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Six Tips to Marketing Compliance

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The text is designed to address a variety of compliance issues. However, you will wish to consult with your compliance staff and/or attorney when you are not sure of an answer.

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CHAPTER 1
ADVERTISING BASICS & UDAAP OVERVIEW

SEMINAR OBJECTIVES AND SIX TIPS TO MARKETING COMPLIANCE

When it comes to advertising and marketing, banks have no shortage of rules and regulations governing what's permitted, what's "off the island" and some "gray" areas about what may be hiding behind the UDAAP curtain. Is there something "unfair, deceptive, or abusive" about the marketing of the product or the product features. The resulting interplay between marketing and compliance goals can become confusing and chaotic. Understanding the bigger picture and having a list of basic guidelines to follow can go a long way in avoiding this difficult paradox.
Join this session to learn **six key tips** to keep your bank's ads and marketing messages in compliance

1. Always strive to be clear, concise, and true
2. For deposit products, make sure to include all the required disclosures.
3. Loans require specific disclosure too—make sure to include all those necessary.
4. Be sure your advertising represents all types of customers – consider Fair Lending issues
5. Manage the compliant process – consider technology for marketing complaints.
6. More technology concerns & online banking issues. Don't forget about compliance when sending text messages.

All advertising is subject to a variety of deposit and lending regulation rules. That's the easy part. Regulators have also jumped on the "UDAAP" bandwagon to make sure that nothing in the advertising and marketing practices is "unfair, deceptive, or abusive. The CFPB has issued multi-million dollar enforcement actions for UDAAP violations, but even banks supervised by the OCC and FDIC must pay attention to the "new normal" of consumer protection. The FDIC added a new section to the Compliance Exam manual called "**Evaluating Consumer Harm**".

Regulator and examiner attention to a bank's advertising and marketing efforts is on overdrive. What can be said in advertisements? What do you have to say? Are there "triggering terms" that require additional information? Covered topics include:

- Understanding UDAAP "traps", what is likely to be considered deceptive, unfair, or abusive? How can you evaluate UDAAP advertising risks?
- Advertising rules under Reg. Z for mortgage loans and open-end plans from the Credit CARD Act; rules for consumer loan products in Regulation Z
- Consumer deposit products in Truth in Savings
- Fair lending concerns for marketing lending products
- "Equal Housing Lender" statement and the logo - when are they required?
- Soliciting via the phone and e-mail: the Telemarketing Sales Rule (TSR) from the FTC and Do Not Call Registry, and CAN-SPAM; rules for TCPA (Telephone Consumer Protection Act) to protect unwanted texts.
- Promotions - drawings, giveaways, bonus rules.
- Restrictions on advertising non-deposit investment sales
- Handling complaints about advertising and marketing

WHAT IS ADVERTISING?

A financial institution typically promotes deposit and loan products through various types of advertising. Here are some definitions and exemptions:

Reg DD defines "**Advertisemen**t" in Reg DD 1030.2 definitions section

(b) *Advertisement* means a commercial message, ***appearing in any medium***, that promotes directly or indirectly:

(1) The availability or terms of, or a deposit in, a new account; and

(2) For purposes of §§ 1030.8(a) and 1030.11 of this part, the terms of, or a deposit in, a new or existing account

Reg Z defines "**Advertisemen**t" in Reg Z, section § 1026.2 —

(2) *Advertisement* means a commercial message in any medium that promotes, directly or indirectly, a credit transaction.

The FDIC rules have this definition:
§ 328.3 Official advertising statement requirements.
(a) *Advertisement defined.* The term "advertisement," as used in this part, shall mean a commercial message, in any medium, that is designed to attract public attention or patronage to a product or business

QUESTION: What type of media is covered?

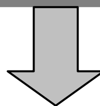
ANSWER: All media is covered by the broad advertising definition including:

- ✓ The Internet is considered a print medium under the FDIC rules
- ✓ Billboards and rate boards in branch lobbies are considered ads
- ✓ When the institution *controls* the content or PAYS for the publication, then these rules must be followed:
    - o Publications or rate sheets that are NOT controlled by the institution are not advertisements (for example rate sheets that a newspaper publishes in a weekly financial section update)
- ✓ UDAP/UDAAP – ***any communication with customers or applicants that gives information about services and products, in ANY form, is POTENTIALLY subject to examination and enforcement, INCLUDING communication from a THIRD PARTY!***

The new UDAAP standards will apply to the consumer products and services of institutions. The long standing UDAP provisions cover both consumer AND commercial activities. To understand these changes, it's helpful to look first at the basic definitions in UDAP and then some of the changes that have been created by Dodd-Frank and the CFPB.

UDAP	UDAAP
➢ **UNFAIR** ➢ **DECEPTIVE**	➢ **UNFAIR** ➢ **DECEPTIVE** ➢ **ABUSIVE**
➢ Applies to commercial and consumer transactions	➢ Applies to consumer transactions, products and services

UDAP -Unfair or Deceptive Acts or Practices
Codified in Section 5(a) of the FTC
Prohibits "unfair or deceptive acts or practices in or affecting commerce"
Applies to any person or entity doing business, not just financial institutions
FTC doesn't have direct enforcement, but the regulators have authority through the Federal Deposit Insurance Act
Many states have their own versions of the federal statute
UDAP standards are broad, but there are standards for what is "unfair" **or** "deceptive"



UDAAP- Unfair, Deceptive and ABUSIVE Acts or Practices
Is part of the Dodd-Frank Act, Title 10
Section 1031(a) says that the CFPB "may take any action authorized under subtitle E to *prevent a covered person or service provider from committing or engaging in an unfair, deceptive, or abusive act or practice under Federal law in connection with any **transaction** with a consumer for a **consumer** financial product or service, or the **offering** of a **consumer financial product or service***

The CFPB has rulemaking authority and the Bureau and bank regulators will enforce the rules
APPLIES TO CONSUMER ISSUES BUT INCLUDES THE "NEW" STANDARD OF ABUSIVE

UDAAP UNDER DODD-FRANK AND THE CFPB

The CFPB has outlined UDAAP exam procedures on their website; a link for this information is in the CFPB resources page in the Appendix of this manual. There are many possible concerns that financial institutions may have as a result of the CFPB and regulatory focus on UDAAP. The "old" standards of UDAP have been litigated in the court system and there is a certain amount of case law that can be reviewed to help determine the level of compliance risk involved in current or future products and services.

Based on some of the recent enforcement actions and the posture of the CFPB it seems likely that financial institutions will need to ask at least two basic questions about every aspect of their products and services to manage UDAAP risk.

KEY QUESTIONS FOR UDAAP COMPLIANCE	
QUESTION:	*POSSIBLE CONCERNS & SOLUTIONS*
1. Does the consumer have ALL the information they need to make an informed choice about a product or service?	➢ The "model" disclosures have been provided, but do they provide sufficient information? ➢ Consider adding a "fact sheet" or conversation logs and steering acknowledgement forms (careful with RESPA GFE's – they can't be modified)
2. Is the consumer in the "right" product or service?	➢ Is there a "better" product for the consumer? ➢ How do you document that the consumer made the "right" choice if a more expensive product or service is selected? Consider a suitability "profile" documentation process. Has the ability to repay been clearly proven? ➢ Look for the CFPB or your regulator to issue standards and guidance

What's "unfair"?

Refusing to release lien after consumer makes final payment on a mortgage. The FTC brought an enforcement action against a mortgage company based on allegations, described below, that repeatedly failed to release liens after consumers fully paid the amount due on their mortgages.

- *Substantial injury.* Consumer's sustained economic injury when the mortgage servicer did not release the liens on their properties after the consumers had repaid the total amount due on the mortgages.
- *Not outweighed by benefits.* Countervailing benefits to competition or consumers did not result from the servicer's alleged failure to appropriately service the mortgage loan and release the lien promptly.
- *Not reasonably avoidable.* Consumers had no way to know in advance of obtaining the loan that the mortgage servicer would not release the lien after full payment. Moreover, consumers generally cannot avoid the harm caused by an improper practice of a mortgage servicer because the servicer is chosen by the owner of the loan, not the borrower. Thus, consumers cannot choose their loan servicer and cannot change loan servicers when they are dissatisfied with the quality of the loan servicing.

Dishonoring credit card convenience checks without notice. The OTS and FDIC brought enforcement actions against a credit card issuer that sent convenience checks with stated credit limits and expiration dates to customers. For a significant percentage of consumers, the issuer reduced credit lines after the checks were presented, and then the issuer dishonored the consumers' checks.

- *Substantial injury.* Customers paid returned-check fees and may have experienced a negative impact on credit history.
- *Not outweighed by benefits.* The card issuer later reduced credit limits based on credit reviews. Based on the particular facts involved in the case, the harm to consumers from the dishonored convenience checks outweighed any benefit of using new credit reviews.
- *Not reasonably avoidable.* Consumers reasonably relied on their existing credit limits and expiration dates on the checks when deciding to use them for a payment. Consumers had received no notice that the checks they used were being dishonored until they learned from the payees. Thus, consumers could not reasonably have avoided the injury.

Processing payments for companies engaged in fraudulent activities. The OCC brought an enforcement action in a case involving a bank that maintained deposit account relations with telemarketers and payment processors, based on the following allegations. The telemarketers regularly deposited large numbers of remotely created checks drawn against consumers' accounts. A large percentage of the checks were not authorized by consumers. The bank failed to establish appropriate policies and procedures to prevent, detect, or remedy such activities.

- *Substantial injury.* Consumers lost money from fraudulent checks created remotely and drawn against their accounts.

- *Not outweighed by benefits.* The cost to the bank of establishing a minimum level of due diligence, monitoring, and response procedures sufficient to remedy the problem would have been far less than the amount of injury to consumers that resulted from the bank's avoiding those costs.
- *Not reasonably avoidable.* Consumers could not avoid the harm because the harm resulted principally from transactions to which the consumers had not consented.

<u>What's "deceptive"?</u>

Inadequate disclosure of material lease terms in television advertising. The FTC brought actions against vehicle leasing companies alleging that their television advertisements represented that consumers could lease vehicles for "$0 down" when advertising a monthly lease payment. However, the FTC alleged that the "blur" of "unreadable fine print" that flashed on the screen at the end of the advertisement disclosed costs of at least $1,000. The settlements prohibited the vehicle leasing companies from misrepresenting the amount consumers must pay when signing the lease.

In addition, the FTC required that if the companies make any representation about the amounts due at lease signing, or that there is "no down payment," the companies must make an equally prominent (readable and audible) disclosure of the total amount of all fees due when consumers sign the lease.

- *Representation or omission likely to mislead:* The television advertisements featured prominent statements of "no money down" or "$0 down" at lease signing. The advertisement also contained, at the bottom of the screen, a "blur" of small print in which disclosures of various costs required by Regulation M (the Consumer Leasing Act) were made. The FTC alleged that the disclosures were inadequate because they were not clear, prominent, or audible to consumers.
- *Reasonable consumer perspective.* A reasonable consumer would believe that he did not have to put any money down and that all he owed was the regular monthly payment.
- *Material representation.* The stated "no money down" or "$0 down" plus the low monthly lease payment were material representations to consumers. The fact that the additional, material costs were disclosed at signing of the lease did not cure the deceptive failure to disclose in the television advertising, the FTC claimed.

Misrepresentation about loan terms. In 2004, the FTC sued a mortgage broker advertising mortgage refinance loans at "3.5% fixed payment 30-year loan" or "3.5% fixed payment for 30 years," implying that the offer was for a 30-year loan with a 3.5% fixed interest rate. Instead, the FTC claimed that the broker offered adjustable rate mortgages (ARMs) with an option to pay various amounts, including a minimum monthly payment that represented only a portion of the required interest. As a result, unpaid interest was added to the principal of the loan, resulting in negative amortization.

- *Practice likely to mislead.* The FTC claimed that the advertisements were misleading because they compared payments on a mortgage that fully amortized to payments on a non-amortizing loan with payments that increased after the first year. In addition, the

FTC claimed that after application, the broker provided Truth in Lending Act (TILA) disclosures that misstated the annual percentage rate (APR) and that failed to state that the loan was a variable rate loan.
- *Reasonable consumer perspective.* It was reasonable for consumers to believe that they would obtain fixed-rate mortgages, based on the representations.
- *Material representation.* The representations were material because consumers relied on them when making the decision to refinance their fully amortizing 30-year fixed loans. As a result, the consumers ended up with adjustable rate mortgages that would negatively amortize if they made payments at the stated 3.5% payment rate.

What's "abusive"?

The Dodd-Frank Act makes it unlawful for any covered person or service provider to engage in an "abusive act or practice."[1] An abusive act or practice:

- Materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service or
- Takes unreasonable advantage of –
  - A lack of understanding on the part of the consumer of the material risks, costs, or conditions of the product or service;
  - The inability of the consumer to protect its interests in selecting or using a consumer financial product or service; or
  - The reasonable reliance by the consumer on a covered person to act in the interests of the consumer.

What are potential areas for Transaction Testing?

Through a high-level assessment of the entity's products, services, and customer base, identify areas for potential transaction testing. This process should determine whether:

- The entity does not underwrite a given credit product on the basis of **ability to repay**.
- A product's profitability depends significantly on **penalty fees** or "back-end" rather than upfront fees.
- A product has **high rates of re-pricing** or other **changes in terms**.
- A product combines features and terms in a manner that can **increase the difficulty of consumer understanding of the overall costs or risks** of the product and the potential harm.
- **Penalties** are imposed on a customer when he **terminates** his relationship with the entity.
- Fees or other costs are imposed on a consumer to **obtain information about their account**.
- A product is **targeted to particular populations**, *without appropriate tailoring* of marketing, disclosures, and other materials designed to ensure understanding by the consumers.

Analyzing Complaints

Analysis of consumer complaints may assist in the identification of potential unfair, deceptive, or abusive practices. Examiners should consider the context and reliability of complaints; every complaint does not indicate violation of law. When consumers repeatedly complain about an institution's product or service, however, examiners should flag the issue for possible further review. Moreover, even a single substantive complaint may raise serious concerns that would warrant further review. Complaints that allege, for example, misleading or false statements, or missing disclosure information, may indicate possible unfair, deceptive, or abusive acts or practices needing review.

Another area that could indicate potential unfair, deceptive, or abusive acts or practices is a high volume of charge-backs or refunds for a product or service. While this information is relevant to the consumer complaint analysis, it may not appear in the institution's complaint records

Another source of concern would be ANY complaint from a service or product offered by a THIRD PARTY that alleges:

1. Misrepresentation of any terms or costs
2. Enrolled without consent
3. Benefits were not received, did not justify the expense, were not fully explained, were difficult to obtain.

FDIC – DECEPTIVE PRACTICES SETTLEMENT

Source: https://www.fdic.gov/news/news/press/2015/pr15066.html

Press Release, August 12, 2015

FDIC Announces Settlement with Citizens Bank of Pennsylvania for Unfair and Deceptive Practices

The Federal Deposit Insurance Corporation (FDIC) announced a settlement with Citizens Bank of Pennsylvania, Philadelphia, Pennsylvania (CBPA), for unfair and deceptive practices in violation of Section 5 of the Federal Trade Commission Act. Under the settlement, CBPA agreed to an Order for Restitution and Order to Pay Civil Money Penalty (Order). The Order requires CBPA to pay a **civil money penalty of $3 million** and provide **restitution of approximately $5.8 million to consumers and businesses who held more than 475,000 accounts affected by the violations.**

The FDIC determined that CBPA engaged in unfair and deceptive practices related to the processes by which the bank reconciled deposit discrepancies, specifically the procedures for reconciling discrepancies between the amount of a deposit as stated on an account holder's deposit slip and the actual amount of the deposit. In some cases, CBPA's procedures resulted in consumers and businesses not receiving the full amount of their actual deposits. The Order requires CBPA to correct the violations of law, ensure future compliance with Section 5, and develop and implement a comprehensive restitution plan for all consumers and businesses adversely impacted by the violations. The Order requires CBPA to make restitution to affected consumers and businesses for deposit underpayments that occurred between January 2008 and November 2013. CBPA will provide restitution without requiring any action by those who were affected.

The FDIC is taking this action in coordination with separate actions by the Consumer Financial Protection Bureau (CFPB) and the Office of the Comptroller of the Currency (OCC). The CFPB's action is against Citizens Financial Group, Inc., Citizens Bank, N.A., and CBPA. The OCC's action is against Citizens Bank, N.A. Each action relates to similar unfair and deceptive practices.

The FDIC Order requires the Bank to take affirmative steps to correct the violations, and to ensure compliance in the future with all consumer protection laws, including the FTC Act.

CFPB FINES WELLS FARGO FOR OPENING UNAUTHORIZED ACCOUNTS

This is the link: www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-fines-wells-fargo-100-million-widespread-illegal-practice-secretly-opening-unauthorized-accounts

September 8, 2016
Today the Consumer Financial Protection Bureau (CFPB) fined Wells Fargo Bank, N.A. $100 million for the widespread illegal practice of secretly opening unauthorized deposit and credit card accounts. Spurred by sales targets and compensation incentives, employees boosted sales figures by covertly opening accounts and funding them by transferring funds from consumers' authorized accounts without their knowledge or consent, often racking up fees or other charges. According to the bank's own analysis, employees opened more than two million deposit and credit card accounts that may not have been authorized by consumers. Wells Fargo will pay full restitution to all victims and a $100 million fine to the CFPB's Civil Penalty Fund. The bank will also pay an additional $35 million penalty to the Office of the Comptroller of the Currency, and another $50 million to the City and County of Los Angeles.

- **Opening deposit accounts and transferring funds without authorization:** According to the bank's own analysis, employees opened roughly 1.5 million deposit accounts that may not have been authorized by consumers.
- **Applying for credit card accounts without authorization:** According to the bank's own analysis, Wells Fargo employees applied for roughly 565,000 credit card accounts that may not have been authorized by consumers.
- **Issuing and activating debit cards without authorization:** Wells Fargo employees requested and issued debit cards without consumers' knowledge or consent, going so far as to create PINs without telling consumers.
- **Creating phony email addresses to enroll consumers in online-banking services:** Wells Fargo employees created phony email addresses not belonging to consumers to enroll them in online-banking services without their knowledge or consent

NEWS COVERAGE:

- Wells Fargo has agreed to pay **$185 million** in penalties after 2 million unauthorized accounts were established in customers names by thousands of Wells Fargo employees trying to meet quotas for 'cross-selling.'
- So far, the firm has fired 5,300 employees involved in setting up the accounts. Carrie Tolsted, the executive in charge of the unit where the systematic fraud occurred, announced her retirement before the scandal became public.
- Tolsted will be leaving with not only nearly $125 million in stock options, but also is expected to receive her yearly bonus of $5.5 million in stock.
- Wells Fargo Chairman and CEO, John Strumpf "retires" on October 13m 2016 and is replaced by Tim Sloan.

CFPB ENFORCEMENT ACTIONS

These are recent **enforcement actions** from the CFPB and many of the focus on "THE DECEPTIVE PRACTICES" portion of the UDAAP definition and any sales and marketing practices that did the following:

- Engaged in "deceptive tactics to sell…products
- Consumers were "misled about benefits"
- Consumers were "deceived about the nature of the products" or
- Consumers were "misinformed about the costs of products"

- CFPB on July 1, 2015, CFPB took action against two credit card add-on product vendors – Affinion Group Holdings, Inc., Affinion's affiliated companies, and Intersections Inc. – for unfairly charging consumers for credit card add-on benefits they did not receive
- CFPB – August 12, 2015 - CFPB consent order requires the bank to provide approximately $11 million in refunds to consumers and pay a $7.5 million penalty for the violations.

CFPB SUMMARIES:
July 1, 2015. – Today the Consumer Financial Protection Bureau (CFPB) took action against two credit card add-on product vendors – Affinion Group Holdings, Inc., Affinion's affiliated companies, and Intersections Inc. – for unfairly charging consumers for credit card add-on benefits they did not receive. Under the proposed consent orders, Affinion would pay approximately **$6.8 million in monetary relief** for eligible consumers who have not yet received refunds and **$1.9 million in civil money penalties**, while Intersections would pay approximately $55,000 in monetary relief to eligible consumers who have not yet received refunds and $1.2 million in civil money penalties. The CFPB alleged that consumers were:

- ✓ **Billed for product benefits they did not receive**
- ✓ **Misled about product benefits and value to avoid cancellations**

August 12, 2015 – Today the Consumer Financial Protection Bureau (CFPB), the Federal Deposit Insurance Corporation (FDIC), and the Office of the Comptroller of the Currency (OCC) took action against Citizens Bank for failing to credit consumers the full amounts of their deposited funds. The bank kept money from deposit discrepancies when receipts did not match actual money transferred. Today's CFPB consent order requires the bank to provide approximately $11 million in refunds to consumers and pay a $7.5 million penalty for the violations. Specifically, Citizens Bank:

- ✓ **Failed to credit consumers the full amount of their deposits**
- ✓ **Falsely claimed that it would verify deposits:** Citizens Bank told consumers that deposits were subject to verification, implying that the bank would take steps to ensure consumers were credited with the correct deposit amount. But the bank's practice was not to verify and correct deposit inaccuracies unless they were above the $25 or $50 threshold. Although some consumers benefited by this policy, others lost money that rightfully belonged to them. The CFPB concluded that many of those consumers were harmed by this unfair and deceptive practice

TO DO:

- ✓ Read the enforcement actions; circulate them to management
- ✓ Are there any "red flags" that you learned from the actions that could be a problem at YOUR next exam?
- ✓ Have you implemented a process for ***monitoring complaints?***
- ✓ Is there a complete review of new products and services prior to implementation? This review is particularly critical for any third party services
- ✓ Are the board minutes documented to reflect that UDAP issues are being discussed?
- ✓ Are the board minutes documented to show that adequate due diligence is being conducting for third party relationships in the initial selection, for contract structure, and for contract renewal and ongoing due diligence regarding complaints and performance?

This is a link to the CFPB Bulletin 2012-06, published July 18, 2012 for supervisory expectations when a financial institution uses a vendor to sell products. It also reviews certain federal laws and compliance program expectations.

http://files.consumerfinance.gov/f/201207_cfpb_bulletin_marketing_of_credit_card_addon_products.pdf

See the expectations in the next section.

OTHER REGULATIONS AND "UNFAIR"

The concept of "unfairness" is already written into other rules, especially that relate to advertising.

SPECIFICS:

- ✓ Reg Z requires that a creditor only offers "actually available term; and that "only those terms that actually are or will be arranged or offered by the creditor" be stated in an advertisement
- ✓ Reg DD prohibits that advertising can be "misleading or inaccurate or misrepresent a depository institution's deposit contract"
- ✓ FAIR LENDING in Regulation B & Fair Housing Act holds that a practice can't unfairly target members of a protected class or have a "disparate impact" on members of a protected class. A disparate impact may also be considered "unfair" under UDAP or UDAAP.
- ✓ FTC (Federal Trade Commission) UDAP Mortgage rules bans deceptive mortgage ads including misrepresentation for all mortgages
- ✓ FTC UDAP rules allows the agency AND the states to seek civil penalties against those who violate the rules
- ✓ 16CFR 321 lists examples of misrepresentations of fees, costs, and other practices would be violations
- ✓ While this provision does not apply directly to banks, thrifts, federal credit unions and other entities outside the jurisdiction of the FTC it could be used by regulators as a basis for UDAP/UDAAP violations

NOTE: This **SECTION OF THE FDIC EXAM MANUAL for "Evaluating Consumer Harm Source: II-2.1-2.3 was UPDATED in November, 2015.**
This is the link, followed by some highlights:

https://www.fdic.gov/regulations/compliance/manual/

What is Consumer Harm?

What is Consumer Harm?

The FDIC's consumer compliance examination process is risk-focused based on the potential for consumer harm. "Consumer Harm" is an actual or potential injury or loss to a consumer, whether such injury or loss is economically quantifiable (e.g., overcharge) or non-quantifiable (e.g., discouragement). It may be caused by a financial institution's violation of a federal consumer protection law or regulation, a disregard for supervisory guidance, or a wrongful act by a financial institution or by a third party. Consumer Harm may occur in a variety of ways, including:

1. **Quantifiable harm** – Economic harm to a consumer where the injury or loss can be measured. For example, a consumer may suffer monetary harm as a result of deceptive marketing practices that entices a consumer to purchase a product without having accurate information regarding the benefits, costs, or terms of the product in violation of Section 5 of the Federal Trade Commission Act. Similarly, if a bank employs a pricing structure that allows significant discretion, without effective monitoring or controls, resulting in a protected class of borrowers being charged higher prices on average than similarly situated non-protected borrowers in violation of the Equal Credit Opportunity Act, then the higher prices paid by the protected class of borrowers over similarly situated non-protected borrowers is quantifiable consumer harm.

2. **Non-quantifiable harm –** Injury or loss to the consumer that cannot be measured, or is very difficult to measure, yet the consumer may suffer some form of economic or other harm. For example, a consumer could be injured economically when a financial institution unfairly denies the consumer credit or discourages an application on a prohibited basis in violation of the Equal Credit Opportunity Act, however calculating a monetary value for the injury may be challenging. Another example may be a bank that imposes additional, unlawful requirements on consumers before the bank is willing to consider the consumers' billing disputes or requirements that are not accurately divulged in the bank's error resolution disclosures. The practices could discourage a consumer from filing a dispute. Consumer harm exists, but may be difficult to identify and/or quantify.

3. ***Potential harm* –** Involves financial institution activities (or failure to take action) that create the possibility that a consumer may be harmed. An example of potential consumer harm is a violation of the regulations that implement the National Flood Insurance Act of 1968 where the financial institution failed to require flood insurance on a residence at loan closing. The consumer has not suffered actual loss but is exposed to potential economic loss should a flood occur.

AVOIDING UDAAP TRAPS AND BEST PRACTICES FOR COMPLIANCE

Unfair and deceptive acts and practices have been prohibited by the Federal Trade Commission Act for many years; however, financial institution violations of this law have been very rare.

Now, along comes Title X, Section 1031 of the Dodd-Frank Act, which specifically mandates the CFPB to prevent and punish unfair, deceptive, or abusive acts. In just the couple of years since Dodd-Frank became law, a significant number of financial institutions have faced or been threatened with enforcement actions and penalties for alleged unfair, deceptive, or abusive acts.

Unfair acts cause or are likely to cause substantial injury to customers, can be reasonably avoided, and are not outweighed by countervailing benefits. Deceptive acts are those that mislead or are likely to mislead from the consumer's perspective, and can be oral or written. Abusive acts materially interfere with a consumer's understanding of a financial product or service, and take unreasonable advantage of the consumer in selecting an appropriate financial product or service based on their individual interests.

While any consumer product or service that the financial institution provides can be criticized for possible UDAAP violations, the following are receiving the most attention:

- Overdraft programs
- Debit and credit card programs
- Loan payment collections and processing
- ATM fees
- Credit life and disability insurance sales
- Any other program that provides a source of significant non-interest income

Expect new examinations to focus on the following, with regard to the above: advertising and solicitations, disclosures, servicing and collections, managing and monitoring third-party vendors that are involved in product or service delivery to your customers, and customer complaints with regard to any of the above.

With regard to managing UDAAP risk, every financial institution should consider the following **BEST PRACTICES TO HELP AVOID UDAAP TRAPS**:

- The CFPB has already published a work program for targeted UDAAP regulatory examinations. Your compliance officer should use the work program to enhance the current compliance audit scope and plan, and gain an understanding of likely issues and review areas.

- **All advertising and marketing materials should be subject to a regular review schedule and updated to ensure they are complete and accurate and that they contain the critical information needed for the consumer to make an informed decision**.
- Changes in the terms or fees of services must be carefully planned and executed, giving the consumer a complete an accurate understanding of the change and adequate time to consider and ask questions about the change and to find alternatives or cancel the product or service at their option.
- Financial institutions should have a robust process for **due diligence and regular review of third-parties that are involved in products and service sales or delivery to your customers.** Remember that your responsibility for their activity is the same as if it is handled directly by you. Your financial institution will have direct accountability for their advertising, acts, and practices. An effective third-party management program incorporates risk assessment, due diligence, contract structuring and review, and regular monitoring and reporting.
- Financial institutions should maintain procedures for **consumer complaints**, including documentation, reporting, and tracking. **Train staff** to be alert for, and to properly report, the following comments from customers, even if oral:
    - ✓ allegations of misleading or false statements,
    - ✓ missing disclosures or information,
    - ✓ undue or excessive fees,
    - ✓ inability to reach customer service,
    - ✓ previously undisclosed or unauthorized charges in their accounts.

CHAPTER 2
DEPOSIT ADVERTISING RULES

DEPOSIT ADVERTISING BASICS

The consumer provisions for deposit advertising are found in Truth-in-Savings and Regulation DD for consumer deposit account disclosures, rules, and advertising

Commercial accounts are not subject to Reg DD but can still be reviewed for potential UDAP principles for being unfair or deceptive acts or practices.

In either case, the ad should reasonably represent the terms of the deposit product being offered and provisions of the deposit contract.

"Profit" is a term that is prohibited from describing interest or the earnings on an account.

GENERAL GUIDELINES & BEST PRACTICES

- ✓ Be careful when using the words "free" or "no cost" or even "low cost"
- ✓ If any maintenance fee or activity fee can be assessed (under any circumstances) the account should not be advertised as FREE
- ✓ There are limited exceptions for check re-order fees, over-limit charges, NSF charges, dormancy fees CAN be assessed on a "FREE" account
- ✓ BE CAREFUL – if a service is "required" for the account and a fee can be assessed it can't be advertised as "FREE". If a bank REQUIRES that a debit or ATM card be issued for a free account and the consumer will be charged ATM service fees for a foreign transaction the account is not considered to qualify as a free account. If the account allows the debit or ATM card to be OPTIONAL then it may be advertised as a free account if there are no other fees that apply.
- ✓ Accounts may be advertised as "FREE" for a limited time IF the timeframe is clearly stated in the ad
- ✓ **ANNUAL PERCENTAGE YIELD –** when an interest rate is advertised, the "annual percentage yield" must also appear, using that term.
  - **The APY may be stated without the interest rate**
  - **The abbreviation APY may be used elsewhere in the ad as long as it is spelled out at least one in the ad (may be in small print)**
  - **The numerical statement of the rate is a trigger term-**
    - **"2% over normal rates" or "bonus rates" available don't trigger additional disclosures**
    - **If the APY is given as a number, state it to 2 decimal points; for example 1.25% APY**
    - **Advertising on the internet that discloses an interest rate must have the APY visible on the same page; links to the APY are not permitted**
    - **Tiered-rate or stepped-rate accounts have rules – the highest APY may be disclosed but not without the other rates; all are required**
    - **APY's must be accurate within .05 (plus or minus)**

- ✓ **BONUS Rules –** see the definition, a "bonus" is given in connection with opening or maintaining an account and has a value of over $10 (yearly calculation)
- ✓ **Waiver of a fee or account expense is not a bonus**
- ✓ **Bonus amounts aren't included in the APY calculation**
- ✓ There are 1099 requirements from the IRS and the IRS considers almost everything reportable. Cash is always reportable; there are de minimis premium exceptions to non-cash inducements to a depositor to open an account that does not have value in excess of $10 for a deposit of less than $5,000 or $20 for a deposit of $5,000 or more.
- ✓ Interest-bearing accounts receive a 1099-INT form and non-interest bearing account receive a 1099-MISC ($600 reporting threshold)

TRIGGER TERMS -APY and bonus are *triggering terms*, meaning if either appears in an ad, additional disclosures must also be made in the ad

- ✓ For broadcast media ads (meaning radio, TV, outdoor billboards, telephone), disclose the following:

  •The minimum balance (if any) to obtain the APY (–If it is a tiered rate account, the minimum balance for each tier must be disclosed)

  •The term of the account for a time product (CD)

  •If a bonus is offered, the APY and all applicable disclosures about the APY must appear

  •A financial institution cannot advertise a bonus by itself (without the APY)

APY and bonus are *triggering terms*, meaning for **written ads** (meaning newspaper, magazine, internet, brochures, etc.), disclose:

- ✓ •All requirements for broadcast media, plus:

  •If the rate is variable, a statement that the rate may change after the account is opened

  •The timing of the APY offered ("offered until" or "offered as of")

  •The minimum opening deposit (if greater than the minimum to earn the stated APY)

  •A statement that "fees could reduce the earnings on the account"(if this is the case)

  •For a time account, statement that a penalty may or will be imposed for early withdrawal

  •If a bonus is offered, what is required to earn the bonus and when it will be provided

- ✓ For Internet ads, triggered terms may appear in a link, provided that link is **only one click away**

SIGNS AND MOBILE DEVICES

Indoor signs are exempt from MANY of the deposit advertising rules in Reg DD. What is an indoor sign? REG DD SAYS (2) *Indoor signs.* (i) Signs **inside the premises of a depository institution (**regardless of whether or not it can be viewed from the outside). Examples:

- ✓ Indoor signs are: computer screens, banners, preprinted posters, and chalk or peg boards. HOWEVER - Any advertisement inside the premises that can be retained by a consumer (such as a brochure or a printout from a computer) is not an indoor sign
- ✓ Required disclosures for indoor signs:
    - Rates must be advertised as "APY"
    - Interest rates may also be disclosed, but not alone
    - If an APY is disclosed, a statement that the person should ask an employee for more information about fees and terms
    - •If advertising a tiered-rate account, the lower dollar amount to get the listed tier must be disclosed
    - •If a time account, the term must be disclosed

Reg Z has no such exceptions; signs must meet all Reg Z requirements Discretionary overdraft limits on automated systems. If the dollar amount of such a limit is included in the disclosed balance, the disclosure is considered to be an "advertisement" promoting the payment of overdrafts Additional disclosures (conditions, etc.) are required for triggering terms on lending ads. The Equal Housing Lender is required on signs for real estate loans.

MOBILE DEVICES

This information is from an article by Carl Pry, written November 2014 for the ABA Bank Marketing and Sales magazine.

See this link: http://www.treliant.com/News-and-Events/Articles/Article-Details/ArticleID/26744/Carl-G-Pry-Do-We-Get-a-Break-When-Advertising-on-Mobile-Devices

It's quite normal for the pace of technology to outpace that of regulation. There is no need to cite examples, as we can all name a few. This is not a knock on the regulatory agencies; it's more a reflection of the speed of technological developments. So when bankers consider how to advertise on mobile devices such as cell phones and tablets, the answer to the question of whether there are any exceptions from disclosure requirements should not be surprising.

There are no such exceptions; advertising on a mobile phone or tablet must be handled the same way it is on a bank's website or other form of electronic media.

For example, if a bank wishes to promote mortgage loans via a specially-formatted ad that will appear on a consumer's mobile phone browser (or via the bank's app), the Equal Housing Lender logo and advertising statement must also appear. The consumer may have to scroll down to see it, but that's not a problem; but it must be present in the ad regardless of the platform (and it

must be legible, which can definitely present a challenge). But with screen sizes of cell phones approaching the size of peoples' heads, maybe that's not as much of a problem as we feared.

Same goes for "Member FDIC" on an insured deposit account ad, and the Non deposit Investment Product disclosures for non-FDIC covered products such as mutual funds and insurance. Again there are no exceptions written into any of those rules.

There is a provision that applies to all electronic media (whether on the web, social media, cell phone, or otherwise) that comes in very handy: the ability to link to required disclosures under Regulations Z (consumer-purpose loans) and DD (consumer deposit accounts). **If the ad contains any terms that trigger additional disclosure, the bank may provide "a link that directly takes the consumer to the additional information." The disclosures must be one click away**. When space is scarce, this provision is most welcome. Again, as long as this link takes the user directly the necessary terms, and doesn't detour to application pages or other information, it's acceptable.

Note that this one-click-away rule does not apply to the "Equal Housing Lender" or "Member FDIC" language (or to the Non deposit Investment Product disclosures). Those must appear on the same page as the promotional message.

Note that this lack of exceptions is the same as advertising on social media. A similar (and common) complaint of limited space is heard when contemplating advertising on Twitter: with a limitation of 140 characters, the words "**Equal Housing Lender" take up 20 all by themselves. One-seventh of the space just for a disclosure?** Again the answer is yes, unfortunately, because there is no exception for limited-space advertising. At least not yet.

BONUS RULES

(f) *Bonus* means a premium, gift, award, or other consideration **worth more than $10** (whether in the form of cash, credit, merchandise, or any equivalent) given or offered to a consumer during a year in exchange for opening, maintaining, renewing, or increasing an account balance. The term does not include interest, other consideration worth $10 or less given during a year, the waiver or reduction of a fee, or the absorption of expenses.

THE COMMENTARY ADDS:

1. *Examples.* Bonuses include items of value, other than interest, offered as incentives to consumers, such as an offer to pay the final installment deposit for a holiday club account. Items that are not a bonus include discount coupons for goods or services at restaurants or stores.

2. *De minimis rule.* Items with a *de minimis* value of $10 or less are not bonuses. Institutions may rely on the valuation standard used by the Internal Revenue Service to determine if the value of the item is de minimis. Examples of items of de minimis value are:

i. Disability insurance premiums valued at an amount of $10 or less per year.

ii. Coffee mugs, T-shirts or other merchandise with a market value of $10 or less.

3. *Aggregation.* In determining if an item valued at $10 or less is a bonus, institutions must aggregate per account per calendar year items that may be given to consumers. In making this determination, institutions aggregate per account only the market value of items that may be given for a specific promotion. To illustrate, assume an institution offers in January to give consumers an item valued at $7 for each calendar quarter during the year that the average account balance in a negotiable order of withdrawal (NOW) account exceeds $10,000. The bonus rules are triggered, since consumers are eligible under the promotion to receive up to $28 during the year. However, the bonus rules are not triggered if an item valued at $7 is offered to consumers opening a NOW account during the month of January, even though in November the institution introduces a new promotion that includes, for example, an offer to existing NOW account holders for an item valued at $8 for maintaining an average balance of $5,000 for the month.

4. *Waiver or reduction of a fee or absorption of expenses.* Bonuses do not include value that consumers receive through the waiver or reduction of fees (even if the fees waived exceed $10) for banking-related services such as the following:

i. A safe deposit box rental fee for consumers who open a new account.

ii. Fees for travelers checks for account holders.

iii. Discounts on interest rates charged for loans at the institution

Official Interpretations of this section.
Section 1030.2—Definitions

(b) *Advertisement.*

1. *Covered messages*. Advertisements include commercial messages in visual, oral, or print media that invite, offer, or otherwise announce generally to prospective customers the availability of consumer accounts--such as:

i. Telephone solicitations.

ii. Messages on automated teller machine (ATM) screens.

iii. Messages on a computer screen in an institution's lobby (including any printout) other than a screen viewed solely by the institution's employee.

iv. Messages in a newspaper, magazine, or promotional flyer or on radio.

v. Messages that are provided along with information about the consumer's existing account and that promote another account at the institution.

2. *Other messages.* Examples of messages that are not advertisements are:

i. Rate sheets in a newspaper, periodical, or trade journal (unless the depository institution, or a deposit broker offering accounts at the institution, pays a fee for or otherwise controls publication).

ii. In-person discussions with consumers about the terms for a specific account.

iii. For purposes of section 1030.8(b) of this part through section 1030.8(e) of this part, information given to consumers about existing accounts, such as current rates recorded on a voice-response machine or notices for automatically renewable time account sent before renewal.

iv. Information about a particular transaction in an existing account.

v. Disclosures required by federal or other applicable law.

vi. A deposit account agreement.

Section 1030.8 – Advertising

(a) *Misleading or inaccurate advertisements.* An advertisement shall not:

(1) Be misleading or inaccurate or misrepresent a depository institution's deposit contract; or

(2) Refer to or describe an account as “free” or “no cost” (or contain a similar term) if any maintenance or activity fee may be imposed on the account. The word “profit” shall not be used in referring to interest paid on an account.

(b) *Permissible rates.* If an advertisement states a rate of return, it shall state the rate as an “annual percentage yield” using that term. (The abbreviation “APY” may be used provided the term “annual percentage yield” is stated at least once in the advertisement.) The advertisement shall not state any other rate, except that the “interest rate,” using that term, may be stated in conjunction with, but not more conspicuously than, the annual percentage yield to which it relates.

(c) *When additional disclosures are required.* Except as provided in paragraph (e) of this section, if the annual percentage yield is stated in an advertisement, the advertisement shall state the following information, to the extent applicable, clearly and conspicuously:

(1) *Variable rates.* For variable-rate accounts, a statement that the rate may change after the account is opened.

(2) *Time annual percentage yield is offered.* The period of time the annual percentage yield will be offered, or a statement that the annual percentage yield is accurate as of a specified date.

(3) *Minimum balance.* The minimum balance required to obtain the advertised annual percentage yield. For tiered-rate accounts, the minimum balance required for each tier shall be stated in close proximity and with equal prominence to the applicable annual percentage yield.

(4) *Minimum opening deposit.* The minimum deposit required to open the account, if it is greater than the minimum balance necessary to obtain the advertised annual percentage yield.

(5) *Effect of fees.* A statement that fees could reduce the earnings on the account.

(6) *Features of time accounts.* For time accounts:

(i) *Time requirements.* The term of the account.

(ii) *Early withdrawal penalties:* A statement that a penalty will or may be imposed for early withdrawal.

(iii) *Required interest payouts.* For non compounding time accounts with a stated maturity greater than one year that do not compound interest on an annual or more frequent basis, that require interest payouts at least annually, and that disclose an APY determined in accordance

with section E of Appendix A of this part, a statement that interest cannot remain on deposit and that payout of interest is mandatory.

(d) *Bonuses*. Except as provided in paragraph (e) of this section, if a bonus is stated in an advertisement, the advertisement shall state the following information, to the extent applicable, clearly and conspicuously:

(1) The “annual percentage yield,” using that term;

(2) The time requirement to obtain the bonus;

(3) The minimum balance required to obtain the bonus;

(4) The minimum balance required to open the account, if it is greater than the minimum balance necessary to obtain the bonus; and

(5) When the bonus will be provided.

(e) *Exemption for certain advertisements.* (1) *Certain media.* If an advertisement is made through one of the following media, it need not contain the information in paragraphs (c)(1), (c)(2), (c)(4), (c)(5), (c)(6)(ii), (d)(4), and (d)(5) of this section:

(i) Broadcast or electronic media, such as television or radio;

(ii) Outdoor media, such as billboards; or

(iii) Telephone response machines.

(2) *Indoor signs.* (i) Signs inside the premises of a depository institution (or the premises of a deposit broker) are not subject to paragraphs (b), (c), (d) or (e)(1) of this section.

(ii) If a sign exempt by paragraph (e)(2) of this section states a rate of return, it shall:

(A) State the rate as an “annual percentage yield,” using that term or the term “APY.” The sign shall not state any other rate, except that the interest rate may be stated in conjunction with the annual percentage yield to which it relates.

(B) Contain a statement advising consumers to contact an employee for further information about applicable fees and terms.

Note: The exception for indoor signs in section (e)(2) originally applied only to signs designed and placed to be seen and read primarily by customers inside the bank's branch office. The Economic Growth and Regulatory Paperwork Burden Reduction Act of 1996 amended § 263(c) of the Truth in Savings Act to eliminate that limitation, and it was removed from the regulation effective 9/24/1998. Here is an excerpt from the 9/29/1998 *Federal Register* publication of the final rule making that amendment (63 FR 52105):*"A further amendment to section 263(c)*

contained in the 1996 Act expands the exemption for signs on the premises of the depository institution. All signs inside the premises of an institution are now exempt from certain advertising disclosures (including signs that are intended to be viewed from outside the premises). Accordingly, the reference in Sec. 230.8(e) [now Sec. 1030.8(e)] to signs that face outside the premises and the corresponding provision in the official staff commentary, comment 8(e)(2)(I)-2, are deleted."

(f) *Additional disclosures in connection with the payment of overdrafts.* Institutions that promote the payment of overdrafts in an advertisement shall include in the advertisement the disclosures required by § 1030.11(b) of this part

COMMENTARY

a) *Misleading or inaccurate advertisements.*

1. *General.* All advertisements are subject to the rule against misleading or inaccurate advertisements, even though the disclosures applicable to various media differ.

2. *Indoor signs.* An indoor sign advertising an annual percentage yield is not misleading or inaccurate when:

i. For a tiered-rate account, it also provides the lower dollar amount of the tier corresponding to the advertised annual percentage yield.

ii. For a time account, it also provides the term required to obtain the advertised annual percentage yield.

3. *Fees affecting "free" accounts.* For purposes of determining whether an account can be advertised as "free" or "no cost," maintenance and activity fees include:

i. Any fee imposed when a minimum balance requirement is not met, or when consumers exceed a specified number of transactions.

ii. Transaction and service fees that consumers reasonably expect to be imposed on a regular basis.

iii. A flat fee, such as a monthly service fee.

iv. Fees imposed to deposit, withdraw, or transfer funds, including per-check or per-transaction charges (for example, $.25 for each withdrawal, whether by check or in person).

4. *Other fees.* Examples of fees that are not maintenance or activity fees include:

i. Fees not required to be disclosed under § 1030.4(b)(4).

ii. Check printing fees.

iii. Balance inquiry fees.

iv. Stop-payment fees and fees associated with checks returned unpaid.

v. Fees assessed against a dormant account.

vi. Fees for ATM or electronic transfer services (such as preauthorized transfers or home banking services) not required to obtain an account.

5. *Similar terms.* An advertisement may not use the term “fees waived” if a maintenance or activity fee may be imposed because it is similar to the terms “free” or “no cost.”

6. *Specific account services.* Institutions may advertise a specific account service or feature as free if no fee is imposed for that service or feature. For example, institutions offering an account that is free of deposit or withdrawal fees could advertise that fact, as long as the advertisement does not mislead consumers by implying that the account is free and that no other fee (a monthly service fee, for example) may be charged.

7. *Free for limited time.* If an account (or a specific account service) is free only for a limited period of time--for example, for one year following the account opening--the account (or service) may be advertised as free if the time period is also stated.

8. *Conditions not related to deposit accounts.* Institutions may advertise accounts as “free” for consumers meeting conditions not related to deposit accounts, such as the consumer's age. For example, institutions may advertise a NOW account as “free for persons over 65 years old,” even though a maintenance or activity fee is assessed on accounts held by consumers 65 or younger.

9. *Electronic advertising.* If an electronic advertisement (such as an advertisement appearing on an Internet Web site) displays a triggering term (such as a bonus or annual percentage yield) the advertisement must clearly refer the consumer to the location where the additional required information begins. For example, an advertisement that includes a bonus or annual percentage yield may **be accompanied by a link that directly takes the consumer to the additional information.**

10. *Examples.* Examples of advertisements that would ordinarily be misleading, inaccurate, or misrepresent the deposit contract are:

i. Representing an overdraft service as a “line of credit,” unless the service is subject to Regulation Z, 12 CFR part 1026.

ii. Representing that the institution will honor all checks or authorize payment of all transactions that overdraw an account, with or without a specified dollar limit, when the institution retains discretion at any time not to honor checks or authorize transactions.

iii. Representing that consumers with an overdrawn account are allowed to maintain a negative balance when the terms of the account's overdraft service require consumers promptly to return the deposit account to a positive balance.

iv. Describing an institution's overdraft service solely as protection against bounced checks when the institution also permits overdrafts for a fee for overdrawing their accounts by other means, such as ATM withdrawals, debit card transactions, or other electronic fund transfers.

v. Advertising an account-related service for which the institution charges a fee in an advertisement that also uses the word "free" or "no cost" (or a similar term) to describe the account, unless the advertisement clearly and conspicuously indicates that there is a cost associated with the service. If the fee is a maintenance or activity fee under Sec. 1030.8(a)(2) of this part, however, an advertisement may not describe the account as "free" or "no cost" (or contain a similar term) even if the fee is disclosed in the advertisement.

11. *Additional disclosures in connection with the payment of overdrafts.* The rule in § 1030.3(a), providing that disclosures required by § 1030.8 may be provided to the consumer in electronic form without regard to E-Sign Act requirements, applies to the disclosures described in § 1030.11(b), which are incorporated by reference in § 1030.8(f).

(b) *Permissible rates.*

1. *Tiered-rate accounts.* An advertisement for a tiered-rate account that states an annual percentage yield must also state the annual percentage yield for each tier, along with corresponding minimum balance requirements. Any interest rates stated must appear in conjunction with the applicable annual percentage yields for each tier.

2. *Stepped-rate accounts.* An advertisement that states an interest rate for a stepped-rate account must state all the interest rates and the time period that each rate is in effect.

3. *Representative examples.* An advertisement that states an annual percentage yield for a given type of account (such as a time account for a specified term) need not state the annual percentage yield applicable to other time accounts offered by the institution or indicate that other maturity terms are available. In an advertisement stating that rates for an account may vary depending on the amount of the initial deposit or the term of a time account, institutions need not list each balance level and term offered. Instead, the advertisement may:

i. Provide a representative example of the annual percentage yields offered, clearly described as such. For example, if an institution offers a $25 bonus on all time accounts and the annual percentage yield will vary depending on the term selected, the institution may provide a disclosure of the annual percentage yield as follows: "For example, our 6-month certificate of deposit currently pays a 3.15% annual percentage yield."

ii. Indicate that various rates are available, such as by stating short-term and longer-term maturities along with the applicable annual percentage yields: "We offer certificates of deposit

with annual percentage yields that depend on the maturity you choose. For example, our one-month CD earns a 2.75% APY. Or, earn a 5.25% APY for a three-year CD."

(c) *When additional disclosures are required.*

1. *Trigger terms.* The following are examples of information stated in advertisements that are not "trigger" terms:

i. "One, three, and five year CDs available."

ii. "Bonus rates available."

iii. "1% over our current rates," so long as the rates are not determinable from the advertisement.

(c)(2) *Time annual percentage yield is offered.*

1. *Specified date.* If an advertisement discloses an annual percentage yield as of a specified date, that date must be recent in relation to the publication or broadcast frequency of the media used, taking into account the particular circumstances or production deadlines involved. For example, the printing date of a brochure printed once for a deposit account promotion that will be in effect for six months would be considered "recent," even though rates change during the six-month period. Rates published in a daily newspaper or on television must reflect rates offered shortly before (or on) the date the rates are published or broadcast.

2. *Reference to date of publication.* An advertisement may refer to the annual percentage yield as being accurate as of the date of publication, if the date is on the publication itself. For instance, an advertisement in a periodical may state that a rate is "current through the date of this issue," if the periodical shows the date.

(c)(5) *Effect of fees.*

1. *Scope.* This requirement applies only to maintenance or activity fees described in comment 8(a).

(c)(6) *Features of time accounts.*

(c)(6)(i) *Time requirements.*

1. *Club accounts.* If a club account has a maturity date but the term may vary depending on when the account is opened, institutions may use a phrase such as: "The maturity date of this club account is November 15; its term varies depending on when the account is opened."

(c)(6)(ii) *Early withdrawal penalties.*

1. *Discretionary penalties.* Institutions imposing early withdrawal penalties on a case-by-case basis may disclose that they "may" (rather than "will") impose a penalty if such a disclosure accurately describes the account terms.

(d) *Bonuses*.

1. *General reference to "bonus."* General statements such as "bonus checking" or "get a bonus when you open a checking account" do not trigger the bonus disclosures.

(e) *Exemption for certain advertisements.*

(e)(1) *Certain media.*

Paragraph (e)(1)(i).

1. *Internet advertisements.* The exemption for advertisements made through broadcast or electronic media does not extend to advertisements posted on the Internet or sent by email.

Paragraph (e)(1)(iii).

1. *Tiered-rate accounts.* Solicitations for a tiered-rate account made through telephone response machines must provide the annual percentage yields and the balance requirements applicable to each tier.

(e)(2) *Indoor signs.*

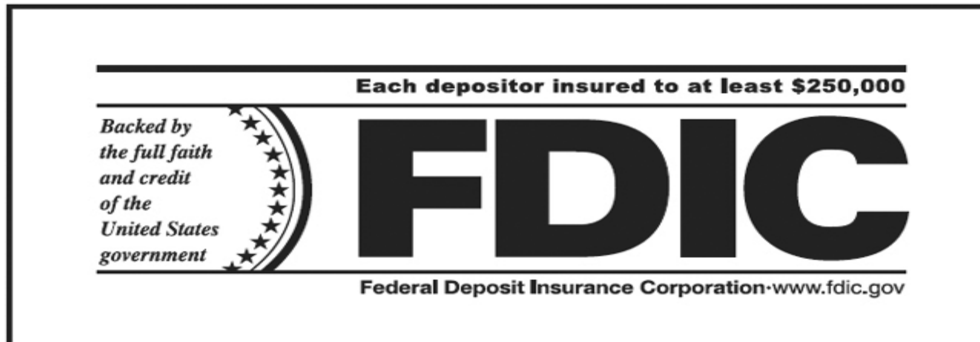
Paragraph (e)(2)(i).

1. *General.* Indoor signs include advertisements displayed on computer screens, banners, preprinted posters, and chalk or peg boards. Any advertisement inside the premises that can be retained by a consumer (such as a brochure or a printout from a computer) is not an indoor sign.

FDIC ADVERTISEMENT OF MEMBERSHIP

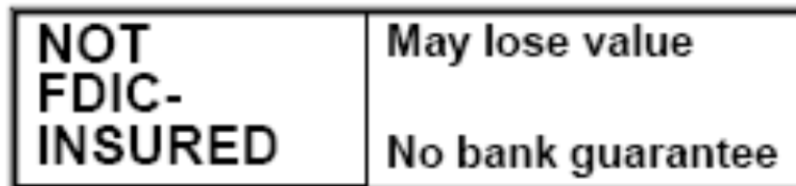
BASIC RULE SUMMARY

- ✓ "Member FDIC" must appear on certain advertisements
- ✓ The FDIC's "official advertising statement" is shown in the "rules" and below



- ✓ OPTIONS – A bank can use symbol or statement (variations)
- ✓ This should appear in each ad for any insured deposit product
- ✓ Also if the ad mentions the institution's name, but is not specific as to any product
- ✓ There are various exceptions to these rules (FDIC regulation: 12 CFR 328)
- ✓ It is permissible, though not necessary, for loan ads
- ✓ .When advertising **non-deposit investment products**, like mutual funds, securities, and so forth, do NOT include the FDIC official advertising statement or logo
- ✓ Sales representatives should inform consumers (orally or in writing) that:
  - "This product is not insured by the Federal Deposit Insurance Corporation"
  - "This product is not a deposit or other obligation of, or guaranteed by, the bank"
  - "This product is subject to investment risks, including possible loss of the principle amount invested"

THIS IS THE TYPICAL LOGO FOR NON-DEPOSIT PRODUCTS



- .When advertising both insured and non-insured products, make sure proper disclosures are made, and there is separation in the ad so there is no doubt non-insured products are not insured

The FDIC Rules and Regulations, Part 328 Covers the "Advertisement of Membership"

Here is a link: https://www.fdic.gov/regulations/laws/rules/2000-5200.html

Advertisement defined. The term "advertisement," as used in this part, shall mean a ***commercial message, in any medium, that is designed to attract public attention or patronage to a product or business***

PART 328—ADVERTISEMENT OF MEMBERSHIP

Section

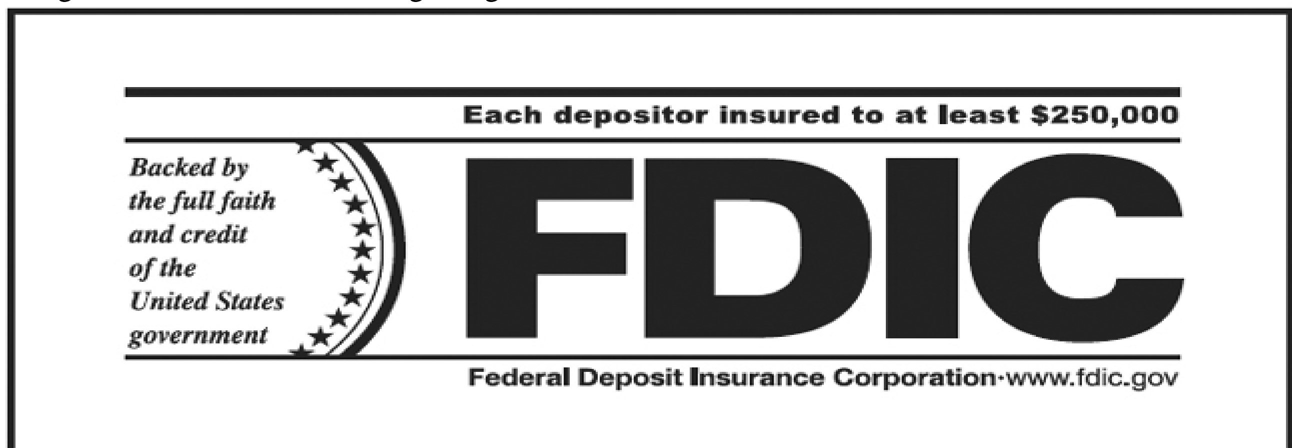
328.0 Scope.
328.1 Official sign.
328.2 Display and procurement of official sign.
328.3 Official advertising statement requirements.
328.4 Prohibition against receiving deposits at same teller station or window as noninsured institution.

§ 328.0 Scope.

Part 328 describes the official sign of the FDIC and prescribes its use by insured depository institutions. It also prescribes the official advertising statement insured depository institutions must include in their advertisements. For purposes of part 328, the term "insured depository institution" includes insured branches of a foreign depository institution. Part 328 does not apply to non-insured offices or branches of insured depository institutions located in foreign countries.

§ 328.1 Official sign.

(a) The official sign referred to in this part shall by 7" by 3" in size, with black lettering and gold background, and of the following design:



(b) The "symbol" of the Corporation, as used in this part, shall be that portion of the official sign consisting of "FDIC" and the two lines of smaller type above and below "FDIC."

§ 328.2 Display and procurement of official sign.

(a) *Display of official sign.* Each insured depository institution shall continuously display the official sign at each station or window where insured deposits are usually and normally received in the depository institution's principal place of business and in all its branches.

(1) *Other locations*--

(i) *Within the institution.* In addition to locations where display of the official sign is required under this § 328.2(a), an insured depository institution may display the official sign in other locations at the institution.

(ii) *Other facilities.* An insured depository institution may display the official sign on or at Remote Service Facilities. If an insured depository institution displays the official sign at a Remote Service Facility, and if there are any noninsured institutions that share in the Remote Service Facility, any insured depository institution that displays the official sign must clearly show that the sign refers only to a designated insured depository institution(s). As used in this part, the term "Remote Service Facility" includes any automated teller machine, cash dispensing machine, point-of-sale terminal, or other remote electronic facility where deposits are received.

(2) *Varied signs.* Instead of displaying the official sign, an insured depository institution may display signs that vary from the official sign in size, color, or material at any location where display of the official sign is required or permitted under this § 328.2(a). However, any such varied sign that is displayed in locations where display of the official sign is required under this § 328.2(a) must not be smaller in size than the official sign and must have the same color for the text and symbols.

(3) *Newly insured institutions.* A depository institution shall display the official sign no later than its twenty-first day of operation as an insured depository institution, unless the institution promptly requested the official sign form the Corporation, but did not receive it before that date.

(b) *Procuring official sign.* An insured depository institution may procure the official sign from the Corporation for official use at no charge. Information on obtaining the official sign is posted on the FDIC's internet Web site, *http://www.fdic.gov*. Alternatively, insured depository institutions may, at their expense, procure from commercial suppliers signs that vary from the official sign in size, color, or material. Any insured depository institution which has promptly submitted a written request for an official sign to the Corporation shall not be deemed to have violated this § 328.2 by failing to display the official sign, unless the insured depository institution fails to display the official sign after receipt thereof.

(c) *Required changes in sign.* The Corporation may require any insured depository institution, upon at least thirty (30) days' written notice, to change the wording of the official sign in a manner deemed necessary for the protection of depositors or others.

§ 328.3 Official advertising statement requirements.

(a) *Advertisement defined.* The term "advertisement," as used in this part, shall mean a commercial message, in any medium, that is designed to attract public attention or patronage to a product or business.

(b) *Official advertising statement.* The official advertising statement shall be in substance as follows: "Member of the Federal Deposit Insurance Corporation."

(1) *Optional short title and symbol.* The short title "Member of FDIC" or "Member FDIC," or a reproduction of the symbol of the Corporation (as described in § 328.1(b)), may be used by insured depository institutions at their option as the official advertising statement.

(2) *Size and print.* The official advertising statement shall be of such size and print to be clearly legible. If the symbol of the Corporation is used as the official advertising statement, and the symbol must be reduced to such proportions that the two lines of smaller type above and below "FDIC" are indistinct and illegible, those lines of smaller type may be blocked out or dropped.

(c) *Use of official advertising statement in advertisements*--(1) *General requirement.* Except as provided in § 328.3(d), each insured depository institution shall include the official advertising statement prescribed in § 328.3(b) in all advertisements that either promote deposit products and

services or promote non-specific banking products and services offered by the institution. For purposes of this § 328.3, an advertisement promotes non-specific banking products and services if it includes the name of the insured depository institution but does not list or describe particular products or services offered by the institution. An example of such an advertisement would be, "Anytown Bank, offering a full range of banking services."

(2) *Foreign depository institutions.* When a foreign depository institution has both insured and noninsured U.S. branches, the depository institution must also identify which branches are insured and which branches are not insured at all of its advertisements requiring use of the official advertising statement.

(3) *Newly insured institutions.* A depository institution shall include the official advertising statement in its advertisements no later than its twenty-first day of operation as an insured depository institution.

(d) *Types of advertisements which do not require the official advertising statement.* The following types of advertisements do not require use of the official advertising statement:

(1) Statements of condition and reports of condition of an insured depository institution which are required to be published by State or Federal law;

(2) Insured depository institution supplies such as stationery (except when used for circular letters), envelopes, deposit slips, checks, drafts, signature cards, deposit passbooks, certificates of deposit, etc.;

(3) Signs or plates in the insured depository institution offices or attached to the building or buildings in which such offices are located;

(4) Listings in directories;

(5) Advertisements not setting forth the name of the insured depository institution;

(6) Entries in a depository institution directory, provided the name of the insured depository institution is listed on any page in the directory with a symbol or other descriptive matter indicating it is a member of the Federal Deposit Insurance Corporation;

(7) Joint or group advertisements of depository institution services where the names of insured depository institutions and noninsured institutions are listed and form a part of such advertisements;

(8) Advertisements by radio or television, other than display advertisements, which do not exceed thirty (30) seconds in time;

(9) Advertisements which are of the type or character that make it impractical to include the official advertising statement, including, but not limited to, promotional items such as calendars, matchbooks, pens, pencils, and key chains; and

(10) Advertisements which contain a statement to the effect that the depository institution is a member of the Federal Deposit Insurance Corporation, or that the depository institution is insured by the Federal Deposit Insurance Corporation, or that its deposits or depositors are insured by the Federal Deposit Insurance Corporation at least $100,000 for each depositor.

(e) *Restrictions on using the official advertising statement when advertising non-deposit products*--(1) *Definitions*--

(i) *Non-deposit product.* As used in this part, the term "non-deposit product" shall include, but is not limited to, insurance products, annuities, mutual funds, and securities. For purposes of this definition, a credit product is not a non-deposit product.

(ii) *Hybrid product.* As used in this part, the term "hybrid product" shall mean a product or service that has both deposit product features and non-deposit product features. A sweep account is an example of a hybrid product.

(2) ***Non-deposit product advertisements***. Except as provided in § 328.3(e)(4), **an insured depository institution shall not include the official advertising statement, or any other statement or symbol which implies or suggests the existence of Federal deposit insurance, in any advertisement relating solely to non-deposit products.**

(3) *Hybrid product advertisements.* Except as provided in § 328.3(e)(4), an insured depository institution shall not include the official advertising statement, or any other statement or symbol which implies or suggests the existence of federal deposit insurance, in any advertisement relating solely to hybrid products.

(4) *Mixed advertisements.* In advertisements containing information about both insured deposit products and non-deposit products or hybrid products, an insured depository institution shall clearly segregate the official advertising statement or any similar statement from that portion of the advertisement that relates to the non-deposit products.

(f) *Official advertising statement in non-English language.* The non-English equivalent of the official advertising statement may be used in any advertisement, provided that the translation has had the prior written approval of the Corporation.

§ 328.4 Prohibition against receiving deposits at same teller station or window as noninsured institution.

(a) *Prohibition.* An insured depository institution may not receive deposits at any teller station or window where any noninsured institution receives deposits or similar liabilities.

(b) *Exception.* This § 328.4 does not apply to deposits received at a Remote Service Facility.

CHAPTER 3
LENDING ADVERTISING RULES & FAIR LENDING

Equal Credit Opportunity Act

Regulation B, under the Equal Credit Opportunity Act (ECOA) prohibits lenders from discriminating against credit applicants, establishes guidelines for gathering and evaluating credit information, and requires written notification when credit is denied.

Fair Housing Act

The Fair Housing Act, 42 U.S.C. 3601 et seq., prohibits discrimination by direct providers of housing, such as landlords and real estate companies as well as other entities, such as municipalities, **banks or other lending institutions** and homeowners insurance companies whose discriminatory practices make housing unavailable to persons based on seven prohibited bases.

Table 1

Prohibited Bases under Equal Credit Opportunity Act (ECOA) and Fair Housing Act (FHA)

ECOA	FHA
Race or color	Race or color
Religion	Religion
National origin	National origin
Sex	Sex
Marital status	Familial status
Age	Handicap
Receipt of public assistance income	
Exercising, in good faith, any right under the Consumer Credit Protection Act	

FAIR LENDING LAWS AND TYPES OF DISCRIMINATION

Equal Credit Opportunity Act (Regulation B)

The purpose of the ECOA is to promote the availability of credit to all creditworthy applicants without regard to any of the prohibited bases (Table #1). The regulation does not attempt to dictate standards of creditworthiness. It does, however, try to strike a balance between your need as a lender to know about the applicant and the applicant's right to privacy regarding questions that have no bearing on his/her creditworthiness. **Regulation B applies to both consumer and business purpose credit.** The difference is found in adverse action notification requirements. The ECOA prohibits discrimination based on

- Race or color
- Religion
- National origin
- Sex
- Marital status
- Age (provided the applicant has the capacity to contract)
- The applicant's receipt of income derived from any public assistance program
- The applicant's exercise, in good faith, of any right under the Consumer Credit Protection Act.

Coverage: All Creditors

Agency/Citation: Equal Credit Opportunity Act, Title VII of the Consumer Credit Protection Act, as amended at 15 USC 1601; Federal Reserve Board/Regulation B at 12 CFR Part 1002. Effective Date: Equal Credit Opportunity Act – 1976

Background

The Equal Credit Opportunity Act (ECOA) and its implementing rule, Regulation B ("Reg B"), are part of the Consumer Credit Protection Act, which also includes Truth-In-Lending. ECOA is intended generally to "promote the availability of credit to all creditworthy applicants, without regard to race, color, religion, national origin, sex, marital status, or age," as long as the applicant has the legal ability to enter into a contract. It is a violation of ECOA and Reg B to deny credit based on these factors. Also, creditors may not deny credit based on the fact that an applicant receives public assistance or has exercised a right under the Consumer Credit Protection Act.

The rule requires creditors to notify applicants of action taken on applications; to report credit histories in the name of both spouses, if applicable; to retain records of compliance; and to collect information for monitoring purposes about an applicant applying for a purchase-money mortgage loan. *(Although Reg B applies to all creditors, the term "financial institution" will be used throughout this summary.)*

General Rule Prohibiting Discrimination (Section 1002.4)

Reg B prohibits financial institutions from discriminating against an applicant on a **prohibited basis regarding any aspect of a credit transaction.** As mentioned above, the prohibited bases are: race, color, religion, national origin, sex, marital status, or age (provided the applicant has the capacity to contract); the fact that all or part of the applicant's income derives from a public

assistance program; or the fact that the applicant has in good faith exercised any right under the Consumer Credit Protection Act.

1002.4 General rules.

(a) *Discrimination.* A creditor shall not discriminate against an applicant on a prohibited basis **regarding any aspect of a credit transaction.**

(b) *Discouragement.* A creditor shall not make any oral or written statement, **in advertising or otherwise, to applicants or prospective applicants that would discourage on a prohibited basis a reasonable person from making or pursuing an application.**

(c) *Written applications.* A creditor shall take written applications for the dwelling-related types of credit covered by §1002.13(a).

(d) *Form of disclosures* —(1) *General rule.* A creditor that provides in writing any disclosures or information required by this regulation must provide the disclosures in a clear and conspicuous manner and, except for the disclosures required by §§1002.5 and 1002.13, in a form the applicant may retain.

(2) *Disclosures in electronic form.* The disclosures required by this part that are required to be given in writing may be provided to the applicant in electronic form, subject to compliance with the consumer consent and other applicable provisions of the Electronic Signatures in Global and National Commerce Act (E-Sign Act) (15 U.S.C. 7001 *et seq.*). Where the disclosures under §§1002.5(b)(1), 1002.5(b)(2), 1002.5(d)(1), 1002.5(d)(2), 1002.13, and 1002.14(a)(2)(i) accompany an application accessed by the applicant in electronic form, these disclosures may be provided to the applicant in electronic form on or with the application form, without regard to the consumer consent or other provisions of the E-Sign Act.

(e) *Foreign-language disclosures.* Disclosures may be made in languages other than English, provided they are available in English upon request.

Types of Discrimination The courts have recognized **three methods** of proof of lending discrimination under the ECOA (and the Fair Housing Act):

- "Overt evidence of discrimination," when a lender blatantly discriminates on a prohibited basis;
- Evidence of "disparate treatment," when a lender treats applicants differently based on one of the prohibited factors; and
- Evidence of "disparate impact," when a lender applies a practice uniformly to all applicants but the practice has a discriminatory effect on a prohibited basis and is not justified by business necessity.

Overt Evidence of Discrimination
There is overt evidence of discrimination when a financial institution openly discriminates on a prohibited basis. There is overt evidence of discrimination even when a financial institution expresses but does not act on a discriminatory preference.

> **Example**: A lending officer told a member, “We do not like to make home mortgages to Native Americans, but the law says we cannot discriminate and we have to comply with the law.” This statement violated the FHAct’s prohibition on statements expressing a discriminatory preference as well as Section 1002.5(a) of Regulation B, which prohibits discouraging applicants on a prohibited basis.

There is overt evidence of discrimination when a financial institution openly discriminates on a prohibited basis. For example, a financial institution offers a credit card with a limit of up to $750 for applicants aged 21-30 and $1500 for applicants over 30. This policy violates the ECOA's prohibition on discrimination based on age.

Disparate Treatment

***Evidence of Disparate Treatment*.**

Disparate treatment occurs when a lender treats an applicant differently based on one of the prohibited bases. Disparate treatment ranges from overt discrimination to more subtle disparities in treatment. It does not require any proof that the treatment was motivated by prejudice or a conscious intention to discriminate against a person beyond the difference in treatment itself. It is considered by courts to be intentional discrimination because no credible, nondiscriminatory reason explains the difference in treatment on a prohibited basis. There is overt evidence of discrimination when a lender openly discriminates on a prohibited basis.

Example:
For example, two minority loan applicants are told that it will take several hours and require the payment of an application fee to determine whether they will qualify for a home mortgage loan. In contrast, a loan officer takes financial information immediately from non-minority applicants and determines whether they are qualified in minutes, without charging a fee. The financial institution's differential treatment violates both the ECOA and the Fair Housing Act.

Evidence of Disparate Impact

When a financial institution applies a policy or practice equally to credit applicants, but the policy or practice has a "disproportionate adverse impact" on applicants from a group protected against discrimination, the policy or practice is described as having a "disparate impact." Policies and practices that are neutral on their face and that are applied equally may still, on a prohibited basis, disproportionately and adversely affect a person's access to credit. The fact that a policy or practice creates a disparity on a prohibited basis is not alone proof of a violation. Where the policy or practice is justified by "business necessity" and there is no less discriminatory alternative, a violation of the ECOA or Fair Housing Act will not exist.
Source: 1994 Interagency Policy Statement on Discrimination in Lending

<u>Example</u>: A lender's policy is not to extend loans for single family residences for less than $60,000.00. This policy has been in effect for ten years. This minimum loan amount policy is shown to disproportionately exclude potential minority applicants from consideration because of their income levels or the value of the houses in the areas in which they live.

Finally, evidence of *discriminatory intent* is not necessary to establish that a lender's adoption or implementation of a policy or practice that has a disparate impact is in violation of the FHAct or ECOA.

FAIR LENDING CONSIDERATIONS

- ✓ Ads must not overtly discriminate
- ✓ Would a "reasonable person" be discouraged from applying by looking at your ad?)
- ✓ .Encourage everyone; discourage no one
- ✓ .Pay attention to the characteristics of the models in ads, do they represent the makeup of your marketing area and demographics? CHECK the FFIEC website for statistics.
- ✓ Ad programs are examined in their totality – is there any aspect of the program that would be viewed as discriminatory on a prohibited basis?
- ✓ Be careful with jointly-sponsored ads, guilt by association if your bank is seen as a co-conspirator in discriminatory conduct
- ✓ Geographic lending advertising – be careful to monitor different ads based on state, city, county, zip code.
- ✓ CONSIDER – Is it a high-minority census tracts (HMCTs)
- ✓ How about advertising for different ages?
- ✓ Only age 62 or over may be targeted (older Americans)
- ✓ Vulnerable classes (UDAAP)
- ✓ Proxies for prohibited information
- ✓ Are lenders or customer service staff screening on a prohibited basis?

PERMITTED ACTIVITIES:

- ✓ Vary advertisements if there is a "legitimate business justification"
- ✓ .What is this? .Vary on non-prohibited bases?
- ✓ .Special promotions are OK, as long as….Offer rates or deals not everyone would get, as long as enough would qualify and conditions are clearly stated
- ✓ .Utilize segment marketing, as long as it can be shown that it was not done on a prohibited bases and proxy data was considered

ADVERTISING BASICS

REG. Z: CONSUMER LOAN ADVERTISING – CLOSED END CREDIT (1026.24)

- ✓ Reg. Z controls consumer loan ads – commercial: just comply with UDAP principles
- ✓ If you state an interest rate, you must also state the APR (reverse not true, though)
- ✓ When advertising a rate, "APR" is sufficient - don't need to spell it out
- ✓ What you must say in an ad depends on what you already do say in the ad:

  Triggering Terms If you say any of these:
  - Downpayment information (only in a credit sale*)
  - Payment amount
    - Number of payments or repayment period
    - Any finance charge amount
- ✓ Triggered Terms Then you must say all of these:
  - Downpayment information (only in a credit sale*)
  - Terms of repayment (typical)
  - APR (and if it is variable, that fact)
- ✓ Numerical disclosures of the terms are what trigger
- ✓ Or if you can figure out the number from the ad's information
- ✓ Notice what is not a triggering term: APR
- ✓ But if you advertise an APR that may rise after consummation, you must state that it is variable
- ✓ You may also state the interest rate, but not more prominently than the APR
- ✓ For online ads, a link to triggered terms is acceptable (only if **they are one click away**)
- ✓ Many additional requirements for mortgage loans

REG. Z: CONSUMER LOAN ADVERTISING – OPEN END CREDIT (1026.16)

- ✓ Triggering Terms If you say any of these:
  - Finance charge or APR
  - Any other charges
- ✓ Triggered Terms, then you must say all of these:
  - Transaction or other activity charges
  - APR (and the fact that it may vary, if it can)
  - Any membership of other participation fee

Additional special rule for HELOCs (1026.16) and portions of (1026.40)

- ✓ Triggering terms can be stated affirmatively or negatively (the absence of the term)
- ✓ •"No Closing Costs Home Equity Lines During July!" - Triggers
- ✓ .Stating the absence of a triggering term nonetheless means you must include all triggered terms in your ad
- ✓ .For all consumer loans covered by Reg. Z, the form of media doesn't matter
- ✓ .Rate boards, online ads, etc. all must follow the same rules

TAX DEDUCTIBILITY

- ✓ Don't hold yourself out to be a tax expert or advisor
- ✓ Do you advertise that interest on home loans is tax-deductible?
- ✓ Especially on home equity loans where LTV could exceed 100%, retirement account ads
- ✓ "Consult your tax advisor" or similar language

EQUAL HOUSING LOGO

When advertising a residential loan product, the Equal Housing Lender logo must be used (commonly known as the little "house") Options are to use either the Equal Housing Lender statement and or the logo (the "house")

- ✓ For visual ad – the logo must appear in all dealing with residential lending
- ✓ No size requirement anymore – just must be legible

- ✓ For internet ads: logo should appear on each page dealing with residential lending products

- ✓ Verbal ads: "equal housing lender" statement should be announced

- ✓ DEFINITION(b) *Dwelling* means any building, structure, or portion thereof which is occupied as, or designed or intended for occupancy as, a residence by one or more families, and any vacant land which is offered for sale or lease for the construction or location thereon of any such building, structure, or portion thereof.

- ✓ Link to FDIC rules: https://www.fdic.gov/regulations/laws/rules/2000-6000.html

- ✓ Link to HUD rules: http://www.hud.gov/offices/fheo/library/part109.pdf

REG Z ADVERTISING COMMENTARY

THIS IS FROM THE COMMENTARY; See what is INCLUDED and what is EXCLUDED

Section 1026.2—Definitions and Rules of Construction

2(a)(2) Advertisement

1. *Coverage.* Only commercial messages that promote **consumer credit transactions** requiring disclosures are advertisements. Messages inviting, offering, or otherwise announcing generally to prospective customers the availability of credit transactions, whether in visual, oral, or print media, are covered by Regulation Z (12 CFR part 1026).

i. Examples include:

A. Messages in a newspaper, magazine, leaflet, promotional flyer, or catalog.

B. Announcements on radio, television, or public address system.

C. Electronic advertisements, such as on the Internet.

D. Direct mail literature or other printed material on any exterior or interior sign.

E. Point of sale displays.

F. Telephone solicitations.

G. Price tags that contain credit information.

H. Letters sent to customers or potential customers as part of an organized solicitation of business.

I. Messages on checking account statements offering auto loans at a stated annual percentage rate.

J. Communications promoting a new open-end plan or closed-end transaction.

ii. The term does not include:

A. Direct personal contacts, such as follow-up letters, cost estimates for individual consumers, or oral or written communication relating to the negotiation of a specific transaction.

B. Informational material, for example, interest-rate and loan-term memos, distributed only to business entities.

C. Notices required by Federal or state law, if the law mandates that specific information be displayed and only the information so mandated is included in the notice.

D. News articles the use of which is controlled by the news medium.

E. Market-research or educational materials that do not solicit business.

F. Communications about an existing credit account (for example, a promotion encouraging additional or different uses of an existing credit card account).

2. *Persons covered.* All *persons* must comply with the advertising provisions in §§1026.16 and 1026.24, not just those that meet the definition of creditor in §1026.2(a)(17). Thus, home builders, merchants, and others who are not themselves creditors must comply with the advertising provisions of the regulation if they advertise consumer credit transactions. However, under section 145 of the Act, the owner and the personnel of the medium in which an advertisement appears, or through which it is disseminated, are not subject to civil liability for violations.

CHAPTER 4
OTHER ADVERTISING RULES & CONSIDERATIONS

SOCIAL MEDIA: CONSUMER RISK MANAGEMENT GUIDANCE

This is a link: https://www.fdic.gov/news/news/financial/2013/fil13056.html#cont

The FFIEC provided Interagency Guidance on activities that involve social media. Since many banks are using social media, this bulletin is very pertinent. The FDIC issued FIL-56-2013 on December 11, 2013. Here are sections from the attachment.

Social Media: Consumer Compliance Risk Management Guidance
I. Purpose

The Federal Financial Institutions Examination Council (FFIEC), on behalf of its members, is issuing this Guidance. The members are the Office of the Comptroller of the Currency (OCC), Board of Governors of the Federal Reserve (Board), Federal Deposit Insurance Corporation (FDIC), National Credit Union Administration (NCUA), the Consumer Financial Protection Bureau (CFPB) (collectively, the Agencies), and the State Liaison Committee (SLC). The FFIEC is issuing, and the Agencies are adopting, this Guidance to address the applicability of existing federal consumer protection and compliance laws, regulations, and policies to activities conducted via social media by banks, savings associations, and credit unions, as well as by nonbank entities supervised by the CFPB (collectively, financial institutions). Various industry participants expressed a need for guidance in this area. The Agencies and SLC will use this Guidance to the extent consistent with their respective authorities. The Guidance is intended to help financial institutions understand potential consumer compliance and legal risks, as well as related risks, such as reputation and operational risks associated with the use of social media, along with expectations for managing those risks. The Guidance provides considerations that financial institutions may find useful in conducting risk assessments and crafting and evaluating policies and procedures regarding social media. Although this Guidance does not impose any new requirements on financial institutions, as with any process or product channel, financial institutions are expected to manage potential risks associated with social media usage and access.

Financial institutions are using social media as a tool to generate new business and interact with consumers. Social media, as any new communication technology, has the potential to improve market efficiency. Social media may more broadly distribute information to users of financial services and may help users and providers find each other and match products and services to users' needs. To manage potential risks to financial institutions and consumers, however, financial institutions should ensure their risk management programs provide oversight and controls commensurate with the risks presented by the types of social media in which the financial institution is engaged, including, but not limited to, the risks outlined within this Guidance.

II. Background

Social media has been defined in a number of ways. For purposes of this Guidance, social media is considered to be a form of interactive online communication in which users can generate and share content through text, images, audio, and/or video. Social media can take many forms,

including, but not limited to, micro-blogging sites (e.g., Facebook, Google Plus, MySpace, and Twitter); forums, blogs, customer review web sites and bulletin boards (e.g., Yelp); photo and video sites (e.g., Flickr and YouTube); sites that enable professional networking (e.g., LinkedIn); virtual worlds (e.g., Second Life); and social games (e.g., FarmVille and CityVille). Social media can be distinguished from other online media in that the communication tends to be more interactive. For purposes of this Guidance, messages sent via traditional email or text message, standing alone, do not constitute social media, although such communications may be subject to a number of laws and regulations discussed in this Guidance. However, messages sent through social media channels are social media. Social media is a dynamic and constantly evolving technology and thus any definition for this technology is meant to be illustrative and not exhaustive. In addition to the examples of social media mentioned above, other forms of social media may emerge in the future that financial institutions should also consider.

Financial institutions may use social media in a variety of ways including advertising and marketing, providing incentives, facilitating applications for new accounts, inviting feedback from the public, and engaging with existing and potential customers, for example by receiving and responding to complaints, or providing loan pricing. Since this form of customer interaction tends to be both informal and dynamic, and may occur in a less secure environment, it can present some unique challenges to financial institutions.

III. Compliance Risk Management Expectations for Social Media

A financial institution should have a risk management program that allows it to identify, measure, monitor, and control the risks related to social media. The size and complexity of the risk management program should be commensurate with the breadth of the financial institution's involvement in this medium. For instance, a financial institution that relies heavily on social media to attract and acquire new customers should have a more detailed program than one using social media only to a very limited extent. However, in accordance with its own risk assessment, a financial institution that has chosen not to use social media should still consider the potential for negative comments or complaints that may arise within the many social media platforms described above, and, when appropriate, evaluate what, if any, action it will take to monitor for such comments and/or respond to them.

The risk management program should be designed with participation from specialists in compliance, technology, information security, legal, human resources, and marketing. Financial institutions should also provide guidance and training for employee official use of social media. Components of a risk management program should include the following:

- A governance structure with clear roles and responsibilities whereby the board of directors or senior management direct how using social media contributes to the strategic goals of the institution (for example, through increasing brand awareness, product advertising, or researching new customer bases) and establishes controls and ongoing assessment of risk in social media activities;
- Policies and procedures (either stand-alone or incorporated into other policies and procedures) regarding the use and monitoring of social media and compliance with all applicable consumer protection laws and regulations, and incorporation of guidance as

appropriate. Further, policies and procedures should incorporate methodologies to address risks from online postings, edits, replies, and retention;

- A risk management process for selecting and managing third-party relationships in connection with social media;
- An employee training program that incorporates the institution's policies and procedures for official, work-related use of social media, and potentially for other uses of social media, including defining impermissible activities;
- An oversight process for monitoring information posted to proprietary social media sites administered by the financial institution or a contracted third party;
- Audit and compliance functions to ensure ongoing compliance with internal policies and all applicable laws and regulations, and incorporation of guidance as appropriate; and
- Parameters for providing appropriate reporting to the financial institution's board of directors or senior management that enable periodic evaluation of the effectiveness of the social media program and whether the program is achieving its stated objectives.

IV. Risk Areas

The use of social media to attract and interact with customers can impact a financial institution's risk profile, including risk of harm to consumers, compliance and legal risks, operational risks, and reputation risks. Increased risk can arise from poor due diligence, oversight, or control on the part of the financial institution. As noted previously, this Guidance is meant to help financial institutions identify potential risks to ensure institutions are aware of their responsibilities to address risks within their overall risk management program.

Compliance and Legal Risks

Compliance and legal risk arise from the potential for violations of, or nonconformance with, laws, rules, regulations, prescribed practices, internal policies and procedures, or ethical standards. These risks also arise in situations in which the financial institution's policies and procedures governing certain products or activities may not have kept pace with changes in the marketplace. This is particularly pertinent to an emerging medium like social media. Further, the potential for defamation or libel risk exists where there is broad distribution of information exchanges. Failure to adequately address these risks can expose an institution to enforcement actions and/or civil lawsuits. The laws and regulations discussed in this Guidance do not contain exceptions regarding the use of social media. Therefore, to the extent that a financial institution uses social media to engage in lending, deposit services, or payment activities, it must comply with applicable laws and regulations as when it engages in these activities through other media. Financial institutions should remain aware of developments involving such laws and regulations.

The following laws and regulations may be relevant to a financial institution's social media activities. This list is not all-inclusive. Each financial institution should ensure that it periodically evaluates and controls its use of social media to ensure compliance with all applicable federal, state, and local laws and regulations, and incorporation of guidance, as appropriate.

Deposit and Lending Products

Social media may be used to market products and originate new accounts. When used to do either, a financial institution is expected to take steps to ensure that advertising, account origination, and document retention are performed in compliance with applicable consumer protection and compliance laws and regulations. These measures may include, but are not limited to:

Truth in Savings Act/Regulation DD and Part 707.[1] The Truth in Savings Act (TISA), as implemented by Regulation DD, and, for credit unions, by Part 707 of the NCUA Rules and Regulations, imposes disclosure requirements designed to enable consumers to make informed decisions about deposit accounts. Regulation DD and Part 707 require disclosures about fees, annual percentage yield (APY), interest rate, and other terms. Under Regulation DD and Part 707, a depository institution may not advertise deposit accounts in a way that is misleading or inaccurate or misrepresents the depository institution's deposit contract.

- If an electronic advertisement displays a triggering term, such as "bonus" or "APY," then Regulation DD and Part 707 require the advertisement to clearly state certain information, such as the minimum balance required to obtain the advertised APY or bonus. For example, an electronic advertisement can provide the required information via a link that directly takes the consumer to the additional information.

Fair Lending Laws: Equal Credit Opportunity Act/Regulation B[2] and Fair Housing Act.[3] A financial institution should ensure that its use of social media does not violate fair lending laws and regulations.

- The Equal Credit Opportunity Act, as implemented by Regulation B, prohibits creditors from making any oral or written statement, in advertising or other marketing techniques, to applicants or prospective applicants that would discourage on a prohibited basis a reasonable person from making or pursuing an application. However, a creditor may affirmatively solicit or encourage members of traditionally disadvantaged groups to apply for credit, especially groups that might not normally seek credit from that creditor.[4]
- Creditors must observe the time frames outlined under Regulation B for notifying applicants of the outcome of their applications or requesting additional information for incomplete applications, whether those applications are received via social media or through other channels.
- As with all prescreened solicitations, a creditor must preserve prescreened solicitations disseminated through social media, as well as the prescreening criteria, in accordance with Regulation B.[5]
- When denying credit, a creditor must provide an adverse action notice detailing the specific reasons for the decision or notifying the applicant of his or her right to request the specific reasons for the decision.[6] This requirement applies whether the information used to deny credit comes from social media or other sources.
- It is also important to note that creditors may not, with limited exceptions, request certain information, such as information about an applicant's race, color, religion, national origin, or sex. Since social media platforms may collect such information about

participants in various ways, a creditor should ensure that it is not requesting, collecting, or otherwise using such information in violation of applicable fair lending laws. Particularly if the social media platform is maintained by a third party that may request or require users to provide personal information such as age and/or sex or use data mining technology to obtain such information from social media sites, the creditor should ensure that it does not itself improperly request, collect, or use such information or give the appearance of doing so.

- The Fair Housing Act (FHA), among other things, prohibits discrimination based on race, color, national origin, religion, sex, familial status, or handicap in the sale and rental of housing, in mortgage lending, and in appraisals of residential real property. In addition, the FHA makes it unlawful to advertise or make any statement that indicates a limitation or preference based on race, color, national origin, religion, sex, familial status, or handicap. This prohibition applies to all advertising media, including social media sites. For example, if a financial institution engages in residential mortgage lending and maintains a presence on Facebook, the Equal Housing Opportunity logo must be displayed on its Facebook page, as applicable.[7]

Truth in Lending Act/Regulation Z.[8] Any social media communication in which a creditor advertises credit products must comply with Regulation Z's advertising provisions. Regulation Z broadly defines advertisements as any commercial messages that promote consumer credit, and the official commentary to Regulation Z states that the regulation's advertising rules apply to advertisements delivered electronically. In addition, Regulation Z is designed to promote the informed use of consumer credit by requiring disclosures about loan terms and costs. The disclosure requirements vary based on whether the credit is open-end or closed-end. Further, within those two broad categories, additional specific requirements apply to certain types of loans such as private education loans, home secured loans, and credit card accounts.

- Regulation Z requires that advertisements relating to credit present certain information in a clear and conspicuous manner. It includes requirements regarding the proper disclosure of the annual percentage rate and other loan features. If an advertisement for credit states specific credit terms, it must state only those terms that actually are or will be arranged or offered by the creditor.
- For electronic advertisements, such as those delivered via social media, Regulation Z permits providing the required information on a table or schedule that is located on a different page from the main advertisement if that table or schedule is clear and conspicuous and the advertisement clearly refers to the page or location.
- Regulation Z requires that, for consumer loan applications taken electronically the financial institution must provide the consumer with all Regulation Z disclosures within the required time frames. Regulation Z does not exempt applications taken via social media.

Real Estate Settlement Procedures Act. Section 8 of the Real Estate Settlement Procedures Act[9](RESPA) prohibits certain activities in connection with federally related mortgage loans. These prohibitions include fee splitting, as well as giving or accepting a fee, kickback, or thing of value in exchange for referrals of settlement service business. RESPA also has specific timing

requirements for certain disclosures. These requirements apply to applications taken electronically, including via social media.

Fair Debt Collection Practices Act.[10] The Fair Debt Collection Practices Act (FDCPA) restricts how debt collectors (generally defined as third parties collecting others' debts and entities collecting debts on their own behalf if they use a different name) may collect debts. The FDCPA generally prohibits debt collectors from publicly disclosing that a consumer owes a debt. Using social media to inappropriately contact consumers, or their families and friends, may violate the restrictions on contacting consumers imposed by the FDCPA. Communicating via social media in a manner that discloses the existence of a debt or to harass or embarrass consumers about their debts (e.g., a debt collector writing about a debt on a Facebook wall) or making false or misleading representations may violate the FDCPA.

Unfair, Deceptive, or Abusive Acts or Practices. Section 5 of the Federal Trade Commission (FTC) Act[11] prohibits "unfair or deceptive acts or practices in or affecting commerce." Sections 1031 and 1036 of the Dodd-Frank Wall Street Reform and Consumer Protection Act[12] prohibit unfair, deceptive, or abusive acts or practices. An act or practice can be unfair, deceptive, or abusive despite technical compliance with other laws. A financial institution should not engage in any advertising or other practice via social media that could be deemed "unfair," "deceptive," or "abusive." Of course, any determination as to whether an act or practice engaged through social media is unfair, deceptive, or abusive, will necessarily be fact-specific. As with other forms of communication, a financial institution should ensure that information it communicates on social media sites is accurate, consistent with other information delivered through electronic media, and not misleading.[13]

Deposit Insurance or Share Insurance. A number of requirements regarding FDIC or NCUA membership and deposit insurance or share insurance apply equally to advertising and other activities conducted via social media as they do in other contexts.

- *Advertising and Notice of FDIC Membership*.[14] Whenever a depository institution advertises FDIC-insured products, regardless of delivery channel, the institution must include the official advertising statement of FDIC membership, usually worded, "Member FDIC." An advertisement is defined as "a commercial message, in any medium, that is designed to attract public attention or patronage to a product or business." The official advertisement statement must appear, even in a message that "promotes nonspecific banking products and services, if it includes the name of the insured depository institution but does not list or describe particular products or services." Conversely, the advertising statement is *not permitted* if the advertisement relates solely to nondeposit products or hybrid products (products with both deposit and nondeposit features, such as sweep accounts).
- *Advertising and Notice of NCUA Share Insurance*.[15] Each insured credit union must include the official advertising statement of NCUA membership, usually worded, "Federally insured by NCUA" in advertisements regardless of delivery channel, unless specifically exempted. An advertisement is defined as "a commercial message, in any medium, that is designed to attract public attention or patronage to a product or business." The official advertising statement must be in a size and print that is clearly legible and

may be no smaller than the smallest font size used in other portions of the advertisement intended to convey information to the consumer. If the official sign is used as the official advertising statement, an insured credit union may alter the font size to ensure its legibility. Each insured credit union must display the official NCUA sign on its Internet page, if any, where it accepts deposits or opens accounts.

- *Non deposit Investment Products*. As described in the "Interagency Statement on Retail Sales of Non deposit Investment Products,"[16] when a depository institution recommends or sells non deposit investment products to retail customers, it should ensure that customers are fully informed that the products are not insured by the FDIC or NCUA; are not deposits or other obligations of the institution and are not guaranteed by the institution; and are subject to investment risks, including possible loss of the principal invested.

Payment Systems

If social media is used to facilitate a consumer's use of payment systems, a financial institution should keep in mind the laws, regulations, and industry rules regarding payments that may apply, including those providing disclosure and other rights to consumers. Under existing law, no *additional* disclosure requirements apply simply because social media is involved (for instance, providing a portal through which consumers access their accounts at a financial institution). Rather, the financial institution should continue to be aware of the existing laws, regulations, guidance, and industry rules that apply to payment systems and evaluate which will apply. These may include the following:

Electronic Fund Transfer Act/Regulation E.[17] The Electronic Fund Transfer Act (EFTA) and its implementing Regulation E provide specific protections, including required disclosures and error resolution procedures, to individual consumers who engage in "electronic fund transfers" and "remittance transfers."

Rules Applicable to Check Transactions. When a payment occurs via a check-based transaction rather than an EFT, the transaction will be governed by applicable industry rules[18] and/or Article 4[19] of the Uniform Commercial Code of the relevant state, as well as the Expedited Funds Availability Act, as implemented by Regulation CC[20] (regarding the availability of funds and collection of checks).

Bank Secrecy Act/Anti-Money Laundering Programs (BSA/AML)

As required by the Bank Secrecy Act (BSA)[21] and applicable regulations,[22] depository institutions and certain other entities must have a compliance program that incorporates training from operational staff to the board of directors. Among other elements, the compliance program must include appropriate internal controls to ensure effective risk management and compliance with recordkeeping and reporting requirements under the BSA. Internal controls are the financial institution's policies, procedures, and processes designed to limit and control risks and to achieve compliance with the BSA. The level of sophistication of the internal controls should be commensurate with the size, structure, risks, and complexity of the financial institution. At a minimum, internal controls include but are not limited to: implementing an effective customer

identification program; implementing risk-based customer due diligence policies, procedures, and processes; understanding expected customer activity; monitoring for unusual or suspicious transactions; and maintaining records of electronic funds transfers. An institution's BSA/AML program must provide for the following minimum components: a system of internal controls to ensure ongoing compliance; independent testing of BSA/AML compliance, a designated BSA compliance officer responsible for managing compliance, and training for appropriate personnel. These controls should apply to all customers, products and services, including customers engaging in electronic banking (e-banking) through the use of social media, and e-banking products and services offered in the context of social media.

Financial institutions should also be aware of emerging areas of BSA/AML risk in the virtual world. For example, illicit actors are increasingly using Internet games involving virtual economies, allowing gamers to cash out, as a way to launder money. Virtual world Internet games and digital currencies present a higher risk for money laundering and terrorist financing and should be monitored accordingly.

Community Reinvestment Act [23]

Under the regulations implementing the Community Reinvestment Act (CRA), a depository institution subject to the CRA must maintain a public file that includes, among other items, all written comments received from the public for the current year and each of the prior two calendar years that specifically relate to the institution's performance in helping to meet community credit needs. The institution must also include any response to those comments, as long as neither the comments nor the responses reflect adversely on the good name or reputation of any persons other than the institution, or publication of which would violate specific provisions of law. A depository institution subject to the CRA should ensure that its policies and procedures addressing public comments take into account such comments when they are received through social media sites run by or on behalf of the institution. However, under the CRA, comments about the institution made on the Internet through sites that are not run by or on behalf of the institution are not necessarily deemed to have been received by the depository institution and would not be required to be retained. Rather, the institution should retain comments made on sites run by or on behalf of the institution that specifically relate to the institution's performance in helping to meet community credit needs.

Privacy

Privacy rules have particular relevance to social media when, for instance, a financial institution collects, or otherwise has access to, information from or about consumers. A financial institution should take into consideration the following laws and regulations regarding the privacy of consumer information:

Gramm-Leach-Bliley Act Privacy Rules and Data Security Guidelines.[24] Title V of the Gramm-Leach-Bliley Act (GLBA) establishes requirements relating to the privacy and security of consumer information. Whenever a financial institution collects, or otherwise has access to, information from or about consumers, it should evaluate whether these rules will apply. The rules have particular relevance to social media when, for instance, a financial institution

integrates social media components into customers' online account experience or takes applications via social media portals.

- A financial institution using social media should clearly disclose its privacy policies as required under GLBA.
- Even when there is no "consumer" or "customer" relationship triggering GLBA requirements, a financial institution will likely face reputation risk if it appears to be treating any consumer information carelessly or if it appears to be less than transparent regarding the privacy policies that apply on one or more social media sites that the financial institution uses.

CAN-SPAM Act[25] and Telephone Consumer Protection Act.[26] The Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (CAN-SPAM Act) and Telephone Consumer Protection Act (TCPA) may be relevant if a financial institution sends unsolicited communications to consumers via social media. The CAN-SPAM Act and TCPA, and their implementing rules,[27] establish requirements for sending unsolicited commercial messages ("spam") and unsolicited communications by telephone or short message service (SMS) text message, respectively. Financial institutions should be familiar with the provisions of the CAN-SPAM Act and TCPA to evaluate whether social media activities trigger the application of either or both laws.

Children's Online Privacy Protection Act.[28] The Children's Online Privacy Protection Act (COPPA) and the Federal Trade Commission's implementing regulation[29] impose obligations on operators of commercial websites and online services directed to children younger than 13 that collect, use, or disclose personal information from children, as well as on operators of general audience websites or online services with actual knowledge that they are collecting, using, or disclosing personal information from children under 13. A financial institution should evaluate whether it, through its social media activities, could be covered by COPPA.

- Certain social media platforms require users to attest that they are at least 13, and a financial institution using those sites may consider relying on such policies. However, the financial institution should still take care to monitor whether it is actually collecting any personal information of a person under 13, such as when a child under 13 manages to post such information on the financial institution's site.
- A financial institution maintaining its *own* social media site (such as a virtual world) should be especially careful to establish, post, and follow policies restricting access to the site to users 13 or older, especially when those sites could attract children under 13. This may be true, for instance, in the case of virtual worlds and any other features that resemble video games.

Fair Credit Reporting Act.[30] The Fair Credit Reporting Act (FCRA) and its implementing regulations[31] contain restrictions and requirements concerning making solicitations using eligibility information, responding to direct disputes, and collecting medical information in connection with loan eligibility. The FCRA applies when social media is used for these activities.

Reputation Risk

Reputation risk is the risk arising from negative public opinion. Activities that result in dissatisfied consumers and/or negative publicity could harm the reputation and standing of the financial institution, even if the financial institution has not violated any law. Privacy and transparency issues, as well as other consumer protection concerns, arise in social media environments. Therefore, a financial institution engaged in social media activities is expected to be sensitive to, and properly manage, the reputation risks that arise from those activities. Reputation risk can arise in areas including the following:

Fraud and Brand Identity

Financial institutions should be aware that protecting their brand identity in a social media context can be challenging. Risk may arise in many ways, such as through comments made by social media users, spoofs of institution communications, and activities in which fraudsters masquerade as the institution. Financial institutions should consider the use of social media monitoring tools and techniques to identify heightened risk, and respond appropriately. Financial institutions should have appropriate policies in place to monitor and address in a timely manner the fraudulent use of the financial institution's brand, such as through phishing or spoofing attacks.

Third Party Concerns [32]

Working with third parties to provide social media services can expose financial institutions to substantial reputation risk. A financial institution should regularly monitor the information it places on social media sites. This monitoring is the direct responsibility of the financial institution, as part of a sound compliance management system, even when such functions may be delegated to third parties. Even if a social media site is owned and maintained by a third party, consumers using the financial institution's part of that site may blame the financial institution for problems that occur on that site, such as uses of their personal information they did not expect or changes to policies that are unclear. The financial institution's ability to control content on a site owned or administered by a third party and to change policies regarding information provided through the site may vary depending on the particular site and the contractual arrangement with the third party. A financial institution should thus weigh these issues against the benefits of using a third party to conduct social media activities. A financial institution should conduct an evaluation and perform due diligence appropriate to the risks posed by the prospective service provider prior to engaging with the provider. To understand the risks that may arise from a relationship with a given third party, the institution should be aware of matters such as the third party's reputation in the marketplace; the third party's policies, including policies on collection and handling of consumer information, including the information of the institution's customers; the process and frequency by which the third party's policies may change; and what, if any, control the institution may have over the third party's policies or actions.

Privacy Concerns

Even when a financial institution complies with applicable privacy laws in its social media activities, it should consider the potential reaction by the public to any use of consumer information via social media. The financial institution should have procedures to address risks from occurrences such as members of the public posting confidential or sensitive information – for example, account numbers – on the financial institution's social media page or site.

Consumer Complaints and Inquiries

Although a financial institution can take advantage of the public nature of social media to address customer complaints and questions, reputation risks exist when the financial institution does not address consumer questions or complaints in a timely or appropriate manner. Further, the participatory nature of social media can expose a financial institution to reputation risks that may arise when users post critical or inaccurate statements. Compliance risk can also arise when a customer uses social media to communicate issues or concerns directly with a financial institution, such as an error dispute under Regulation E, a billing error under Regulation Z, or a direct dispute about information furnished to a consumer reporting agency under FCRA and its implementing regulations. This Guidance does not require financial institutions to monitor and respond to all Internet communications; however, a financial institution is expected to take into account the results of its own risk assessments in determining the appropriate approach to take regarding monitoring of, and responding to, such communications. Appropriate steps may include, for example, establishing one or more specific channels consumers must use when submitting complaints or disputes directly to the institution for further investigation, to the extent consistent with other applicable legal requirements. However, the institution should also consider the risks, particularly the reputation risk, inherent in not responding to complaints and disputes received through other channels and tailor its policies and procedures accordingly, in a manner appropriate to the institution's size and risk profile. Based on its own risk assessment processes, a financial institution should also consider whether and how to respond to communications disparaging the financial institution on other parties' social media sites. One approach to managing these risks would be to monitor question and complaint forums on social media sites to ensure that such inquiries, complaints, or comments are reviewed, and when appropriate, addressed in a timely manner.

Employee Use of Social Media Sites

Financial institutions should be aware that employees' communications via social media may be viewed by the public as reflecting the financial institution's official policies or may otherwise reflect poorly on the financial institution, depending on the form and content of the communications. Employee communications can also subject the financial institution to compliance risk, operational risk as well as reputation risk. Therefore, as appropriate, financial institutions should take steps to address these risks, such as establishing policies and training to address employee participation in social media representing the financial institution. For example, if an employee is communicating with a customer regarding a loan product through an approved social media channel, policies should include steps to ensure the customer is receiving all of the required disclosures. This Guidance does not address any employment law principles

that may be relevant to employee use of social media. In addition, the Guidance is not intended to impose any specific requirements for policies or procedures regarding employee personal use of social media. Each financial institution should evaluate the risks for itself and determine appropriate policies to adopt in light of those risks.

Operational Risk

Operational risk is the risk of loss resulting from inadequate or failed processes, people, or systems. The root cause can be either internal or external events.[33] Operational risk includes the risks posed by a financial institution's use of information technology (IT), which encompasses social media.

The identification, monitoring, and management of IT-related risks are addressed in the *FFIEC Information Technology Examination Handbook*,[34] as well as other supervisory guidance issued by the FFIEC or individual agencies.[35] A financial institution should pay particular attention to the booklets "Outsourcing Technology Services"[36] and "Information Security"[37] when using social media, and include social media in existing risk assessment and management programs.

Social media is one of several platforms vulnerable to account takeover and the distribution of malware. A financial institution should ensure that the controls it implements to protect its systems and safeguard customer information from malicious software adequately address social media usage. Financial institutions' incident response protocol regarding a security event, such as a data breach or account takeover, should include social media, as appropriate.

Conclusion

As noted previously, this Guidance is intended to help financial institutions understand and successfully manage the risks associated with use of social media. Financial institutions are using social media as a tool to generate new business and provide a dynamic environment to interact with consumers. As with any product channel, financial institutions are expected to manage potential risks to the financial institution and consumers by ensuring that their risk management programs provide appropriate oversight and control to address the risk areas discussed within this Guidance.

LOTTERIES

- ✓ Banks are prohibited from holding or participating in "lotteries"
  - .A "lottery" is where 3 or more people give money or credit for the possibility that one or more of them (but not all of them) will get more than they contributed
    - .The winner may be determined by any random selection, game, race, contest, etc.
- ✓ The key is "giving money or credit" to get in
  - If there is no purchase required to qualify the contest, drawing, etc., then it is not a "lottery" under the statute and it's permitted

MORE RULES:

- ✓ Financial institutions cannot deal in lottery tickets for others
- ✓ Advertise or publicize another's lottery or its winners
- ✓ Allow use of its premises by others for a lottery purpose

FTC - FREE CREDIT REPORTS, TESTIMONIALS, DO NOT CALL RULES

FREE CREDIT REPORT ISSUES

- ✓ FTC Free Credit Reports Rule requires prominent disclosures in advertisements for "free credit reports"
  - .Ads offering free credit reports must include a disclosure, across the top of each page that mentions free credit reports, which states:

THIS NOTICE IS REQUIRED BY LAW. Read more at FTC.GOV. You have the right to a free credit report from AnnualCreditReport.com or 877-322-8228, the ONLY authorized source under federal law.

- ✓ .Website disclosure must include a clickable button to "Take me to the authorized source" and clickable links to AnnualCreditReport.com and FTC.GOV

TESTIMONIALS

- ✓ FTC's Guides Concerning the Use and Endorsements and Testimonials in Advertising covers:
  - ."Any advertising message…that consumers are likely to believe reflects the opinions, beliefs, findings, or experiences of a party other than the sponsoring advertiser, even if the views expressed by that party are identical to those of the sponsoring advertiser"

- ✓ .Standards to be met:
  - ."Material connections" must be disclosed
  - .Testimonials must be truthful
  - .Expert endorsers must actually be qualified
  - .False or misleading claims = UDAP

DO _NOT CALL RULES

- ✓ .There are 3 aspects to this: FTC Do-Not-Call rules, company-specific rules, and state laws
- ✓ .FTC Do-Not-Call rules (from the Telephone Consumer Protection Act, or TCPA)
  - After a personal phone number (including cell phone numbers) is registered with FTC, you cannot call that number for solicitations unless it is covered by an exception
    - Companies with a present relationship are exempt for 18 months since last transaction with it (3 months if an inquiry or application has been made)
    - If the consumer has expressly consented to calls

- Numbers remain on the list indefinitely
- .You must check the list every 3 months for additions and changes

✓ Company-specific rules

- .If a consumer specifically asks the company not to call anymore, no solicitation calls may then be made
- •Keep your own Do-Not-Call list in addition to checking the FTC's list

✓ .State Do-Not-Call rules

- .Most are similar to FTC's, but be sure to check

✓ .FTC has called for comments on possible changes to the caller ID provisions of the Telemarketing Sales Rule (TSR) that was released in August, 2008.

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TELEPHONE CONSUMER PROTECTION ACT – TCPA

What is regulated under the TCPA?

The Telephone Consumer Protection Act (TCPA) regulates telemarketing calls, auto-dialed calls, prerecorded calls, text messages, and unsolicited faxes. It also is the authority to create the National Do-Not-Call List. The Federal Communications Commission ("FCC") is empowered to issue rules and regulations implementing the TCPA.

What are the TCPA's restrictions on collection calls under FCC rules?

The FCC has determined that debt collection calls are not telemarketing calls. Therefore, under the rule the FCC has stated that with respect to autodialed or prerecorded debt collection calls, to the extent that they do not contain telemarketing messages, would not require any consent when made to residential wireline consumers, but require either prior written or oral consent if made to a consumer's wireless number referring to 47 C.F.R. § 64.1200(a)(1).

On February 15, 2012, the Federal Communications Commission (FCC) issued a Report and Order (Order) that updates and clarifies certain provisions of the TCPA. Remaining in effect is the FCC's earlier ruling that autodialed or prerecorded collection calls to wireless numbers are made with the consumer's "prior express consent" if the consumer has given the cell phone number to the creditor for use in normal business communications, such as in a credit application.

The FCC also provided in the Order a non-exhaustive list of other types of calls that are exempt from the written consent requirement reserved for telemarketing calls, such as research and survey calls and bank account fraud alerts to the extent they do not contain telemarketing messages as well.

What are the TCPA's restrictions on telemarketing and advertisements under FCC rules?

The FCC rules that govern the delivery methods telemarketing and advertisements. *Telemarketing* means the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person.

Beginning October 16, 2013, prior express written consent was required for all autodialed calls, pre-recorded calls or texts sent or made to a wireless number and pre-recorded calls made to wired numbers for advertising or telemarketing purposes. The prior business relationship exemption was eliminated.

Exceptions include calls:

- that are manually dialed and do not contain a pre-recorded message;
- made for emergency purposes;
- not made for a commercial purpose;

- made for a commercial purpose but does not include or introduce an advertisement or constitute telemarketing;
- made by or on behalf of a tax-exempt nonprofit organization; or
- that delivers a “health care” message made by, or on behalf of, a “covered entity” or its “business associate,” as those terms are defined in the HIPAA Privacy Rule.

Some other important restrictions under the TCPA include:

- Disconnect an unanswered telemarketing call prior to at least 15 seconds or four (4) rings.
- Abandon more than 3% of all telemarketing calls that are answered live by a person, as measured over a 30-day period for a single calling campaign. If a single calling campaign exceeds a 30-day period, the abandonment rate shall be calculated separately for each successive 30-day period or portion thereof.

Additional requirements for all artificial or prerecorded voice telephone messages include:

- At the beginning of the message, it must state clearly the identity of the business, individual, or other entity that is responsible for initiating the call.
- During or after the message, state clearly the telephone number (other than that of the auto-dialer or prerecorded message player that placed the call) of such business, other entity, or individual. The telephone number provided may not be a number for which charges exceed local or long distance charges.
- Provide an automated, interactive voice- and/or key press-activated opt-out mechanism for the called person to make a do-not-call request

And finally, no person or entity may initiate any telephone solicitation to:

- Any residential telephone subscriber before the hour of 8 a.m. or after 9 p.m. (called party's local time)
- A residential telephone number on the national do-not-call registry

What if a wired number is ported to a wireless number?

The FCC rule allows a conditional 15 day grace period for calls made to numbers which have been ported from wired lines to wireless where the consumer may be charged for the call. A person will not be liable for violating the prohibition when the call is placed to a wireless number that has been ported from wireline service and such call is a voice call; not knowingly made to a wireless number; and made within 15 days of the porting of the number from wireline to wireless service, provided the number is not already on the national do-not-call registry or caller’s company-specific do not-call list.

What if a number is added to the National Do Not Call Registry?

The FCC rule allows a person to employ a version of the national do-not-call registry obtained from the administrator of the registry no more than 31 days prior to the date any call is made, as

long as the person conducts internal training, and has written procedures and records documenting this process.

What is the compliance risk?

The TCPA allows individuals to file lawsuits and collect damages. There are cases, especially in the collections area, that are in conflict in the federal courts. For example, a court in Pennsylvania found that it was the intent of Congress that only telemarketing, not debt collection calls, be covered by the TCPA. Another court in Florida ruled that providing a cell phone number on a credit application was not sufficient prior consent to contact the number for debt collection. While yet another stated that just the "capacity of a "predictive dialer" was sufficient, even if it was not used (preview dialing was used).

CAN-SPAM ACT, JUNK FAX PREVENTION, AND COPPA

Controlling the Assault of Non-Solicited Pornography And Marketing Act of 2003 (CAN-SPAM)

- ✓ This applies to banks that send out electronic messages to either customers or prospective customers to sell your products or services
  - •These are "commercial electronic mail messages," whose primary purpose is to sell product or service
  - •"Transactional or relationship messages" are exempt – these facilitate, complete, or confirm a transaction the customer has requested, or contains needed information regarding such a transaction; they can also deal with an account or relationship with the customer

- ✓ .Unsolicited messages must meet certain standards
  - They cannot contain false or misleading information (including in the header)
  - They must contain a means to reply (a return address) for means of opting out of future messages

Junk Fax Prevention Act - Similar to Do-Not-Call Rules and CAN-SPAM

- ✓ Prevents "unsolicited advertisements" via fax unless there is an established business relationship (EBR)
- ✓ When there is an EBR, the person sending the fax must obtain the fax number directly from the recipient or otherwise ensure that the recipient voluntarily agrees to the make the number available for public distribution
  - •Voluntary agreement that faxes to that number are acceptable
  - •Could appear in a directory for public consumption
- ✓ The send must provide a clear and conspicuous notice and contact information on the first page of the fax
  - •This allows the recipient to opt out of future fax transmissions
  - •Senders must honor opt out requests within 30 days

Online Marketing: COPPA -Children's Online Privacy Protection Act (COPPA);

- ✓ Applies when: web site or online service (games, activities, etc.) directed to children under 13 and collects personal information from children; or
- ✓ .Site is directed to general audiences and have knowledge that site collects personal information from children
- ✓ .Must post "clear and prominent" link to information practices notice on bank's home page and at each place where collecting personal information from children
- ✓ .Larger font size or a different color type on a contrasting background could be used
- ✓ .Notice requirements:
  - Must be clearly written and understandable
  - Include the name, address, telephone number, and email address of the collector
  - Types of information collected and how collected
  - How information is used
  - Whether information is disclosed to third parties

- Procedures where parent can review the child's information, ask to have it deleted and refuse to allow further collection

✓ .Verifiable consent from the child's parent must be obtained before information can be collected, used or disclosed
  - .Reasonable effort must be made to ensure a parent receives the information practices notice and consents to it

The FDIC has several relevant exam procedures in the "PRIVACY AND CONSUMER INFORMATION portion of the exam manual.

Here are the sections:

VIII Privacy and Consumer Information

VIII-1.1	Gramm-Leach-Bliley Act (Privacy of Consumer Financial Information) (377k)	01/2014
VIII-2.1	Children's Online Privacy Protection Act (COPPA)	01/2014
VIII-3.1	Right to Financial Privacy Act	06/2006
VIII-4.1	Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003	01/2014
VIII-5.1	Telephone Consumer Protection Act	01/2014
VIII-6.1	Fair Credit Reporting Act	01/2014