

Compliance Issues in

BY CARL G. PRY

Compliance issues in advertising are some of the more difficult to manage; not so much because the requirements themselves are complex, but because they are spread out among so many different laws and regulations. Keeping track of which rules to follow in different types of ads can be daunting. This article explains the requirements for various forms of advertising, focusing chiefly on deposit and lending products.

What Is an Advertisement?

There is no single definition of an advertisement. Regulations DD (Truth in Savings) and Z (Truth in Lending) both define an advertisement as a commercial message appearing in any medium that promotes a bank product. Obviously the idea is to foster interest so that consumers open up new accounts and loans. Look at the material you're providing to customers and prospects—is the goal of the piece to entice someone to open up a new account or loan? If so, it's an advertisement; this is a good rule of thumb to follow for all the advertising rules. Note also that, under recent Reg. DD amendments, the definition of an ad also includes overdraft promotions directed to existing accountholders.

The rules apply to a marketing message placed on documentation delivered to a current customer, such as a periodic statement. Such a message will be considered an ad if its purpose is to promote an additional deposit account or loan.

If the message is promotional in nature, the rules apply regardless of the medium in which it appears.

Those printed in the newspaper or broadcast on the radio clearly qualify, but messages that play on a telephone response machine while a caller is on hold or messages placed on parking lot signs are also ads. It does matter, however, since in some cases the rules differ depending on the type of media the ad appears in. If the bank does not have editorial control over the content presented, the rules do not apply. CD, credit card, and mortgage rate comparisons printed by many Sunday newspapers are therefore not advertisements, because banks have no control over how the information is presented.

In recent years there has been much attention given to ads on Internet Web sites. The most important point to remember here is that from a regulatory perspective, Web-based ads are treated the same as those in other written media. The Internet is not a "broadcast" medium, even though the information travels over telephone and data lines. Because a con-

A person wearing a dark pinstriped suit jacket is shown from the back. Their right hand is placed on their lower back. The background is a light yellow color with a decorative border at the top and bottom consisting of a thin black line and a wider yellow band with a green and white striped pattern.

ADVERTISING

If the message is promotional in nature, the rules apply regardless of the medium in which it appears.

sumer could easily print a Web page, these ads must be treated as though they were printed in a newspaper.

Advertisements Cannot Be Unfair or Deceptive: Section 5 of the FTC Act

One of the most critical standards in advertising comes from Section 5 of the Federal Trade Commission Act—the Unfair or Deceptive Acts or Practices (UDAP) standards. Section 5(a) of the FTC Act prohibits “unfair or deceptive acts or practices in or affecting commerce,”¹ and this standard applies to any person or entity doing business, not just banks.

While the FTC has no direct enforcement authority over banks, the regulatory agencies have authority (by way of the Federal Deposit Insurance Act) to enforce these rules when they find conduct in violation, including how banks advertise their products and services. Many states also have their own versions of the FTC Act; these are sometimes referred to as “mini-FTC Acts,” as their requirements typically mirror federal law.

The UDAP standards are broad; they cover *any* unfair or deceptive practice in business. As such, there are no advertising-specific definitions or standards in the act. But over time the FTC and courts have developed interpretations of what constitutes an unfair or deceptive act. There are standards that exist for what is “unfair” or “deceptive.” An advertisement does not have to be both unfair *and* deceptive to violate the rule—the standards are judged independently. An advertisement can be found to be unfair *or* deceptive and be in violation. Traditionally the standard for deception was cited more frequently, but that seems to be changing; more practices are being judged as unfair, so it’s important to understand both.

What Makes an Advertisement Unfair?

There are three factors that make an ad unfair under the FTC Act²: (1) it causes or is likely to cause substantial injury (2) that cannot be reasonably avoided and (3) the injury is not outweighed by any benefits. Let’s look at each of these in turn:

1. The ad causes or is likely to cause substantial injury. The term “substantial injury” usually means monetary harm or loss. But “substantial” doesn’t mean each individual consumer must lose a great deal of money. If a large number of people are caused a small amount of harm, a substantial injury may be found. The injury could also be deemed substantial if it merely raises a risk of harm to consumers.

2. The injury cannot reasonably be avoided. The injury is unavoidable when a practice (wording in an ad, for instance) interferes with a consumer’s ability to make an informed decision. The consumer’s actual decision will not be judged; the standard is whether the material’s content interfered with a rational and reasonable decision-making process.

This is typically seen when important information is missing from an ad. If restrictions are omitted (a minimum deposit must be maintained to receive the stated APY, for in-



stance), a consumer cannot make a rational decision regarding the product because all relevant facts are not available.

3. The injury is not outweighed by any benefits. The net impact of the advertisement is to harm the consumer. An example of a benefit could be that products and services are made more widely available, but overcoming harm is a difficult burden to hurdle. In most cases any perceived benefit to consumers will not counterbalance the harm caused. A particular benefit of a product or service may be emphasized (such as “no annual fee”), but the reality is that other fees and charges may more than offset the “benefit” of no annual fee. The result is that the “benefit” is negated and the net effect is to harm the consumer.

Public Policy Considerations

Public policy includes laws, regulations, and judicial decisions. These are used as factors to determine whether an ad is unfair. If the ad violates other provisions regulating advertising, such as Regulation DD (Truth in Savings) or Regulation Z (Truth in Lending), it is then much easier to determine the ad’s overall impact to be unfair. This is not the sole determining factor, however. The fact that an ad

violates other laws or regulations will not always result in a finding of unfairness; conversely, an ad may still be unfair even though it contains no violations of other rules.

The themes of UDAP are found in various laws and regulations applicable in advertising compliance. Reg. Z, which regulates consumer loan ads, requires that only “actually available terms” be offered in ads, continuing that “only those terms that actually are or will be arranged or offered by the creditor”³ be stated in an ad. Reg. DD, which governs consumer deposit accounts, prohibits “misleading or inaccurate advertisements,” further stating that an ad “shall not misrepresent a depository institution’s contract.”⁴

The Equal Credit Opportunity Act (ECOA) and Regulation B prohibit discrimination in any aspect of a lending transaction on a prohibited basis, including advertising. The Fair Housing Act similarly prohibits discrimination in residential real estate transactions on a prohibited basis. If an advertisement unfairly targets or has a disparate impact on members of a protected class, it may also violate the FTC Act as well. But again, these provisions are independent—an ad could violate ECOA or FHA without being unfair under the UDAP standards, or vice versa.

What Makes an Advertisement Deceptive?

The FTC has delineated three factors to consider whether a practice (including advertising) is deceptive⁵: (1) the representation, omission, or practice misleads or is likely to mislead; (2) a “reasonable” consumer would be misled; and (3) the representation, omission, or practice is material.

1. The ad misleads or is likely to mislead. Similar to the standard for unfairness, an advertisement can mislead by what is stated in the ad as well as by what is not stated. Whether or not an ad is deceptive is viewed in the context of the entirety of the ad, not just by examining individual statements. Offering pricing or fee structures that aren’t truly available or omitting critical qualification standards are examples of misleading practices. Limited-time promotions can also mislead if the temporary nature of the offer is not disclosed. Even if all relevant information is included and all wording is accurate, the layout or structure of the message may be misleading if attention is deliberately directed away from important information. Ask yourself if the true message comes through when examining an ad, or if clarification or redesign is needed.

Bait-and-switch tactics are another example of a misleading practice. Advertising the existence of a particular product or service when in reality the version provided to the consumer is vastly different is a form of misleading advertising, because the customer ultimately will be worse off than what he or she expected when responding to the ad.

2. A “reasonable” consumer would be misled. This standard is based on the target audience of the message and considers how a member of that group would likely respond. The group’s “net impression” is viewed in this context, as inter-

The rules apply to a marketing message placed on documentation delivered to a current customer, such as a periodic statement. Such a message will be considered an ad if its purpose is to promote an additional deposit account or loan.

pretation may differ depending on the sophistication of the target audience. If a product is marketed specifically to elderly or financially inexperienced consumers, for example, the potential to mislead is far greater than if targeted to a general audience. Again, this may create a potential fair lending issue under ECOA or FHA if the target audience is a protected class. Make sure to understand the target audience for any promotional campaign and make sure wording and appearance present a fair and accurate picture of what is offered.

Misleading statements cannot be “cured” by qualifying disclosures—in other words, fine print at the bottom of an ad cannot explain away a misleading headline or text. A “reasonable” consumer may only glance at a headline and nothing more. Headlining a rate as “fixed” when in reality it may change for any number of reasons may be misleading, even if the conditions are listed in the fine-print disclosures. Changes that increase a product or service’s cost are inherently suspect.

The standard here is the likelihood of deception. If an ad is structured in a way that the reader’s attention is directed toward misleading statements or claims and away from qualifying disclosure language, the likelihood of deception greatly increases. If a reasonable consumer would read only the headline and would be unlikely to notice fine-print qualifiers, the ad may be deceptive. This may also occur in oral advertising (such as radio ads) when important restrictions or qualifications are disclosed only in “quick-talk” at the end. A reasonable consumer may not hear or fully understand them, creating a potential problem.

3. The representation, omission, or practice is material. A practice is material if it is likely to affect a choice: Would the consumer be more likely to take action based on the ad’s overall impact? Information regarding cost or restrictions is

almost always considered material, so if specific claims are made in an ad, they will be material. If those claims are inaccurate or misleading, the ad as a whole may be deceptive. The same applies to omissions: If information necessary to make a rational decision regarding a product or service is not included in the ad, the omission will be material.

**Deposit Advertising:
Deposit Insurance—Symbol and Statement**

FDIC regulations mandate that the “official advertising statement” be used in “all advertisements” by insured banks.⁶ The official advertising statement is “Member of the Federal Deposit Insurance Corporation,” but variations of the verbiage are permitted; the most common is simply “Member FDIC.”⁷ In place of the wording of the official statement, the ad could include a reproduction of the “symbol,” which is the FDIC logo normally posted at each station in the bank where insured deposits are accepted.

As any compliance professional knows, virtually all rules have exceptions, and there are instances where the official statement is not required. The most common are advertisements of loan products, securities, and trust services (products to which FDIC insurance does not apply), and radio and television ads that do not exceed 30 seconds in length. Listings in directories and on normal bank supplies (stationery, pens, etc.) are also not required to have the statement. The theme of the rule is that the official statement is required in any promotion of an insured product, wherever practical. The statement may be included at the bank’s discretion in any ad covered by the exceptions (such as loan ads); however, it must not be included in any promotion of a nondeposit investment product.

The logo or statement must be visible and legible where it is required. This should not be a problem in normal print advertising, but on billboard advertising the statement must be legible to passing drivers. The FDIC also considers a bank’s home Web page to be “to some extent an advertisement”⁸ and the statement should appear there, as well. Other pages on a bank’s Web site are judged independently; each page should contain the statement if material on the page displays an advertising message that does not meet one of the exceptions.

Nondeposit Investment Products

While ads promoting traditional deposit products (such as checking, savings, and money market accounts) must contain the “Member FDIC” verbiage, nondeposit investment products such as mutual funds, annuities, stocks, bonds, and insurance products must not. The regulators have mandated separate disclosures⁹ for such advertisements in order to inform the potential customer of the risk characteristics of such products, which are as follows:

- The product is not insured by the FDIC.
- The product is not a deposit or other obligation of, or guaranteed by, the bank.
- The product is subject to investment risks, including

possible loss of the principal amount invested.

As with the FDIC official statement, a shorthand version of these disclosures may be used. This “logo disclosure” is as follows:



The information is often presented in two or three boxes; either presentation is acceptable. The point is that the reader must not be confused into thinking that noninsured products are in fact FDIC-insured. An advertisement that describes both insured and noninsured products must carefully segregate the material with appropriate disclosures. Boxes, lines, or other graphics that clearly delineate which products are insured and which are not could be utilized.

If a third-party company sells the nondeposit investment products in the bank’s ad, the third party must be clearly identified so the reader is not given the mistaken impression that the products are being sold by the bank.

**Consumer Deposit Advertising:
Truth in Savings/Regulation DD**

Reg. DD covers only deposit accounts offered for a consumer purpose; it doesn’t cover commercial accounts. Therefore, these rules govern only consumer deposit account advertising. As mentioned above, Reg. DD incorporates the UDAP standard: the ad must not contain anything misleading or that misrepresents the deposit contract. A recent change to Reg. DD brings communications regarding existing accounts under the definition of an “advertisement”¹⁰ for the purpose of communications regarding overdraft protection programs, discussed below.

Reg. DD contains rules that govern what can and cannot be said in an ad. The first is the simplest: Do not use the word “profit” to represent interest paid on an account. The second is a little more complex: Do not refer to an account as “free,” “no cost,” or “fees waived” if a maintenance or activity fee could be imposed. Examples of maintenance or activity fees are minimum balance fees, per-transaction fees, or monthly service fees. Check printing fees, balance inquiry fees, stop payment fees, returned check charges, and account dormancy fees are not maintenance or activity fees, so those types of charges may be assessed against an account advertised as free.

There are variations on this theme, though. An account may be advertised as free for a limited time (assuming of course that this is the case) as long as the time period is stated. Even though an account may not be free, an account service may be advertised as free—e.g., “free ATM transactions.” Finally, conditionally free accounts may

be promoted as long as the condition is not related to the account. So an account may be free to customers 60 years of age or older, but those under 60 will be charged a maintenance fee, as a customer's age is not related to the account itself. (By the way, there are no age limitations on the deposit side as there are on the lending side—the only age-related benefit that can be granted in connection with a lending product is for persons 62 or older.)

Advertising Rates of Return

Whenever a deposit account ad promotes a rate of interest, it must be advertised as “annual percentage yield,” or APY. The words “annual percentage yield” must be spelled out at least once in the ad, but there are no restrictions regarding where they are placed or how large the print must be, so it may be included in the fine print, for example. The abbreviation “APY” may then be used elsewhere when promoting the yield. The “interest rate” (using that term) may be advertised in conjunction with the APY (or the APY may be advertised alone), but the interest rate cannot appear without the corresponding APY. Further, the interest rate cannot be more conspicuous than the APY if both are stated in the ad.

When advertising tiered-rate or stepped-rate accounts, the temptation is to disclose only the tier or account level with the highest APY. However, Reg. DD requires the APYs of all tiers to be disclosed in such an ad, along with the minimum balances for each applicable tier (close to and with equal prominence to the applicable APY), or the time periods that each yield is in effect for a stepped-rate account. When advertising an APY, it must be disclosed to two decimal places—“3.95% APY,” for example. Though there is a built-in $\frac{1}{20}$ of 1 percent tolerance (.05 percent) in Reg. DD, this is not a license to overdisclose the APY by the tolerance amount (3.95 cannot be advertised as 4.00, for example).

Advertising a Bonus

A “bonus” for Reg. DD purposes is “a premium, gift, award, or other consideration worth more than \$10”¹¹ offered as an incentive for opening, maintaining, or increasing an account balance. Items with a *de minimis* value of \$10 or less are not bonuses and the advertising rules stated here don't apply. A bonus is a nonbank product (such as a hat or T-shirt); the waiver of a bank fee, for instance, is not a bonus. In addition, discount coupons are not bonuses.

Generally speaking, when a bonus is mentioned in an ad, the annual percentage yield of the account must also be stated, along with other considerations.

What Must Appear in the Ad?

The required disclosures that must appear in an ad depend upon the media in which it appears. The Federal Reserve, when writing Regulation DD, understood that certain advertisements (like short radio or TV spots) have limited time or space, so they lessened the requirements for those types of ads.

Broadcast media includes television or radio spots,

“outdoor media” such as outdoor signs and billboards, and messages on telephone response machines. The annual percentage yield is a “trigger” for additional disclosure, meaning if the rate is disclosed numerically, more information is required. Statements such as “premium rates available” don't require additional disclosure because the numerical APY cannot be determined. If an annual percentage yield is mentioned in a broadcast media ad, the following must also be disclosed (See figure 1.).

Since time and space limitations are typically not an issue when preparing print advertising, the rules require more disclosure. **Written media** ads include those printed in the newspaper or in a brochure, but also include those presented on the bank's Web site. Remember, treat Internet-based advertising the same as you would any other written media. If an annual percentage yield is mentioned in a written ad, the following must also be disclosed in addition to the requirements for broadcast media ads (See figure 2.).

figure 1

Requirements for Broadcast Media Deposit Advertisements if an Annual Percentage Yield Is Stated:

- the **minimum balance required** to obtain the stated annual percentage yield (if there is no minimum required, that fact need not be stated)
- if the account is a time deposit such as a CD, the **term** of the account
- if a **bonus** is offered in connection with the promotion, any **time requirement** and/or **minimum balance** required to obtain the bonus

figure 2

Requirements for Written Media Deposit Advertisements if an Annual Percentage Yield Is Stated:

- the three disclosures stated above for broadcast media advertisements, as applicable
- if the APY is variable, a **statement that the rate may change** after the account is opened
- the **period of time** the APY is available or a statement that the APY is current as of a **specific date**
- the **minimum deposit required to open** the account, if it is greater than a minimum to obtain the stated APY
- a statement that **fees could reduce the earnings** on the account if a maintenance or activity fee could be imposed
- if the account is a time deposit, a statement that **penalties will or may be imposed for early withdrawal**
- if a **bonus** is offered, the **minimum balance required to open the account**, if it is greater than that necessary to receive the bonus
- **when the bonus will be provided**

HUD used to mandate that the logo be a certain size depending upon the size of the overall ad. This is no longer the case, and the standard now is simply that the logo be discernible to the reader.

An **indoor sign** is one located inside the premises of the bank to be seen by people inside the building. Examples would include rate boards, banners, and computer screen messages posted inside a branch building. It does not matter if the message can be seen from outside the building. A sign on the outside of the bank building or atop the parking lot marquee is not an indoor sign.

The rules for indoor signs are the most relaxed, because bank personnel are readily available to provide additional information to customers. If the sign lists a rate of return, like any other ad it must list the APY. In this case, either the abbreviation or “annual percentage yield” may be used—the full spelling is not required. But again, the “interest rate” may also be stated, using that term and no other. When the APY is listed, a statement that the consumer should contact an employee for further information regarding applicable fees and terms is also required.

Advertising Overdraft Protection Programs

The Fed included new requirements for advertising overdraft protection programs covered under recent amendments to Reg. DD. A covered advertisement of an overdraft program could appear in a newspaper, brochure, e-mail message, Internet page, ATM screen, or telephone solicitation, but also a disclosure of available balance amount that includes the overdraft limit (such as on periodic statement). This last example illustrates the important modification to

the rules. The definition of “advertisement” was expanded to cover certain statements made to existing checking account customers regarding overdraft programs.

Communications on ATM receipts, in outdoor media, or on a required disclosure are not covered. Further, the rule for indoor signs is similar to other deposit ads: The sign should state that fees may apply and the consumer should contact an employee for more information. Banks must be careful to consider any language promoting such programs, either in campaigns to attract new customers and accounts or to their existing checking account customers.

Do's and Don'ts

The Fed introduced standards for what must and must not appear in advertising promoting an overdraft protection (See figure 3.).

Only the fees disclosure is required for advertisements on ATM screens or by telephone response machine. The Fed also listed statements to avoid in such advertising, as they would be considered misleading or inaccurate (See figure 4.).

Advertising Loans: Fair Lending Considerations

A bank must be fair in its lending advertising—that’s an easy statement to make. But how can a bank be sure its advertising is truly fair and does not discriminate against

figure 3

Required Disclosures for Reg. DD-Covered Advertisements of Payments of Overdrafts

- **fees** for payment of overdrafts
- the **category** of transactions for which an overdraft fee could be imposed: check, ATM transaction, debit card, etc.
- the **time period** by which an overdraft must be repaid
- any **circumstances** under which an overdraft would not be paid, for example: “Whether your overdrafts will be paid is discretionary and we reserve the right not to pay. For example, we typically do not pay overdrafts if your account is not in good standing, you are not making regular deposits, or you have too many overdrafts.”¹²

figure 4

Misleading or Inaccurate Statements when Advertising Overdraft Protection Programs

- representing the overdraft service as a line of credit (unless it is truly a line of credit covered by Reg. Z)
- representing that all overdrafts will be paid (with or without a specified dollar limit) when retaining discretion not to do so
- representing that a negative balance may be maintained when in fact the consumer is required to bring the balance current
- describing the service as protection against bouncing checks when in fact the account can be overdrawn by additional means
- advertising a service for which there is a cost in an ad for a free account, unless the ad clearly indicates the cost for the service

any member of a protected class under either Regulation B (ECOA) or the FHA? Fair lending concepts apply to all types of lending, consumer or commercial; therefore the rules cover all types of lending advertising. The most important principle is to view advertising campaigns as a whole, rather than looking at each ad independently.

Consider whether the entirety of the bank's advertising is equally appealing to everyone and does not exclude a particular group. This means understanding your target demographic and making sure your campaigns reach that audience. This applies not only to the appearance and wording of the ads themselves, but the media in which they're presented. Proper attention should be devoted not only to making certain to picture a diverse array of people in ads, but also to understanding how people receive messages, and then tailoring campaigns in a fair and equitable manner and placing them in media designed to reach that audience.

The Fair Housing Act and the Equal Housing Lender Logo

The various federal regulators have differing standards regarding the requirement to display the fair housing logo, a small house with an "=" inside. The OCC's requirements are vague in this area, and the OTS makes no clear mention of requirements in oral advertisements. In short, no matter the regulator, the best practice is to include the logo and slogan in all written advertising having to do with a "dwelling" and include the phrase "equal housing lender" in all dwelling-related oral advertising. Also make sure that the logo appears on each Web page that contains a dwelling-related promotion.

A "dwelling" under the FHA is broadly defined to include any building (including a mobile home) occupied or intended as a residence by one or more persons. Any advertisement for a residential or construction loan is clearly covered, as would be a commercial loan to construct an apartment complex.

HUD used to mandate that the logo be a certain size depending upon the size of the overall ad. This is no longer the case, and the standard now is simply that the logo be discernible to the reader.

Consumer Loan Advertising: Truth in Lending/Regulation Z

Like Reg. DD on the deposit side, Reg. Z governs only consumer loans; the rules don't apply to commercial loans. And again like Reg. DD, Reg. Z contains a provision that essentially reflects the UDAP standard: The ad must contain only "actually available terms," meaning it may represent only "terms that actually are or will be arranged or offered by the creditor."¹³



Advertising Rates

Whenever a consumer loan ad promotes an interest rate, it must be expressed as an APR. Unlike Reg. DD, the words "annual percentage rate" are not required; the abbreviation "APR" throughout is sufficient. The interest rate may also be disclosed, but it cannot be more prominent than the APR (the interest rate cannot be disclosed alone). If the rate could increase after the loan is consummated, the ad must contain a simple statement of that fact, such as "variable rate" or "rate may increase," or other words to that effect. The possibility of a rate increasing because of some sort of delinquency or other default by the borrower does not qualify and thus needs no such statement.

What Has To Be Said Depends on What Is Already Said

Reg. Z's system of advertising disclosure depends on what are called "triggering" and "triggered" terms. That is, stating certain information requires inclusion of additional terms. Conversely, if no "triggering" terms are stated, nothing additional need be included.

Under Reg. Z, unlike Reg. DD, the rules are identical regardless of the medium in which the ad is presented. This means there are no provisions for reduced disclosure for rate boards or other indoor signs, or for short radio or TV ads. If disclosures are triggered, they must appear.

There are separate sets of triggering and triggered terms

figure 5

Triggering Terms in Closed-End Credit

- **The number of payments or the repayment period:** This is the most commonly stated triggering term in closed-end advertising. The numerical repayment period must be able to be determined in the ad to require additional disclosure. In other words, "30-year mortgage loans" and "60 low monthly payments" trigger additional disclosure, while "various terms available" or "biweekly payment stream" would not because the exact period cannot be determined. If the number could be deduced by other information in the ad, additional disclosures would be triggered.
- **The amount of any payment:** Again, numerical disclosure of the payment amount, or sufficient information that the amount can be deduced, trigger.
- **The amount of any finance charge:** This also includes numerical disclosure of any portion of a finance charge, such as a particular fee.
- **The amount or percentage of any down payment:** This is a triggering term only in what is called a "credit sale" transaction, where the creditor (the bank) is also the seller of the item. This may occur when advertising a foreclosed property, for instance. Down payment is not a triggering term in noncredit sale advertising.

figure 6

Triggered Language in Closed-End Credit

- **The terms of repayment:** This could be listed as the payment schedule or other representative example including the number, amount, and frequency of payments, such as “60 monthly payments of \$15.63 per \$1,000 borrowed.” Examples must be labeled as such.
- **The APR:** Same rules apply here as for other disclosures of APR—no need to spell out the term “annual percentage rate” and if the APR could increase after consummation, a statement of that fact is required.
- **The amount or percentage of any down payment:** Again, applicable only in a credit sale transaction.

figure 7

Triggering Terms in Open-End Credit

- **The APR or any other periodic rate.**
- **Any information regarding when a finance charge may be imposed or begins to accrue under the plan.** This includes any information on a grace period or balances to which the finance charge applies, including the methodology for its calculation.
- **Any charge or fee that may be imposed under the plan.** This means both finance charges and non-finance charge fees and includes any transaction or activity-type charge, minimum or fixed charge, and membership or participation fee that may be charged under the terms of the plan.

figure 8

Triggered Language in Open-End Credit

- **The APR or any other periodic rate.** Again, the interest rate may be stated along with the APR, and if the rate is variable, a statement of that fact must be included. If the plan contains an initially discounted or “teaser” APR, the ad must list the period that the teaser rate will be in effect along with the current fully indexed rate (and if that rate could vary, a statement to that fact, as well).
- **Any minimum, fixed, transaction, activity or similar charge or membership or participation fee** that could be imposed under the plan.

for closed-end credit and open-end credit. Statement of any of the following terms triggers additional disclosures in closed-end credit (See figure 5.).

Note that in closed-end credit, APR is not a triggering term. An ad could say “6% APR on mortgage loans” and not trigger any additional disclosure. On the other hand, “Great rates on a 15-year mortgage loan” would.

When *any* of the above is disclosed in an ad, *all* of the following additional information must be included (See figure 6.).

Any of the following terms trigger additional disclosure in open-end credit ads (See figure 7.).

When any of the above is disclosed in an ad, all the following additional information must be included (See figure 8.).

If the ad is for a home equity line of credit, make sure not to state or imply that a HELOC is “free money” or anything similar. If the ad makes mention of potential tax deductibility or benefits of the plan, a statement that the consumer should “consult a tax advisor regarding the deductibility of interest,” or similar verbiage, should be included. In addition, there are additional disclosure requirements for a HELOC ad (See figure 9.).

One other important difference between home equity lines of credit and other open-end credit lines is that a negative reference to a trigger term, meaning mention of the lack of that term, will nonetheless trigger additional disclosure. The mention of “no annual fees for HELOC plans” would trigger the APR, variable rate disclosures, and any other fees in the ad, for example.

For both closed and open-end credit, if the ad appears on the bank’s Web site, the triggered language may appear on a separate page that is linked to the ad. The link must “clearly direct the consumer to the location”¹⁴ of the linked disclosures, and the link must take the consumer directly to that page. This means that the consumer should not have to click through several pages to get to the triggered disclosures; it should be one click away.

Conclusion

All advertisements should have a compliance review before they’re put into the market, but this does not have to be a painful process. The best course of action any bank could take regarding all these requirements is to ensure that compliance is deeply involved in the advertising process. It is always harder to make changes after final copy is ready than to be an active participant in the development of the campaign. Training is important, as well, so that marketing personnel understand what the requirements are and can handle many of the requirements before copy comes across a compliance reviewer’s desk. BC

ABOUT THE AUTHOR

Carl Pry is a vice president and compliance manager in consumer risk management for KeyBank in Cleveland, Ohio. In this capacity he handles a variety of fair lending

figure 9

Additional Triggered Language in Home Equity Lines of Credit

- any loan fee listed as a percentage of the loan amount
- an estimate of any other fees required to establish the plan, stated as a dollar amount or a range
- if the APR is variable, a statement of the maximum APR that may be imposed
- if the ad contains a statement about any minimum payment, a statement that a balloon payment may result

issues such as HMDA analysis, marketing reviews, and risk assessment and analysis.

Pry brings more than 15 years of banking and finance experience through positions at Kirchman Regulatory Service in Orlando, Fla., as well as a manager in the Finance & Performance Management service line for the consulting firm Accenture in Chicago, Ill. He has written extensively regarding consumer and commercial

compliance, tax, audit, and financial institution legal issues. He has spoken at dozens of banking, compliance, and state bar associations, and has conducted training sessions for financial institutions across the country.

Pry earned his bachelor's degree at Bowling Green State University in Ohio, and earned his JD and MBA degrees at the University of Toledo. He resides with his family in Cleveland. Reach him by telephone at (216) 689-6169 or by e-mail at Carl_G_Pry@Keybank.com.

Endnotes

¹ 15 USC 45(a)(1).

² As recited in FDIC FIL-26-2004, "Unfair or Deceptive Act or Practices in State-Chartered Banks."

³ 12 CFR 226.16(a) and 226.24(a).

⁴ 12 CFR 230.8(a).

⁵ FTC Policy Statement on Deception, October 24, 1983.

⁶ 12 CFR 328.3(a).

⁷ 12 CFR 328.3(b).

⁸ FDIC: Ordering & Using FDIC Signs & Logos (www.fdic.gov/regulations/resources/signage/index.html).

⁹ Interagency Statement on Retail Sales of Nondeposit Investment Products, February 15, 1994.

¹⁰ 12 CFR 230.2(d); 70 FR 29582, May 24, 2005.

¹¹ 12 CFR 230.2(f).

¹² Comment 7 to 12 CFR 230.11(b).

¹³ 12 CFR 226.16(a) and 226.24(a).

¹⁴ Comment 4 to 12 CFR 226.24(d).

Half Page # 1