CFPB-0004 (Feb. 10, 2015).

²¹ Complaint, *Consumer Fin. Prot. Bureau v. Nationwide Biweekly Admin.*, No. 3:15-cv-02106 (N.D. Cal. May 11, 2015).

Seller Beware: Lessons Learned from 2015 Deceptive Advertising Enforcement in the Consumer Finance Space

Regulators also brought actions against organizations whose advertisements implied an affiliation with consumers' educational institutions. In an October 2015 CFPB complaint, the Bureau alleged deception where direct mail advertisements contained an official-looking seal and the name of the student's university.²² In December 2015, the Federal Reserve and the Federal Deposit Insurance Corporation entered into a consent order with a bank affiliate whose student loan disbursement product direct mail advertisements and website included a university's logo and school name more prominently than the affiliate's name and logo.²³

In December 2015, the FTC issued an "Enforcement Policy Statement on Deceptively Formatted Advertisements," reiterating the agency's position that advertisements should be identified as such to consumers.²⁴ While this guidance focuses on natively formatted advertisements, particularly in the digital context, the document provides a useful guide on how the FTC evaluates whether advertisements mislead consumers by obscuring the advertiser through creative formatting.

Institutions should review the FTC's most recent guidance on deceptively formatted advertisements as well as the Endorsement Guide to ensure that the advertisement format, including logos, labels, and packaging, and any endorsements do not disguise the advertiser or otherwise obscure the true source of the advertisement.

IV. Conclusion

What constitutes deceptive advertising continues to be shaped by enforcement actions and guidance issued by regulators. In the evolving age of digital advertising and outsourcing, institutions should consider evaluating their compliance management systems to integrate lessons learned from recent enforcement actions to enhance vendor oversight and ensure a robust advertisement review process.

Authors:

Ori Lev

ori.lev@klgates.com
+1.202.778.9058

Anjali Garg

anjali.garg@klgates.com
+1.202.778.9442

²² Complaint, *Consumer Fin. Prot. Bureau v. Global Financial Support et al*, No. 3:15-cv-02440 (S.D. Cal. Oct. 29, 2015).

²³ *In the Matter of WEX Bank*, No. FDIC-15-0117b and FDIC-15-0119k (Dec. 21, 2015); *In the Matter of Higher One*, No. FDIC-15-0129b and FDIC-15-0130k (Dec. 18, 2015); *In the Matter of Higher One*, No. 15-026-E-1 and 15-026-CMP-1 (Dec. 23, 2015).

²⁴ Fed. Trade Comm'n, Enforcement Policy Statement on Deceptively Formatted Advertisements (Dec. 22, 2015), available at https://www.ftc.gov/system/files/documents/public_statements/896923/151222deceptiveenforcement.pdf.

Consumer Financial Services Practice Contact List

K&L Gates' Consumer Financial Services practice provides a comprehensive range of transactional, regulatory compliance, enforcement and litigation services to the lending and settlement service industry. Our focus includes first- and subordinate-lien, open- and closed-end residential mortgage loans, as well as multi-family and commercial mortgage loans. We also advise clients on direct and indirect automobile, and manufactured housing finance relationships. In addition, we handle unsecured consumer and commercial lending. In all areas, our practice includes traditional and e-commerce applications of current law governing the fields of mortgage banking and consumer finance.

For more information, please contact one of the professionals listed below.

LAWYERS

Boston

R. Bruce Allensworth	bruce.allensworth@klgates.com	+1.617.261.3119
Gregory N. Blase	gregory.blase@klgates.com	+1.617.951.9059
Brian M. Forbes	brian.forbes@klgates.com	+1.617.261.3152
Irene C. Freidel	irene.freidel@klgates.com	+1.617.951.9154
Andrew Glass	andrew.glass@klgates.com	+1.617.261.3107
Sean P. Mahoney	sean.mahoney@klgates.com	+1.617.261.3202
Stanley V. Ragalevsky	stan.ragalevsky@klgates.com	+1.617.951.9203
Robert W. Sparkes, III	robert.sparkes@klgates.com	+1.617.951.9134
Ryan M. Tosi	ryan.tosi@klgates.com	+1.617.261.3257
Phoebe Winder	phoebe.winder@klgates.com	+1.617.261.3196

Charlotte

John H. Culver III	john.culver@klgates.com	+1.704.331.7453
Amy Pritchard Williams	amy.williams@klgates.com	+1.704.331.7429

Dallas

David A. Tallman	david.tallman@klgates.com	+1.214.939.4946
------------------	---------------------------	-----------------

Miami

Paul F. Hancock	paul.hancock@klgates.com	+1.305.539.3378
-----------------	--------------------------	-----------------

New York

Elwood F. Collins	elwood.collins@klgates.com	+1.212.536.4005
-------------------	----------------------------	-----------------

Pittsburgh

Melissa J. Tea	melissa.tea@klgates.com	+1.412.355.8385
----------------	-------------------------	-----------------

San Francisco

Jonathan Jaffe	jonathan.jaffe@klgates.com	+1.415.249.1023
----------------	----------------------------	-----------------

Seattle

Holly K. Towle	holly.towle@klgates.com	+1.206.370.8334
----------------	-------------------------	-----------------

Sydney

Andrea P. Beatty	andrea.beatty@klgates.com	+61.2.9513.2333
------------------	---------------------------	-----------------

Washington, D.C.

Costas A. Avrakotos	costas.avrakotos@klgates.com	+1.202.778.9075
David L. Beam	david.beam@klgates.com	+1.202.778.9026
Emily Booth-Dornfeld	emily.booth@klgates.com	+1.202.778.9112
Melanie Brody	melanie.brody@klgates.com	+1.202.778.9203
Holly Spencer Bunting	holly.bunting@klgates.com	+1.202.778.9853
Soyong Cho	soyong.cho@klgates.com	+1.202.778.9181
Krista Cooley	krista.cooley@klgates.com	+1.202.778.9257
Daniel F. C. Crowley	dan.crowley@klgates.com	+1.202.778.9447
Eric J. Edwardson	eric.edwardson@klgates.com	+1.202.778.9387

Consumer Financial Services Practice Contact List

Jon Eisenberg	jon.eisenberg@klgates.com	+1.202.778.9348
Shanda N. Hastings	shanda.hastings@klgates.com	+1.202.778.9119
Steven M. Kaplan	steven.kaplan@klgates.com	+1.202.778.9204
Kris D. Kully	kris.kully@klgates.com	+1.202.778.9301
Rebecca H. Laird	rebecca.laird@klgates.com	+1.202.778.9038
Ori Lev	ori.lev@klgates.com	+1.202.778.9058
Michael J. Missal	michael.missal@klgates.com	+1.202.778.9302
Laurence E. Platt	larry.platt@klgates.com	+1.202.778.9034
Stephanie C. Robinson	stephanie.robinson@klgates.com	+1.202.778.9856
Phillip L. Schulman	phil.schulman@klgates.com	+1.202.778.9027
Kerri M. Smith	kerri.smith@klgates.com	+1.202.778.9445
Stephen G. Topetzes	stephen.topetzes@klgates.com	+1.202.778.9328

PROFESSIONALS

Government Affairs Advisor / Director of Licensing

Washington, D.C.

Stacey L. Riggin	stacey.riggin@klgates.com	+1.202.778.9202
------------------	---------------------------	-----------------

Counsel

Washington, D.C.

Keisha Whitehall Wolfe	keisha.whitehallwolfe@klgates.com	+1.202.778.9124
------------------------	-----------------------------------	-----------------

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