

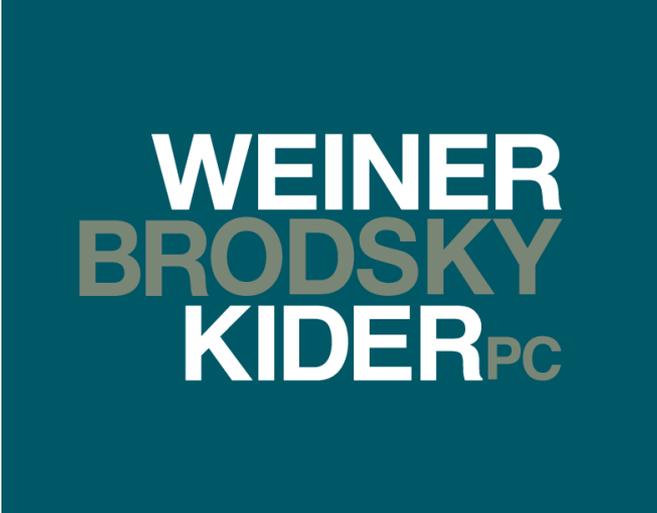
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NRMLA's  
2018 Western Regional Meeting  
March 19-20 • Huntington Beach, CA



# 2018 Western Regional Meeting

MARCH 19-20 • HUNTINGTON BEACH, CA



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**NRMLA Western Regional Meeting 2018**

**Compliant Advertising and Marketing**

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Jim also is a Director (and formerly Lead Director) of MFA Financial, Inc., a multi-billion dollar NYSE-listed REIT that invests, on a leveraged basis, in residential mortgage assets including Agency MBS, Non-Agency MBS, residential whole loans and CRT securities.

Jim also is active in a variety of affordable housing initiatives. He is a member of the Board of Directors of Enterprise Community Investment, Inc., the investment subsidiary of Enterprise Community Partners, Inc. He also formerly served as Chairman of the Housing Opportunities Commission.

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Melissa Klimkiewicz is dedicated to providing pragmatic, comprehensive and timely guidance to her financial services industry clients, which primarily include mortgage lenders and servicers. A partner in Buckley Sandler LLP's Washington, DC office, Ms. Klimkiewicz frequently assists Federal Housing Administration mortgagees with their initial program applications, annual recertification efforts, compliance with, and understanding of, program rules and self-reporting obligations, audits by the Quality Assurance Division, inquiries from the Office of Inspector General, and enforcement actions by the Mortgagee Review Board. She received her J.D. from The George Washington University and her B.A. from the University of Pennsylvania.

# Jim Milano



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Jim Milano is a Member of the law firm of Weiner Brodsky Kider PC. Jim focuses his practice on federal and state consumer financial services regulatory compliance, and transactional matters that affect consumer finance and mortgage companies, investors and the vendors that serve such entities. Jim is nationally recognized as one of the leading lawyers on reverse mortgage law. Jim currently serves as Outside General Counsel to the National Reverse Mortgage Lenders Association, and is a former Chairman of the Manufactured Housing Institute's Finance Lawyers Committee. Jim frequently publishes articles in journals and is a regular speaker at mortgage banking conferences and webinars. Jim received several undergraduate degrees from Louisiana State University in 1983 and 1986, and his law degree from Louisiana State University in 1989, and an LL.M from Emory University in 1991. Jim is licensed to practice law in the District of Columbia, Maryland and Virginia, as well as Georgia and Louisiana. Prior to joining Weiner Brodsky Kider in 2000, Jim worked as Corporate Counsel and General Counsel, starting in 1992, at several large consumer finance and mortgage banking companies.

# Compliant HECM Marketing – Advertising Practices

March 20, 2018

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# Federal Laws Regulating Reverse Mortgage Lender Advertising Practices

- We'll touch on today...
  - **Americans with Disabilities Act ("ADA") – Website and Mobile Application**
  - Truth In Lending Act Advertising Rules ("TILA Advertising Rules")
  - Mortgage Acts and Practices Advertising Rule ("MAP Rule")
  - FTC Act Prohibition on Unfair or Deceptive Acts or Practices ("UDAP")
  - Dodd-Frank Act Prohibition on Unfair, Deceptive, and Abusive Acts and Practices ("UDAAP")
  - HUD Rules
- We'll save for another day...
  - RESPA Co-Marketing Rules
  - ECOA and Fair Housing Act tenets to apply to advertising
  - FDIC Logo/Disclosure
  - CAN-SPAM Act
  - Telephone Consumer Protection Act
  - FTC's Telemarketing Sales Rule

# Americans with Disabilities Act (ADA)

- Individuals with disabilities must receive “full and equal enjoyment of the goods, services, facilities, privileges, advantages or accommodations of any place of public accommodation”
- Public accommodations (including financial institutions) must provide “auxiliary aids and services” designed to provide effective communication to individuals with a hearing, vision or speech disability, unless doing so would fundamentally alter the goods and services or result in an undue burden
- DOJ has taken position that ADA Title III covers access to websites, online tools and mobile applications of public accommodations, regardless of whether the public accommodation has a “brick and mortar” presence
- Plaintiffs’ counsel, with increasing success, have argued that places of “public accommodation” includes financial institutions’ websites and mobile applications

# DOJ Timeline

- 2010: DOJ issued advance notice of proposed rulemaking (“ANPR”)
  - Declared that websites for “public accommodations” must be accessible to persons with disabilities
  - Proposed Web Content Accessibility Guidelines version 2.0 (“WCAG 2.0”) AA as standard
- 2011-2016: Numerous enforcement actions alleging inaccessibility of digital platforms (using WCAG 2.0 AA as standard)
  - Settlements include common elements
- 2017: Enforcement activity effectively ceased and DOJ withdrew 2010 ANPR

# Private Litigation Timeline

- Since 2013, increasing litigation
- 2016
  - 250 lawsuits alleging companies websites were not accessible to the blind
  - Highest volume: CA, FL, NY, and AZ
  - Plaintiffs' counsel targeted large and regional banks
- 2017: Plaintiffs' counsel targeted community banks and credit unions
- January 2018: Plaintiffs counsel filed more than 25 ADA lawsuits in NY and FL
  - More than 10 complaints filed in EDNY allege inaccessibility of financial institutions' websites
- Most financial institutions have settled

# Litigation Trends

- Plaintiffs' counsel strategies
  - Demand letters
  - Recently, filing claims in court without first mailing demand letters
  - Assert that WCAG 2.0 AA requires companies to redesign websites
- Strategies to limit litigation
  - Banking groups advocating for legislation to “freeze” private lawsuits and DOJ actions until DOJ has established standards and allowed time to comply
  - Banking groups have sought settlements with disabilities rights groups
  - States attorneys general have recently taken action to limit litigation by serial plaintiffs (NV and SC)
  - Arizona amended its ADA to exempt websites from accessibility rules

# Business Realities

- Easy to be sued (plaintiffs need only visit your website)
- Reputational risk
- Business risk
  - Costs increase if disabled individuals can't do business through your website
  - Lost business
    - Centers for Disease Control and Prevention estimates that 1/5 Americans have visual, hearing, mobility, or cognitive disabilities
    - U.S. Census Bureau estimates that ½ of those disabilities is “severe”

# Tips for ADA Digital Platform Compliance Framework

- Proactively evaluate website and mobile application accessibility and undertake appropriate risk mitigation measures
  - Use qualified ADA accessibility consultants
  - Conduct such audits under attorney-client privilege
  - Use WCAG 2.0 AA standard to evaluate accessibility
- Designate staff to ensure ADA compliance and develop policies and procedures
- Post a website accessibility statement that offers assistance to, and seeks feedback on how to improve accessibility from, individuals with disabilities
- Ensure vendor contracts make vendors responsible for ADA compliance
- Involve IT, Compliance, Marketing, and content providers in discussions
- If receive a demand letter/complaint, consult legal counsel

# TILA Advertising Rules (12 CFR Part 1026)

- “Advertisement” - commercial message in any medium that promotes, directly or indirectly, a credit transaction
- Separate rules apply to open and closed-end
- Trigger terms require additional disclosures
- Disclosures regarding rates, balloon payments, tax implications
- Prohibitions on misrepresentations and misleading practices – examples:
  - Government endorsement
  - Use of current lender’s name
  - Use of foreign language
  - “Free” money

# MAP Rule (12 CFR Part 1014)

- Applies to a “commercial communication” regarding any term of any mortgage credit product
- Identifies deceptive acts and practices in advertising mortgage loans
- Prohibits misrepresentations in advertising of mortgage loan terms – examples:
  - Amount of interest consumer pays
  - True cost of ancillary products
  - Incorrectly using the term “fixed”
  - Amount of credit available
  - Potential and circumstances for default
  - Association with the government
- Does *not* identify affirmative advertising disclosure requirements

# UDAP (FTC Act) / UDAAP (Dodd Frank Act)

## ■ UDAP

- Prohibits unfair or deceptive representations, omissions, acts, or practices with regard to consumer communications
- FTC considers prominence, presentation, placement, and proximity in reviewing advertisements for UDAP compliance

## ■ UDAAP

- Prohibits unfair, deceptive, and abusive acts and practices
- Each term may be interpreted to cover any material representation that may harm a consumer

## ■ Enforcement (MAP Rule and UDAAP)

- December 2016 - CFPB brought enforcement actions against 3 reverse mortgage lenders

# HUD/FHA Rules

- “Advertising” is any communication made to an outside Entity or individual that describes or calls attention to a Mortgagee’s FHA products or services
- Mortgagee is responsible for employees’ and contractors’ actions
- Rules
  - Comply with applicable state licensing and regulatory requirements
  - Ads must reflect Mortgagee’s name, location, and appropriate contact info
  - Limitations on use of HUD and FHA names, acronyms, and logos
  - Must include a conspicuous disclaimer that materials are not from or approved by HUD/FHA
  - Can’t make any statement or representation that could mislead a mortgagor as to his/her rights under a HECM
- Noncompliance can result in administrative action

# Tips to Comply with Federal Advertising Requirements

## ■ Do...

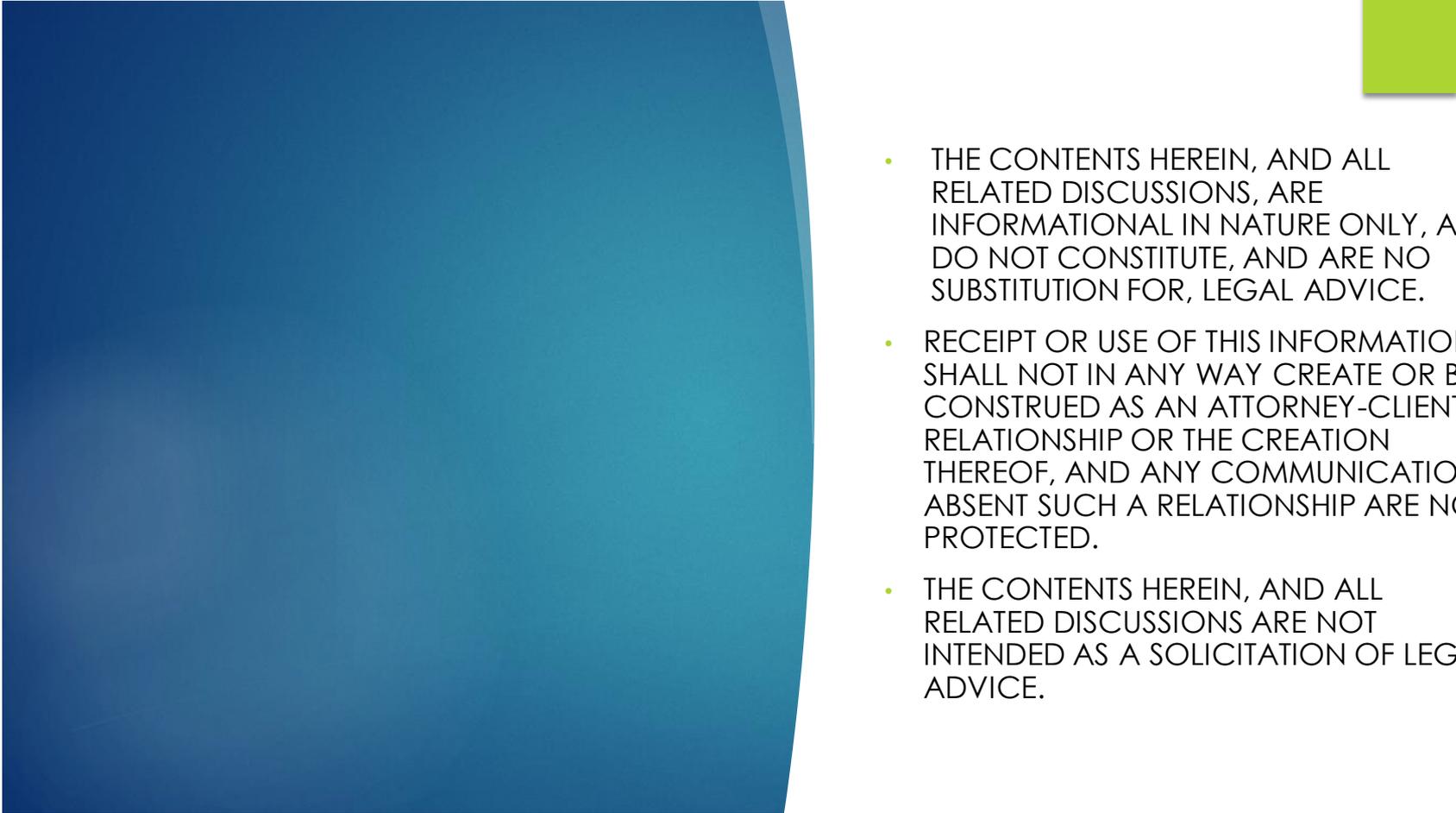
- Comply with all affirmative advertising obligations (TILA, HUD)
- Prominently disclose the identity of the lender
- Accurately disclose the available terms

## ■ Don't...

- Mislead consumers regarding government affiliation
- Create a sense of urgency when there is no time limit
- Indicate that consumers will make no monthly payments (b/c T&I payments may be required)
- Suggest that a reverse mortgage eliminates debt or provides tax-free cash
- Advertise a “no cost” refinance, where consumer may incur cost
- State that consumers with reverse mortgages will never be forced to leave their homes
- Make misleading statements regarding rates or interest accrual
- Advertise terms that won't actually be available



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ADVERTISING

# Advertising Challenges

## ▶ Federal Laws And Regulations

- ▶ Mortgage Acts and Practices – Advertising Rule (MAP Rule), Regulation N
- ▶ UDAAP
- ▶ ECOA, TILA
- ▶ Fair Housing Act
- ▶ HUD Rules on HECM Advertising

## ▶ State Laws

- ▶ Licensing
- ▶ NMLS ID
- ▶ Taglines
- ▶ UDAP

## ▶ Recent Enforcement Actions

# Federal Advertising Rules

## MAP Rule/Regulation N (12 CFR 1014 *et seq.*)

- ▶ Applies only to non-depository mortgage lenders, state chartered credit unions, and entities that market and advertise mortgage products but are not mortgage lenders, such as mortgage brokers, real estate brokers, advertising agencies, lead generators, and rate aggregators.
- ▶ The MAP Rule sets forth specific deceptive acts and practices in the advertising of mortgage loan products and prohibits misrepresentation in any commercial communication concerning the terms of mortgage loan products.
  - ▶ A few examples of specific misrepresentations prohibited by the MAP Rule include misrepresentations about:
    - ▶ Terms, amounts, payments, or other requirements relating to taxes or insurance associated with the mortgage credit product;
    - ▶ 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; and
    - ▶ The right of the consumer to reside in the dwelling.
- ▶ Requires 24 month record-keeping
  - ▶ An entity must keep all materially different commercial communications and documents describing the offered products.

# Federal Advertising Rules

## UDAAP

- ▶ Sec. 1036 of the Dodd-Frank Act (July 21, 2010).
- ▶ A representation, omission, act or practice is deceptive when, among other things:
  - 1) the representation, omission, act, or practice misleads or is likely to mislead the consumer;
  - 2) the consumer's interpretation of the representation, omission, act, or practice is reasonable under the circumstances; and
  - 3) the misleading representation, omission, act, or practice is material.
- ▶ FTC's "four Ps" test can assist in the evaluation of whether a representation, omission, act, or practice is likely to mislead:
  - ▶ Is the statement prominent enough for the consumer to notice?
  - ▶ Is the information presented in an easy-to-understand format that does not contradict other information in the package and at a time when the consumer's attention is not distracted elsewhere?
  - ▶ Is the placement of the information in a location where consumers can be expected to look or hear?
  - ▶ Finally, is the information in close proximity to the claim it qualifies?

# Federal Advertising Rules

## ECOA

- ▶ Prohibits discrimination in advertising
  - ▶ Cannot use words, symbols, models or other forms of communication that express, imply, or suggest a discriminatory preference or a policy of exclusion.

## TILA Advertising Rules

- ▶ Applies primarily to Creditors, but Agents of Creditors are allowed to distribute information, especially in connection with Open End Lines of Credit
  - ▶ An advertisement may not refer to a home-equity plan as “free money” or contain a similarly misleading term.
  - ▶ An advertisement that states that any interest expense incurred under the home-equity plan is or may be tax deductible may be misleading.
  - ▶ If an advertisement is for a loan secured by the consumer’s principal dwelling, and the advertisement states that the advertised extension of credit may exceed the fair market value of the dwelling, the advertisement shall clearly and conspicuously state that:
    - ▶ Consumer should consult a tax adviser for further information regarding the deductibility of interest and charges.

# Federal Advertising Rules

Fair Housing Act (42 USC 3601 *et seq.*)

- ▶ Cannot print or publish any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin, or an intention to make any such preference, limitation, or discrimination.

HUD Rules on HECM Advertising

- ▶ HUD Handbook 4000.1, I.A.6.n
  - ▶ Advertisements must not convey the false impression that they are authored, approved, or endorsed by HUD or FHA.
  - ▶ Advertising materials must be retained for two years from the date that they are circulated.
- ▶ HUD Mortgage Letter 2014-10
  - ▶ Cannot use any misleading or misrepresentative advertising or marketing materials in connection with the HECM program.
  - ▶ Advertising materials used in connection with the HECM program must include a disclaimer, displayed in a conspicuous location, that clearly informs the public that such materials are not from HUD or FHA.

# State Law Advertising Requirements

## Licensing

- ▶ Solicitation in the mortgage and finance lead generation business may trigger state licensing requirements.
- ▶ Examples:
  - ▶ California: A RMLA License or a BRE Real Estate Corporation License may be required to engage in soliciting borrowers or lenders for mortgage loans.
  - ▶ Texas: A Mortgage Company License may be required to advertise that the company is engaging in or conducting the business of a residential mortgage loan company.

## NMLS ID

- ▶ The NMLS unique ID of any licensed mortgage loan originator must be clearly shown on all residential mortgage loan application forms, solicitations, or advertisements, including business cards or Internet websites, and other documents as may be established by the applicable state mortgage broker regulator.

# State Law Advertising Requirements

## Tag Lines

- ▶ Some states require the disclosure of:
  - ▶ the license type under which the loan advertised is offered;
  - ▶ the state regulatory body which supervises that type of loan transaction; and
  - ▶ that the regulatory body does not endorse the loan or the licensee.
- ▶ For example, in California, an advertisement must disclose the license type under which the loan would be made or arranged, whether in the printed text of the advertisement or in the oral text of a radio or TV advertisement.
  - ▶ Under the California Residential Mortgage Lending Act, all advertisements must include this statement: “Licensed by the Department of Corporations under the California Residential Mortgage Lending Act.”

## UDAP

- ▶ States have very broad statutes that forbid lenders from engaging in unfair or deceptive advertising.

# Federal Enforcement Actions

*CFPB v. All Financial Services* (U.S. District Court for the District of MD, 2/12/15).

- Lawsuit is on-going
- Impersonating the Government
- Misrepresentation regarding required payments on a reverse mortgage
- Deceptive misrepresentations regarding the product's time limits
- Record-keeping

*In the Matter of NewDay Financial, LLC*, 2015-CFPB-0004 (2/10/15).

- Pre-approved offers of credit and live checks in mailers to veterans and reverse mortgage borrowers
- VA non-profit endorsement – no disclosure that non-profit paid by lender for endorsement

CFPB Study (June 2015, A closer look at reverse mortgage advertisements and consumer risks).

- Consumers in the study did not understand that reverse mortgage proceeds would have to be repaid.
- Consumers thought reverse mortgages were provided by the government.
- Consumers noted that the presence of an interest rate made it clear that a reverse mortgage would be repaid in the future.
- The study found that “lender advertisements undoubtedly contribute to consumers not understanding that taking out a reverse mortgage in their early eligibility years has risks.”

# Federal Enforcement Actions

*In the Matter of American Advisors Group (“AAG”), 2016-CFPB-0026 (Dec. 7, 2016).*

- ▶ CFPB alleged that AAG violated the MAP Rule/UDAAP by:
  - ▶ Allegedly stating that consumers with reverse mortgages cannot lose their homes, and the consumers have a right to stay in their homes for the remainder of their lives;
  - ▶ Allegedly stating that consumers make no monthly payments and a reverse mortgage provides tax-free cash;
  - ▶ Allegedly using testimonials that a consumer is now debt free or completely out of debt after obtaining a reverse mortgage; and
  - ▶ Allegedly providing disclosures that were neither clear nor prominent in its advertisements.
- ▶ AAG was ordered to pay \$400,000 in civil money penalties.

# Federal Enforcement Actions

*In the Matter of Reverse Mortgage Solutions, Inc.* ("RMS"), 2016-CFPB-0027 (Dec. 7, 2016).

- ▶ CFPB alleged that RMS violated the MAP Rule/UDAAP by:
  - ▶ Allegedly stating that consumers with reverse mortgages would not be responsible for payments during the course of the loan;
  - ▶ Allegedly asserting that a consumer with a reverse mortgage cannot be forced to leave;
  - ▶ Allegedly stating that a consumer can leave his home to whomever he wishes, and that heirs could keep the mortgaged property after the consumer's death;
  - ▶ Allegedly advertising that reverse mortgages can eliminate all of a consumer's debt; and
  - ▶ Allegedly creating a sense of urgency for consumers to obtain a reverse mortgage when no time limit existed.
- ▶ RMS was ordered to pay \$325,000 in civil money penalties.

# Federal Enforcement Actions

*In the Matter of Aegean Financial (“Aegean”), 2016-CFPB-0025 (Dec. 7, 2016).*

- ▶ CFPB alleged that Aegean violated the MAP Rule/UDAAP by:
  - ▶ Allegedly stating that consumers will make no monthly payments for the duration of the reverse mortgage;
  - ▶ Allegedly disseminating advertisements promoting reverse mortgage refinancing at no cost to the consumer;
  - ▶ Allegedly stating that consumers with reverse mortgages can live in their home for the rest of their lives, and that consumers would never ever be forced from their home;
  - ▶ Allegedly advertising to Spanish speaking consumers that its reverse mortgage product came from the United States Housing Department;
  - ▶ Allegedly providing disclosures that were neither clear nor prominent in its advertisements; and
  - ▶ Allegedly not maintaining advertisement records for the statutorily required two years.
- ▶ Aegean was ordered to pay \$65,000 in civil money penalties.

# State Enforcement Actions

MA Consent Order – *Direct Finance Corp.* (“DFC”), 2015-011-MB (Feb. 17, 2017).

- ▶ The Massachusetts Attorney General alleged that DFC’s flyer and website advertising reverse mortgage loans were misleading and deceptive by:
  - ▶ Allegedly advertising a “Lifestyle Improvement Loan” without directly identifying that the product was a reverse mortgage;
  - ▶ Allegedly stating that the cash received from a “Lifestyle Improvement Loan” comes with no strings attached and that the funds available from a HECM line of credit was guaranteed to grow;
  - ▶ Allegedly stating that the debt of a “Lifestyle Improvement Loan” can never be a negative; and
  - ▶ Allegedly referencing FHA insurance without explaining that the product was a reverse mortgage.
- ▶ DFC was ordered to pay \$15,000 in civil money penalties.

# State Enforcement Actions

MA Consent Order - *American Advisors Group*, 2008-022-CO (Oct. 21, 2008).

- ▶ The Massachusetts Attorney General alleged that AAG's consumer solicitation regarding reverse mortgage loans contained language:
  - ▶ That had the tendency to be false or misleading;
  - ▶ That could collectively create the appearance that the solicitation was issued by a government agency;
  - ▶ That was marked as "URGENT NOTICE;" and
  - ▶ That the mailing was marked as forwarded from "ADMINISTRATIVE OFFICES."
- ▶ AAG was ordered to pay \$10,000 in civil money penalties.

# State Enforcement Actions

WA Statement of Charges – *High TechLending, Inc.* (“HTL”), C-17-2229-17-SC01 (Oct. 5, 2017).

- ▶ The Washington Department of Financial Institutions, Consumer Services Division, charged HTL with:
  - ▶ Targeting seniors with reverse mortgage offers using false, deceptive, and misleading advertising;
  - ▶ Falsely representing that borrowers could stay in their homes for life without making monthly payments;
  - ▶ Misrepresenting HECM loan terms and failed to disclose the risks of default and foreclosure;
  - ▶ Representing that HECM loans are insured by the Federal Government but omitted that borrowers must pay premiums for that insurance; and
  - ▶ Using deceptive solicitations, brochures, Internet websites, YouTube videos, and Facebook pages to promote the HECM program
- ▶ The Statement of Charges seeks a final order requiring HTL to pay a \$300,000 fine plus investigative fees.



MARKETING

# Marketing Challenges

- ▶ RESPA
  - ▶ Marketing service agreements (“MSAs”)
  - ▶ Co-marketing agreements
- ▶ Recent Enforcement Actions
  - ▶ CFPB
  - ▶ HUD-OIG
- ▶ Social Media Marketing/Advertising
  - ▶ RESPA, TRID, ECOA, GLBA, UDAP and UDAAP
  - ▶ Recent Enforcement Action
- ▶ Fair Use and Copyright

# Marketing Service Agreements

RESPA (12 USC 2601 *et seq.*)

- ▶ RESPA Section 8(a) prohibits a person from giving or accepting “any fee, kickback, or thing of value pursuant to any agreement or understanding” that business incident to or a part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person.
- ▶ HUD issued an Interpretative Rule in June 2010, in the context of home warranty companies, stating that advertising aimed at a general, non-specific audience, and not affirmatively influencing any particular homebuyer or seller, is permissible, assuming that payment was reasonable in the amount to the fair market value for the services actually performed.
- ▶ CFPB issued Compliance Bulletin 2015-05 in October 2015 reiterating that analyses of MSAs will involve fact-dependent reviews and that the CFPB intends to continue “actively scrutinizing” such agreements.
- ▶ *PHH Corp. v. CFPB* (D.C. Cir. Jan. 31, 2018): MSAs allowed so long as payment is commensurate with the value of services and goods

# Co-Marketing Agreements

## RESPA (12 USC 2601 *et seq.*)

- ▶ Differs from MSAs because these instances involve two or more parties each of whom are represented in one marketing piece.
- ▶ (1) Both parties must pay their pro rata share of the advertisement
  - ▶ E.g., if both parties are represented 50/50, each is responsible for half of the advertising expense.
- ▶ (2) And the arrangement does not involve discounts on expenses that otherwise would be incurred by persons in a position to refer settlement services or business.
  - ▶ E.g., if both parties are represented 50/50 in a single advertisement, and if one party pays more than half of the advertising expense, that party has improperly defrayed the expenses of the other party.

# Recent Enforcement Actions

*In the Matter of Prospect Mortgage, LLC* ("Prospect"), 2017-CFPB-0006 (Jan. 30, 2017).

- ▶ Alleged that Prospect tracked the number of referrals its counterparties delivered, and adjusted its payments under its agreements based on the volume of referrals provided.
- ▶ Prospect was ordered to pay \$3.5 million in civil money penalties.

*In the Matter of NewDay Financial, LLC* ("NewDay"), 2015-CFPB-0004 (Feb. 10, 2015).

- ▶ Alleged that NewDay entered into an MSA with a veterans' organization that was facilitated by another third-party company and paid fees to both the veterans' organization and the other third-party company.
- ▶ NewDay was ordered to pay \$2 million in civil money penalties.

*In the Matter of Lighthouse Title, Inc.* ("Lighthouse"), 2014-CFPB-0015 (Sept. 25, 2014).

- ▶ Alleged that Lighthouse entered into MSAs because it believed that if it did not, the counterparties would refer business to other providers.
- ▶ Did not prohibit MSAs outright, but stated that the very act of entering into a contract is a "thing of value" even if fees paid under that contract are the fair market value for goods or services provided.
- ▶ Lighthouse was ordered to pay \$200,000 in civil money penalties.

# Recent Enforcement Actions

## HUD-OIG Audit Reports

*In the Matter of Cornerstone Home Lending* ("Cornerstone"), 2014-FW-1006 (Sept. 26, 2014).

- ▶ Found that Cornerstone paid marketing fees to realtors for the referral of FHA mortgage business
- ▶ Found that MSA required realtors to exclusively promote Cornerstone's mortgage products and programs and restricted realtors from entering into similar agreements with other lenders
- ▶ Cornerstone was required to:
  - ▶ Train staff regarding RESPA requirements and
  - ▶ Review current MSAs to determine whether they constitute improper referrals

*In the Matter of First Magnus Financial Corporation* ("FMFC"), 2008-LA-1014 (Aug. 1, 2008).

- ▶ Found that FMFC paid marketing and non-competition fees to builders and real estate companies for the referral of FHA mortgage business
- ▶ Found that FMFC had loan officers on site at builders' and real estate companies' offices, which limited borrowers' ability to comparison shop
- ▶ FMFC was required to discontinue the practice of paying marketing and non-competition fees for referrals of FHA mortgage business
- ▶ It was recommended that FMFC's active status and approval to perform FHA business be removed, and that administrative actions be pursued against the principal owners and management of FMFC

# Social Media Advertising/Marketing

## ▶ FTC's Endorsement Guides: What People Are Asking

- ▶ A staff guidance that answers frequently asked questions about advertising and endorsing brands on social media.
- ▶ Endorsements must be disclosed especially when one is "sponsored" or paid a thing of value.
  - ▶ Otherwise, would be considered "astroturfing"

## ▶ Types of Social Media Used for Advertising and Marketing

- ▶ Facebook: allows users to create business pages and personal accounts, engage in more interactive pursuits such as commenting and posting on pages, and to "like" users' comments.
- ▶ Yelp: allows users to create business pages, which present content to consumers in a controlled manner, permits businesses to upload photos and links to the business' website, and allows users to post comments and reviews on the business' page.
- ▶ Twitter: allows businesses to create a profile, send out ad campaigns, target advertising to reach a specific audience, and to use analytics to understand impact and audience.
- ▶ Instagram: provides a platform for business advertising content, allows users to publicly post images and videos, provides tagging capabilities for posted images and videos, and provides a commenting function for users to comment and "like" photos and videos.

# Social Media Advertising/Marketing

## RESPA

- ▶ “Likes,” “fans,” “follows,” and displays of advertising on the Internet may be determined to be a “thing of value,” with the intent such action will result in mutual referrals.
- ▶ LinkedIn posts where a loan originator discusses “realtor partners” and “referral partners” may implicate prohibitions against kickbacks.

## TILA-RESPA Integrated Disclosure Rule

- ▶ Key information may be provided by a consumer to a loan originator through social media messaging, and TRID safeguards enacted for documenting the receipt of an “application” may be unintentionally avoided.
- ▶ A lender’s email retention and receipt processes may also be negated by social media interaction.

## ECOA

- ▶ Mobile and digital platforms allow advertisers to target only certain consumers, known as “people-based advertising,” which implicates fair lending concerns.
- ▶ Lenders must ensure that they are not engaging in a form of “redlining,” and excluding consumers who may fall within prohibited classifications.

# Social Media Advertising/Marketing

## GLBA

- ▶ Obligation to safeguard consumer information to reduce risk of exploitation.
  - ▶ Lenders may create marketing segments based on data unique to a specific person: e-mail, phone number, social media identifiers. If these identifiers can be discovered by unintended people, key consumer information may be at risk for exploitation.
  - ▶ Communication with consumers through social media, e.g., tweets, might include non-public information in an unsecured format that is subject to easy access to third parties.
  - ▶ An unsecured chat box on the Internet to communicate with consumers also present exploitation risks.

## UDAP and UDAAP

- ▶ Using fictitious testimonials to boost a company's reputation is referred to as "astroturfing."
- ▶ Placing false testimonials or reviews on the Internet may cause violations related to UDAP and UDAAP.

# Social Media Advertising/Marketing

NY Consent Order - *Residential Finance Corp.* (“RFC”), 10-181 (Dec. 31, 2010).

- ▶ Alleged that RFC falsely created and posted positive reviews about the company on third-party consumer opinion websites to counteract criticism on such websites;
- ▶ Alleged that RFC failed to disclose the identities of those who had ownership or management affiliations with the company, but rather referred to themselves generically or with false names, when posting “false” reviews; and
- ▶ Alleged that RFC copied and posted such “false” and/or “conflicted” reviews to the company’s own website to boost the company’s online reputation.
- ▶ RFC was ordered to pay \$150,000 in civil money penalties.

# Fair Use and Copyright

## Fair Use Doctrine, 17 USC § 107

- ▶ Permits limited use of copyrighted material without having to first acquire permission from the copyright holder
- ▶ Intended to balance the interests of copyright holders with the public interest in the wider distribution and use of creative works
- ▶ The Supreme Court has traditionally characterized fair use as an affirmative defense
  - ▶ But the 9<sup>th</sup> Circuit has concluded that fair use was not merely a defense, but was an expressly authorized right (*Lenz v. Universal Music Corp.*, 801 F.3d 1126 (9<sup>th</sup> Cir. 2015))
- ▶ Examples of fair use include commentary, search engines, criticism, parody, news reporting, research, and scholarship

# Fair Use and Copyright

## Four-Factor Test to Determine Fair Use:

1. The purpose and character of the use, including whether such use is of a commercial nature or for non-profit educational purposes;
2. The nature of the copyrighted work;
3. The amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
4. The effect of the use upon the potential market for or value of the copyrighted work.

Questions?