

# Real Estate and Advertising on the Internet

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**The complex interplay between federal regulations, state statutes, and regulatory schemes necessitates that careful attention be paid to the particularities of each situation.**

Few would argue that the Internet has not significantly transformed the fundamental processes of most types of commercial transactions. The advantages are obvious. It allows companies to communicate with a large number of disparate individuals, efficiently aggregates information, and makes possible a level of direct interaction with consumers that previously was not possible. The real estate industry is certainly no exception. Businesses that are involved in real estate transactions realize that it is to their competitive advantage to harness the benefits of online advertising and solicitation. Real estate businesses also, however, cannot ignore the myriad of special legal issues that arise once an advertisement has been published on the Internet for the sale, lease or financing of real property, or for other regulated real estate related services.

Even in light of the recent economic downturn, the U.S. online population will grow to 205 million by the end of 2006, up from 122 million at the end of 2000. "With over half of the U.S. population expected to be online within the next five years . . . the Internet is destined to become a mass-market medium for advertisers."<sup>1</sup> In addition, online advertising spending is expected to expand up to \$15.4 billion over the next four years.<sup>2</sup> Real estate related transactions have been projected to be one of the top five growth sectors on the Internet.<sup>3</sup>

Most real property related advertisements displayed

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on the Internet involve the listing of real property for sale or lease, the offering of real estate related services (e.g., property management, appraisal), or the offering of mortgage lending services. Consequently, Internet advertisements for all of these purposes are governed by a patchwork of state and federal laws, industry rules, and practice guidelines developed by organizations within the real estate industry itself.

## ***Internet Advertising and The Federal Trade Commission***

First and foremost, any advertisement placed on the Internet involving real estate related products or services, or any other products or services for that matter, must comply with regulations promulgated by the Federal Trade Commission. By placing a commercial advertisement or engaging in marketing on the Internet, an advertiser becomes subject to the authority of the FTC. The Federal Trade Commission Act allows the FTC to promulgate rules and exercise enforcement activities in the interest of all consumers to prevent deceptive and unfair acts or practices by advertisers. The basic consumer protection statute enforced by the FTC in consumer advertising is Section 5(a) of the FTC Act which provides in pertinent part that "unfair or deceptive acts or practices in or affecting commerce are declared unlawful."<sup>4</sup> Section 18 of the FTC Act<sup>5</sup> authorizes the FTC to prescribe rules that define with specificity acts or practices that are unfair or deceptive acts or practices in or affecting commerce within the meaning of Section 5(a)(1) of the FTC Act.

If the FTC finds that an advertiser has violated the FTC Act, it can enforce certain specific remedies against the advertiser. First, the FTC can enter a “cease and desist order” against the advertiser that forbids the continuation of specific conduct outlined in the order. Additionally, the FTC is empowered to seek either preliminary or permanent injunctions in a federal court to remedy any violation of a provision of a law that is enforced by the FTC.<sup>6</sup> The FTC may also seek the imposition of civil penalties against an advertiser that violates a rule promulgated under the FTC Act or a final cease and desist order handed down by the FTC.<sup>7</sup> Criminal penalties also may be imposed if, with intent to defraud or mislead, an advertiser deceives consumers, resulting in injury.<sup>8</sup> Finally, the FTC may require advertisers to pay amounts determined by the FTC into a consumer redress fund if violations are found to have been committed by an advertiser.<sup>9</sup> Given the broad statutory authority granted to the FTC to impose penalties for advertisers’ violations of the FTC Act and related regulations relating to advertising, consideration of the applicable regulatory environment, both prior to publishing an advertisement on the Internet, and as part of an ongoing compliance program, is crucial.

The most fundamental policy for all commercial advertisers, those within the real estate industry or otherwise, is that both traditional advertising regulations and principles, as well as specific guidelines related to the medium of the Internet, apply to an Internet advertising compliance analysis. The FTC’s authority to prohibit “unfair or deceptive acts or practices” applies broadly across all advertising claims, marketing and promotional activities, and sales practices in general. The FTC Act is not limited to any particular type of advertising, applying equally to mediums both off-line or online in cyberspace.<sup>10</sup> Therefore, no matter what medium is being utilized for marketing purposes, an advertiser must always follow these general principles:

- An advertiser must always tell the truth and not mislead the consumer.
- An advertiser must not engage in unfair practices—that is, any advertising or marketing that causes substantial, unavoidable consumer injury without offsetting benefits to competition or consumers.
- Any claims made by an advertiser must be substantiated before they are made.<sup>11</sup>

The FTC exercises its broad statutory authority through the issuance of industry specific rules and advisories that give businesses some guidance as to what constitutes an unfair or deceptive practice. These rules prohibit specific acts or practices that the FTC has found to be unfair or deceptive. The FTC has indicated that the industry specific rules and advisories have broad application, including to the Internet. The FTC has observed that “[m]any rules and guides address claims about products or services or advertising in general

and are not limited to any particular medium used to disseminate those claims or advertising. Therefore, the plain language of many rules and guides also applies to claims made on the Internet.”<sup>12</sup>

### ***Unfair and Deceptive Practices or Acts***

The FTC has stated that, under Section 5 of the FTC Act, a representation, omission or practice is deceptive if:

- it is likely to mislead consumers, and
- it is material, or likely to affect consumers’ behavior or decisions about the product or service.<sup>13</sup>

An example of practices determined to be “deceptive” by the FTC under this standard is the recent Day Trading line of cases decided in May 2000.<sup>14</sup> The FTC targeted Internet advertisers who sold combinations of online, “real time” training relating to trading securities; software programs; trading manuals; e-mail newsletters and mentoring services for prices ranging from \$79 to \$4,995. Using advertising claims such as “. . . [m]ake money regardless of the market going up or down,” “. . . return on account of 2041%,” “. . . this service has returned an average of 167% annually,” and phony testimonials, the advertisers promoted their systems with exaggerated claims about earnings or profits and made little or no mention of the risks associated with day trading. They also claimed that their systems minimized those risks.

The FTC charged CompuTrade LLC with making unsubstantiated, false and misleading statements in violation of federal law. CompuTrade LLC eventually signed a consent agreement with the FTC under which it agreed not to make any misrepresentations in any manner, expressly or by implication, about the financial benefits of its program and to always include a disclosure explaining the risks of its service.

As to what constitutes an “unfair act or practice” pursuant to Section 5(a) of the FTC Act, the FTC Act provides that an act or practice is unfair if the injury it causes, or is likely to cause, is:

- substantial,
- not outweighed by other benefits to consumers or competitors, and
- not reasonably avoidable by the consumers themselves.<sup>15</sup>

Furthermore, established public policy may be used as evidence in considering the above elements.<sup>16</sup> However, such public policy considerations may not serve as a primary basis for such determination.<sup>17</sup>

The case of *In re Griffin Systems* provides a helpful illustration of the finding of an “unfair” act or practice by the FTC.<sup>18</sup> Griffin Systems sold service contracts to purchasers of new cars through solicitation materials. After receiving payment and registration from customers, Griffin Systems subsequently cancelled almost

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14,000 service contracts for reasons not permitted under the service contracts, such as when a customer filed a certain number of claims for service under the agreement. Griffin Systems also required that its customers obtain prior authorization for repairs by calling a specified toll-free number, but thousands of calls to this number were never answered. Even though Griffin Systems was aware that such calls were never answered, it denied claims for repairs under the reasoning that its customers did not obtain proper authorization.

The FTC concluded that such actions were unfair, citing Griffin Systems' intentional establishment of a condition to its performance and then depriving its customers of any opportunity to satisfy that condition. Such actions constituted substantial injury to consumers with no countervailing benefits. The Commission further stated that the injury caused by Griffin Systems was not reasonably avoidable by the consumer and hence constituted an unfair business practice.<sup>19</sup>

### ***The Substantiation Requirement***

The FTC Policy Statement on Advertising Substantiation provides, among other things, that any advertising claim made for a product or service must be supported by a "reasonable basis" before its dissemination to the public. The lack of a "reasonable basis" is an unfair or deceptive practice in violation of Section 5(a) of the FTC Act. What constitutes a "reasonable basis" depends, as it does in an unfairness analysis, on a determination of factors relevant to the benefits and costs of substantiating a particular claim. This analysis focuses particularly on:

- the type of claim,
- the product or service,
- the consequences of a false claim,
- the benefits of a truthful claim,
- the cost of developing substantiation for the claim, and
- the amount of substantiation experts in the field believe is reasonable.<sup>20</sup>

If there is extrinsic evidence involved, such as expert testimony or consumer surveys, the FTC examines what level of substantiation consumers expect to support a particular product claim, and whether the adequacy of evidence an advertiser possesses meets those expectations. At the very least, an advertiser must possess or keep on file records or evidence to support their claims prior to dissemination.<sup>21</sup>

### ***Online Advertising and the Rule On Disclosures***

In the context of real estate or mortgage lending related advertising, the most important issue for avoid-

ing deceptive and unfair trade practices is careful consideration of the rules applicable to the disclosure of material information concerning the property or services being offered, and the identity of the advertiser itself, whether it is a real estate brokerage firm, a salesperson, or a mortgage lender or broker. To ensure that consumers are treated fairly and are not deceived by advertisements, the FTC has created a series of rules requiring proper disclosure. Disclosures are required for the provision of any qualifying information or statements within any express or implied claim in an advertisement in order to prevent consumer confusion. Disclosures also should provide additional information so that consumers cannot reasonably be expected to be misled by the claims being made within the advertisement itself. The overriding principle in relation to all types of claims is that the appropriate or required disclosure must be presented clearly and conspicuously to the consumer to prevent deception, confusion or, alternatively, to provide material information within the advertisement.<sup>22</sup> This standard is applied from the perspective of the "reasonable consumer."<sup>23</sup> In other words, the FTC evaluates the disclosure by examining how reasonable consumers actually perceive and understand the disclosure within the context of the entire ad. Advertisers are responsible for ensuring that "reasonable consumers" are likely to both notice and understand their qualifying disclosures.

In one recent case relating to the failure of an advertiser to include proper disclosures along with its advertising claims, the FTC charged Netpliance, Inc., a Delaware corporation based in Austin, Texas, with deceptive advertising, unfair billing, misrepresenting federal laws and violating a series of other federal laws that the FTC enforces. Netpliance marketed a device called the i-opener that it advertised as a less expensive alternative to the PC for Internet access and email. The FTC complaint challenged these advertisements as deceptive because Netpliance failed to disclose adequately all of the extra costs associated with using the i-opener, such as monthly Internet service fees and long distance telephone charges. In addition, the company failed to disclose to consumers that they must use Netpliance's Internet service to access the Internet. Consumers could not access the Internet with the i-opener through another Internet service provider, even if it happened that Netpliance ceased providing Internet service in the future. The company eventually agreed to settle FTC charges that its sales and billing practices violated federal laws.<sup>24</sup>

The FTC's requirement of disclosure of material information is especially important in advertising real estate and mortgage lending transactions and services, particularly given the traditional relationship between buyer and seller, lender and borrower or principal and agent in both commercial and residential property contexts. For example, a seller of real estate may, under applicable state law, be under no obligation to divulge non-obvious physical defects in relation to the condi-

tion of a property unless such conditions make the property dangerous or unfit for habitation.<sup>25</sup> The Internet, however, has changed the relationship between the duties of a buyer and a seller. Even if the buyer is under the obligation to inquire and inspect the property for non-obvious defects, the seller must be even more careful in his or her statements concerning the property and ensure that the proper disclosures in an advertisement or electronic communication have been made so that no misrepresentation can be reasonably deemed to have occurred. Because the Internet permits a buyer to inspect the property only remotely, it is incumbent upon the seller to clearly disclose any material information that would counter allegations of misrepresentation.<sup>26</sup>

### ***The Clear and Conspicuous Standard***

Another important factor for real estate advertisers to keep in mind is that the FTC's "clear and conspicuous standard" also has particular importance in its application to the operation of the Internet itself. Specifically, online advertisers must understand that they do not have 100 per cent control of their advertisement once it is placed on a Web page. Differences in browser technology, operating systems and end user preference can cause information to display to a given consumer in radically different ways than intended by the advertiser. Individuals may use different display resolutions on their monitor that distort the graphical placement of text and images. Many consumers access the Internet through older computer systems that cannot incorporate the latest technologies such as JAVA or FLASH Multimedia presentations. Internet browsers, such as Netscape Navigator and Microsoft Explorer, interpret HTML source code in different ways, resulting in some Web pages working in one browser, but not others. All of these factors demonstrate the difficulty facing an advertiser on the Internet in attempting to incorporate a proper disclosure within the requirements of the FTC Act.

If a real estate broker, for example, placed important disclosure information concerning a property for sale on a FLASH multimedia presentation, such information would not even be displayed on an older computer system running legacy browser software, such as Netscape 2.0. This consumer would not, therefore, even see the disclosure at all. Accordingly, advertisers must be vigilant in assuring that their disclosures are not compromised by differences and limitations contained in Internet technology itself.

There are certain general guidelines that are applied to determine whether a particular disclosure is clear and conspicuous. These principles are applied on a case-by-case basis in context with the information that must be provided and the nature of the advertisement itself. Although there is no set formula, these guidelines can provide assistance in the evaluation of a disclosure to determine whether it is indeed clear and conspicuous.

### ***General Guidelines For the Proximity and Placement of Online Disclosures<sup>27</sup>***

There are a number of guidelines real estate advertisers must follow relating to the proximity and placement of online disclosures. These include the following:

- A disclosure must be placed as closely to the claim it qualifies or other relevant information to prevent confusion or deception to the consumer. Advertisers should place disclosures and claims on the same screen within a Web page when viewed and should avoid Web page formats that discourage scrolling or that are unintuitive.
- Advertisers should use text or visual cues to encourage consumers to scroll if the information presented is lengthy. Merely having a scroll bar is not an effective visual cue. A graphic or prompt to instruct the consumer to scroll or move lower is appropriate and encouraged.
- If an advertiser's claim requires an appropriate disclosure be effectively communicated to consumers, it must be displayed before they make a purchase or incur a financial obligation. In addition, disclosures cannot be placed on the order page that relates back to information or a claim viewed several pages earlier. The disclosures must be made in context with the particular claim or product.
- To be clear and conspicuous, disclosures must be prominently displayed in terms of color, size and graphics. The disclosure should not be disguised in any way. Advertisers have a responsibility to evaluate the disclosure to ensure that it is at least as prominent as the advertised claims to which it relates.
- Graphics, visual images and other factors should not distract from the disclosure itself. The clear and conspicuous standard is evaluated with respect to the entire advertisement itself; therefore, all factors are taken into consideration in relation to the disclosure's presentation to consumers.
- If a Web site has numerous pages and links, advertisers may need to repeat presentation of important disclosures to consumers in order to comply with the clear and conspicuous standard. Because Web sites can be navigated in a nonlinear fashion, repeated exposure of an important disclosure ensures that the disclosure meets the clear and conspicuous standard. In addition, if advertisers repeat their claims within different areas of the Web site, the associated disclosure must also be redisplayed.
- To be clear and conspicuous, disclosures should have simple and concise language and syntax that is understandable to the advertiser's intended audience. Disclosures should not be burdened by

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legal or technical jargon. They also should not include any extraneous material that would diminish the effectiveness of the information required to be presented to the consumer.

### **Guidelines For Proximity and Placement of Online Disclosures—Hyperlinking<sup>28</sup>**

Hyperlinking to a disclosure may also cause problems for advertisers, especially if a disclosure is an integral part of, or inseparable from, the advertiser's claim, such as cost information or health and safety disclosures. Such types of disclosures should be placed on the same page and immediately next to the claim.

If the disclosure, however, is lengthy or if it needs to be repeated, then hyperlinking to the disclosure may be justified. Observing the following hyperlinking guidelines should aid in meeting the FTC's clear and conspicuous standard:

- Label or describe the hyperlink clearly and conspicuously as a disclosure. It should be obvious and not hidden by such devices as asterisks or footnotes.
- Use hyperlink styles consistently to allow consumers to know when a link is available. Do not use colors or graphics that camouflage the hyperlink from the consumer's eye.
- Place the hyperlink near the relevant information. The hyperlink should be near the claim that triggers the disclosure so that consumers can notice it easily and relate it to the claim.
- The transition from the hyperlink to the disclosure itself must be simple and easy. The Web page referred to by the hyperlink must contain the complete disclosure. The disclosure must be displayed prominently. Guidelines For Proximity and Placement of Disclosure With Different Online Technologies<sup>29</sup> Because of the variety of ways information can be displayed and presented to a consumer on the Internet, advertisers must be careful when using new technology. Pop-up windows, FLASH animation and JAVA applications are all creative methods for expression; but as stated previously, they must be examined in relation to whether the disclosures and other information are communicated effectively to the consumer. For every new creative technology, advertisers must carefully consider whether the new technology is an appropriate vehicle for displaying an important disclosure.
- Advertisers must also understand thoroughly technological limitations. If the new technology is limited to only the latest version of a particular browser, advertisers must compensate by providing an alternative method for displaying the information or disclosure for those consumers who are not up to date.

- Advertisers must recognize and respond to consumer behavior in relation to each technique. Many times if consumers are presented with information in a new way, they might not respond to it adequately or even ignore it. Many consumers automatically close pop up windows. Others ignore them. Advertisers must evaluate whether a new technique is an effective means to convey the disclosure in relation to how consumers respond. If a disclosure is presented to consumers using new technologies that result in the disclosure being less clear or conspicuous, then advertisers should avoid the use of these technologies for disclosure purposes.

### **Guidelines For Proximity and Placement of Online Banner Ads<sup>30</sup>**

Banner ads also need to fulfill the clear and conspicuous requirement. Unfortunately, the small size of most banner ads and the limitations in their functionality make adhering to the clear and conspicuous requirement particularly difficult. There are, however, certain guidelines to assist advertisers in meeting the clear and conspicuous standard in the context of banner ads.

- Whenever possible, any necessary disclosure or other information should be displayed on the banner ad itself.
- If the banner ad is too small for the length of the disclosure, the disclosure may be hyperlinked by the banner to a Web page. The disclosure must still be clear and conspicuous on the Web page.
- Scrolling text and rotating panels can present important information and refer consumers back to the Web page for the full disclosure.
- If the banners are interactive to the point where consumers may perform transactions without moving to the Web site itself, any required disclosures must be displayed in relation to the advertiser's claims.

### **Guidelines For Disclosures Relating to Multimedia Messages<sup>31</sup>**

Internet advertisements (as well as CD mailers, etc.) may incorporate numerous multimedia sources such as audio messages, video images and animation. To adhere to the clear and conspicuous standard, any claims made by these methods must be accompanied by a disclosure that is similar in form. Therefore the disclosure should match the type of presentation:

- Audio claims must have audio disclosures. The disclosure must also be in a sufficient volume and cadence, and the audio disclosure must be such that it is understandable to a reasonable consumer. A disclosure cannot be limited to an audio clip if the claim or information that needs

to be qualified is also in the advertisement's text or other format. The disclosure must match the claim.

- For visual disclosures, they must be displayed for a sufficient amount of time and duration.

### ***The Truth in Lending Act and Advertising***

In addition to maintaining compliance with the FTC Act and its related regulations, any advertisement that promotes "consumer credit" or a "consumer lease" is subject to the regulations promulgated under the Truth in Lending Act ("TILA").<sup>32</sup> Specifically, the main objective of TILA is to protect ordinary consumers through the requirement of meaningful disclosure of credit and lease terms so that consumers can easily compare available credit terms and shop wisely for credit.<sup>33</sup> An advertisement targeting consumers for the marketing of "consumer credit" or a "consumer lease" as defined in TILA must be in compliance with TILA. Therefore, many real estate advertisers, including real estate and mortgage brokers, mortgage lenders, builders and others are subject to this statute.

The Federal Reserve Board implemented TILA, among other ways, through its adoption of Regulation Z.<sup>34</sup> Under Regulation Z, an advertisement is defined as "any commercial message in any medium that promotes, directly or indirectly, a credit transaction."<sup>35</sup> Therefore, advertisements online fall under the auspices of TILA. Furthermore, Regulation Z requires the disclosure of any meaningful and material information concerning the cost of the credit offered, which, depending on the circumstances, typically means listing the specific finance charges and annual percentage rate involved in the transaction.<sup>36</sup>

TILA § 108(c) provides expanded powers to the FTC, irrespective of whether the creditor is engaged in interstate commerce, to enforce violations of both TILA and Regulation Z.<sup>37</sup> An example of FTC enforcement under this provision is *In re Guild Mortgage Co.*, where the Guild Mortgage Company was charged with providing consumers with inaccurate and misleading information regarding its annual percentage rates and the amount of its monthly required payments in connection with its adjustable-rate mortgages. The Guild Mortgage Company subsequently settled with the FTC through a consent agreement that required, among other things, that Guild Mortgage cease and desist from all inaccurate disclosures concerning its finance charges and annual percentage rates, and that Guild pay \$500,000 to consumers over a five year period to redress its violations under TILA and Regulation Z. Guild also agreed in writing via the consent decree to accurately disclose the annual percentage rate, finance charge and payment schedule to consumers as required under Regulation Z.<sup>38</sup> Obviously, this example illustrates the importance of seeking compliance review from outside counsel prior to publicizing advertisements subject to the strictures of TILA and Regulation Z.

The FTC also has the power to force a creditor to cure violations it commits by retroactively adjusting the accounts of customers who were injured by improper disclosure.<sup>39</sup> For example, in the case of *In re Excell Mortgage Corp.*, the FTC charged the Excell Mortgage Corp. with failing to accurately disclose the composite annual percentage rate and finance charge in its adjustable rate mortgages. The consent decree ultimately required by the FTC provided that Excell take steps to cure its alleged violations. This included making Excell accurately calculate and disclose the annual percentage rate and finance charges in connection with its extension of consumer credit, and the number, amount and timing of scheduled payments to consumers with respect to their payment of outstanding mortgage obligations. Excell was also required to agree to make adjustments to the accounts of every consumer to whom it disclosed an annual percentage rate with the miscalculated amounts over the span of the prior three years.<sup>40</sup> Again, this case provides a good example of why compliance review in the context of mortgage lending advertisements placed on the Internet is highly advisable.

### ***Other Federal Regulations***

Although the FTC Act and TILA are two of the most important federal statutes affecting how real estate related advertising is conducted on the Internet, there are also other regulatory requirements that may be applicable in various cases. The Fair Housing Act ("FHA") protects against discriminatory practices in relation to individuals seeking a home.<sup>41</sup> The FHA also extends this protection against discriminatory advertising for the marketing of a home or lease.<sup>42</sup> Likewise, the Equal Credit Opportunity Act governs all aspects of a borrower's dealings with a creditor, including the advertising, and preapplication and information disclosure process.<sup>43</sup> Careful analysis and consultation with an attorney experienced in online advertising compliance review is therefore highly advisable before engaging in advertising on the Internet.

### ***State Regulation of Real Estate Products and Services on the Internet***

State laws governing advertising on the Internet with respect to the real estate industry are widely divergent in content and application, and can sometimes be very complex depending upon the relevant factual circumstances. Every state has its own laws and regulations governing mortgage lenders and real estate brokers, and an administrative agency with authority to promulgate and enforce rules and regulations concerning ethical behavior and acts for its licensed real estate professionals and mortgage lenders and brokers.

Texas is one of a handful of states that has directly addressed the advent of the Internet and provided guid-

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ance to real estate professionals regarding what constitutes acceptable parameters for online advertising. For example, under regulations promulgated by the Texas Real Estate Commission, "advertising" is defined to include, "all publications, radio or television broadcasts, all electronic media including E-mail and the Internet, business stationary, business cards, signs and billboards" for purposes of the application of guidelines regarding misleading advertising.<sup>44</sup>

With respect to real property transactions involving a party or parties outside state borders, the Texas Real Estate Commission, for example, has ruled that out-of-state individuals who engage in real estate brokerage practices through the medium of the Internet or other types of communication are required to have a Texas broker's license only if the transaction involves prospective buyers and sellers, all of whom must be residents of Texas, and only if the property is located at least partially within the state itself.<sup>45</sup>

To the contrary, the State of California takes the position that any real estate agent or broker who wishes to advertise for the sale or lease of real property located outside of California to California residents must register the particular out of state property with the California Real Estate Commissioner.<sup>46</sup>

These anecdotal examples demonstrate the complicated legal environment for those engaged in the online advertisement of real estate and real estate related products and services on the Internet. Given the myriad of state regulations, an advertiser must consider carefully the jurisdictions where the promotion will be targeted or received, and then examine all applicable state laws and regulations in regard to licensing, brokerage and mortgage lending requirements for a proper evaluation of risk.

### ***The ARELLO Best Practices Internet Guidelines For Real Estate Brokers***

There are some potentially helpful guidelines concerning commercial activity on the Internet for the real estate brokerage firm. The Best Practices Internet Guidelines (the "Guidelines") promulgated by the Association of Real Estate License Law Officials ("ARELLO") was developed to "create a framework of real estate consumer protection . . . and provide regulatory guidelines that each jurisdiction can use to create specific regulations concerning online real estate activities that it deems necessary, in a manner that is consistent with the operation and nature of the Internet and that will minimize cross-jurisdictional regulatory conflict."<sup>47</sup> ARELLO places a significant emphasis on full disclosure of all material information concerning a licensee or licensed firm for the purpose of informing the consumer. This includes required disclosure of the licensee name, the name of the affiliated firm and the jurisdiction in which it is licensed to do business, and the city and state in which the licensee's office is located.<sup>48</sup>

The Guidelines purposefully distinguish between "active" communications and solicitations and "passive" communications and solicitations, presumably for purposes of deciding in what circumstances personal jurisdiction over an advertiser will be obtained. An "active solicitation" is defined as "active communications with consumers about real estate services with intent to form a brokerage relationship."<sup>49</sup> A "passive communication" is defined as a "communication available to the general public with no intent to contact specifically identifiable individuals or groups of individuals."<sup>50</sup> The Guidelines provide that certain forms of online communications such as Web pages, discussion lists, banner ads and the like are considered to be passive communications.<sup>51</sup> The Guidelines recommend that all Internet related advertising that consumers can view or experience as a separate unit, including passive communications, include full disclosure of information concerning the licensee or licensed firm.<sup>52</sup>

The Guidelines also address the issue of online listing services for real estate by emphasizing the need for consistent and current information regarding listed properties, and that such information should be updated in a timely manner. The Guidelines stress that particular attention should be paid to any material changes in either the listing status of the property or its description. All listing information likewise should include in a readily visible manner a statement of the last time the entries were updated. ARELLO recommends that licensed entities should not advertise other licensed entities' listings without written permission and, if given, should not alter the online display or any informational part of the listing without the written permission of the listing owner.<sup>53</sup>

The ARELLO Best Practices Internet Guidelines have been recommended by the New York State Real Estate Board to all of its real estate brokers and salespersons licensed in and/or conducting business within the state.<sup>54</sup> Both the South Dakota Real Estate Commission and the Real Estate Council of Alberta have adopted their own revised versions of the Guidelines to provide rules of direction for their members.<sup>55</sup>

### ***The Model Internet Advertising Rule***

The National Association of Realtors ("NAR") also has published its own guidelines in the form of the Model Internet Advertising Rule ("MIAR") that was approved by its Leadership Team in April 1999, and amended by its Board of Directors in May 2000.<sup>56</sup> The MIAR is a practical guide formulated for members of the National Association of Realtors that sets forth disclosure requirements for a licensed brokerage firm or licensee conducting various forms of online advertising.<sup>57</sup>

Disclosure requirements under the MIAR are divided between rules governing the actions of licensed firms and rules governing the actions of licensees.<sup>58</sup>

The rule further delineates between the marketing of real estate as opposed to the marketing of brokerage services.<sup>59</sup> If real estate is being advertised for sale or lease, the MIAR requires that all disclosure information be included on the same Web page in which the advertisement or marketing appears. On the other hand, the MIAR requires that disclosure information for the advertising of brokerage services be available only on the home page of the firm's Web site or via a clearly identified hyperlink.<sup>60</sup>

The real estate listing rules suggested in the MIAR are similar to the ARELLO Guidelines. Licensed entities are obligated to periodically review their listed properties on the Internet and update any information concerning the real property listed to assure that it is current and not misleading. This review, it is suggested, should be conducted monthly, and listing information should state the date it was last revised.<sup>61</sup> Licensed entities may display and distribute information concerning properties listed by other licensed entities only if given proper authorization. The authorization can be express or incorporated in a cooperative service agreement. The displayed information should not be altered or changed in any way without the written permission of the listing broker.<sup>62</sup>

In the case of directed Internet communications, such as email, electronic discussion groups, and bulletin board entries, for advertising and marketing purposes, licensed entities must disclose all of their identifying information, either on the first page or last page of their communication to the consumer.<sup>63</sup> Such information includes the firm or licensee's name, the city and state in which the firm or licensee's office is located and the regulatory jurisdictions in which the license of the brokerage or broker/salesperson is held.<sup>64</sup>

### Conclusion

Given the complexity of the interplay between potentially applicable federal regulations and individual state statutes and regulatory schemes, it is clear that there is no single standard that encapsulates compliance with the advertising of real estate related products and services on the Internet. Unfortunately, a decentralized system, shaped by interests at the national, state, and local level, governs the real estate and mortgage lending industry, both online and off-line. Full compliance, therefore, requires a careful analysis of the particular factual circumstances, starting at the federal level of regulation, and then by processing each separate state's local laws and policies to ensure that the Internet advertisement will not result in unanticipated liabilities. Although a full discussion of all of the possible combinations and types of potentially applicable laws and regulations is beyond the scope of this article, it is important for any advertiser contemplating marketing on the Internet to consult with outside counsel in order to keep abreast of the expanding regulatory requirements in this emerging field of regulation.

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<sup>1</sup> Jupiter Research: Online Advertising Through 2006—Prioritizing Opportunities in a Slow Market, Volume 3/August 8, 2001.

<sup>2</sup> *Id.*

<sup>3</sup> Jonathan Bick, Online Deals; How the Internet is Changing the Land Transfer Business, *NYLJ*, April 14, 1999.

<sup>4</sup> 15 U.S.C.A. Sec. 45(a)(1).

<sup>5</sup> 15 U.S.C.A. Sec. 57a.

<sup>6</sup> U.S.C.A. Sec. 53(b).

<sup>7</sup> U.S.C.A. Sec. 45(m).

<sup>8</sup> 15 U.S.C.A. Sec. 54.

<sup>9</sup> 15 U.S.C.A. Sec. 57b (b).

<sup>10</sup> See 15 U.S.C.A. Sec. 45(a)(1).

<sup>11</sup> FTC Working Paper Dot Com Disclosures, May 3, 2000.

<sup>12</sup> *Id.*

<sup>13</sup> See FTC Policy Statement on Deception, sent to Chairman of Senate Commerce, Science and Transportation Committee and House Energy and Commerce Committee, reprinted in 45 *Antitrust & Trade Reg. Rep. (BNA)* No. 1137, at 689 (Oct. 14, 1983).

<sup>14</sup> In the Matter of Computrade LLC (FTC File Nos. 002 3085, 2000).

<sup>15</sup> See FTC Policy Statement on Unfairness, sent to Chairman of Senate Commerce, Science and Transportation Committee (December 17, 1980).

<sup>16</sup> See 15 U.S.C.A. Sec. 45(n).

<sup>17</sup> *Id.*

<sup>18</sup> In re Griffin Systems, 117 FTC 515 (1994).

<sup>19</sup> *Id.*

<sup>20</sup> FTC Policy Statement on Advertising Substantiation, appended to Thompson Medical Co., 104 F.T.C. 648, 839 (1984), *aff'd*, 791 F.2d 189 (D.C. Cir. 1986), cert denied, 479 U.S. 1086 (1987).

<sup>21</sup> See In the Matter of Honeywell, Inc. (FTC Docket No. C-3823, 1998). An advertiser must possess at least the level of substantiation expressly or impliedly claimed in the ad.

<sup>22</sup> FTC Working Paper Dot Com Disclosures, May 3, 2000.

<sup>23</sup> See FTC Policy Statement on Deception, sent to Chairman of Senate Commerce, Science and Transportation Committee and House Energy and Commerce Committee, reprinted in 45 *Antitrust & Trade Reg. Rep. (BNA)* No. 1137, at 689 (Oct. 14, 1983).

<sup>24</sup> In the Matter of Netpliance, Inc. (FTC File No. 002-3238, 2001).

<sup>25</sup> Jonathan Bick, Online Deals; How the Internet is Changing the Land Transfer Business, *NYLJ*, April 14, 1999.

<sup>26</sup> *Id.*

<sup>27</sup> FTC Working Paper Dot Com Disclosures, May 3, 2000.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

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<sup>31</sup> Id.  
<sup>32</sup> 15 U.S.C.A. 1601, et. seq.  
<sup>33</sup> 15 U.S.C.A. 1601 (a) & (b).  
<sup>34</sup> 12 C.F.R. §§ 226.1-226.32.  
<sup>35</sup> 12 C.F.R. § 226.1 (a) (2).  
<sup>36</sup> See 12 C.F.R. §§ 226.1-226.32.  
<sup>37</sup> 15 U.S.C. § 1607 (c).  
<sup>38</sup> FTC Docket No. C-3320 (December 31, 1990).  
<sup>39</sup> Pub. L. No. 93-637 § 206 (a) amending FTC Act § 18 [15 U.S.C. § 57a].  
<sup>40</sup> FTC Docket No. C-3371 (February 26, 1992).  
<sup>41</sup> See 24. C.F.R. Part 180.  
<sup>42</sup> F.H.A. § 804 (c).  
<sup>43</sup> See 12 C.F.R. Part 202; Reg. B § 202.2 (m).  
<sup>44</sup> Texas Real Estate Commission Rules (2001) § 535.154.  
<sup>45</sup> See TEX. CIV. STATE ANN. ART. 6573a (Vernon 1998); TREC Press Release Sept. 22, 1999.  
<sup>46</sup> 46 CAL. BUS. & PROF. CODE § 10249 (a) (January 1, 2002).  
<sup>47</sup> Id.  
<sup>48</sup> ARELLO Best Practices Internet Guidelines § Term Definitions.

<sup>49</sup> Id.  
<sup>50</sup> Id.  
<sup>51</sup> ARELLO Best Practices Internet Guidelines § 3 (A).  
<sup>52</sup> ARELLO Best Practices Internet Guidelines § 2 (A).  
<sup>53</sup> ARELLO Best Practices Internet Guidelines § 4 (A).  
<sup>54</sup> See <http://www.dos.state.ny.us/lcns/arello.html>.  
<sup>55</sup> See <http://www.state.sd.us/dcr/realestate/Real-hom.htm>; <http://www.reca.ab.ca/Intern.htm>.  
<sup>56</sup> See National Association of Realtors Model Internet Advertising Rule §§ 1-6 available at <http://www.realtor.org/rodesign.nsf/pages/legalctr?OpenDocument>.  
<sup>57</sup> Id.  
<sup>58</sup> Id.  
<sup>59</sup> Id.  
<sup>60</sup> National Association of Realtors Model Internet Advertising Rule §§ 1-4.  
<sup>61</sup> National Association of Realtors Model Internet Advertising Rule § 7.  
<sup>62</sup> National Association of Realtors Model Internet Advertising Rule § 8.  
<sup>63</sup> National Association of Realtors Model Internet Advertising Rule §§ 5-6.  
<sup>64</sup> Id.

