



ADVERTISING RULES FOR FINANCIAL INSTITUTIONS APRIL 2009

Presented by:

Carla Stone Witzel and Marjorie A. Corwin

Gordon, Feinblatt, Rothman, Hoffberger & Hollander, LLC
233 East Redwood Street
Baltimore, MD 21202

410-576-4192 410-576-4041

cwitzel@gflaw.com

mcorwin@gflaw.com

Today's Presentation

- Highlights of General Advertising Rules
 - Unfair or Deceptive Practices
 - Maryland Law
 - Federal Law
 - Truth in Savings
- Truth in Lending Rules
 - Open-End Credit
 - Closed-End Credit



Unfair or Deceptive Acts and Practices

- Advertisement that has a capacity to deceive. Intent is not necessary.
- Examples:
 - Bait and Switch
 - Unavailability of Advertised Goods or Services
 - Use of term “Free”



Maryland Law

Consumer Protection Act

Unfair or deceptive trade practices include an advertisement or offer of consumer goods, consumer realty, or consumer services:

- (i) Without intent to sell, lease, or rent them as advertised or offered; or
- (ii) With intent not to supply reasonably expected public demand, unless the advertisement or offer discloses a limitation of quantity or other qualifying condition.

Maryland Law

- Maryland has a general law prohibiting false advertising.

“A person may not advertise falsely in the conduct of any business, trade, or commerce in the provision of any service.”

- *Advertise falsely* means to use any advertisement which is misleading in a material respect.
- Penalty = \$500 per violation

Maryland Law

Maryland has a law specific to banks that prohibits:

- False, misleading, or deceptive advertising,
- Restricting a customer from obtaining credit, property, or service from a competitor (unless it's a loan customer and the restriction is reasonably necessary),
- Engaging in act that is anticompetitive, unfair, deceptive, or injurious to public.

Penalty = Misdemeanor and \$3,000 fine

Maryland Law

Except for banks authorized to do business in Maryland (and their affiliates), a person may not use any name, title, or other words that represent that the person is authorized to do the business of banking in this State.



Federal Banking Law

Advertisement of Membership in the FDIC

- Each insured depository institution must include the official FDIC advertising statement in all of its advertisements that either promote deposit products and services or promote non-specific banking products and services.

Federal Banking Law

- The official advertising statement must in substance state: “Member of the Federal Deposit Insurance Corporation.”
- Alternatively, the short title “Member FDIC” or a reproduction of the FDIC symbol may be used.
- The official advertising statement must be clearly legible.



Federal Banking Law: Non-Deposit Products

- A bank must 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; or
 - Relating solely to hybrid products.

Federal Banking Law: Non-Deposit Products

- “Non-deposit product” includes insurance products, annuities, mutual funds, and securities.
- “Hybrid product” means a product or service that has both deposit product features and non-deposit product features, such as a sweep account.

Federal Banking Law: Non-Deposit Products

- In advertisements of both insured deposit products and non-deposit products or hybrid products, a bank must clearly segregate the official advertising statement or any similar statement from that portion of the advertisement that relates to the non-deposit products.

Federal Law: Nondiscrimination in Advertising

- Advertising of a loan secured by a dwelling must prominently indicate that the bank makes such loans without regard to race, color, religion, national origin, sex, handicap or familial status.
- In written advertisements, banks may include the Equal Housing Lender logo.
- In oral advertisements, banks should state the bank is either an “equal housing lender” or an “equal opportunity lender.”



Contests and Sweepstakes

- Lotteries
- Contests
- Sweepstakes
- Statutes and rules



Contests and Sweepstakes

Lotteries

- Illegal under Federal banking laws and Maryland laws
- Any promotion containing all three elements of:
 - Prize
 - Chance
 - Consideration

Contests and Sweepstakes

Lotteries

Prize:

- Anything of tangible value – no matter how nominal

Chance:

- Random selection of winners
- Any chance, even when mixed with skill

Contests and Sweepstakes

Lotteries

Consideration depends on State law or Federal law

- Purchase
- Payment
- Substantial expenditure of time or effort (not Maryland)
- Federal Banking Laws – “advance money or credit to another”

Contests and Sweepstakes

Contests

- ❑ Winners selected on basis of skill rather than chance
- ❑ Skill must be bona fide, *e.g.*, based on specific objective criteria
- ❑ Consideration can be required, except in a few States

Contests and Sweepstakes

Sweepstakes

- ❑ Winners determined by chance
- ❑ Consideration must be “eliminated”

Contests and Sweepstakes

Sweepstakes

Consideration

- Purchase of product or service
- Payment of money
- Submitting to a sales presentation

Contests and Sweepstakes

Sweepstakes

Alternate Method of Entry

- Must be a free mechanism
- Must have equal dignity with purchase or payment method of entry
- Must be clearly and conspicuously disclosed
 - Disclose “no purchase necessary” in all advertising
 - Clear instructions on how to enter free

Contests and Sweepstakes

- State law
- U.S. Postal Rules



Truth in Savings Advertising Rules



Truth in Savings Advertising Rules

- An advertisement is a commercial message, in any medium, that directly or indirectly promotes the availability of, or a deposit in, an account.
- The definition includes telephone solicitations by a financial institution, messages on an ATM screen or printout, newspaper, TV, and radio solicitations, and statement stuffers.

Truth in Savings Advertising Rules

- Basic TISA rule: advertisements cannot be inaccurate or misleading or misrepresent an institution's deposit contract.



Truth in Savings Advertising Rules

- There is one basic trigger term: the statement of a rate of return.
- If any rate of return is stated, it must be the “annual percentage yield” for advertised accounts. The abbreviation “APY” may be used provided the term “annual percentage yield” is used at least once in full.

Truth in Savings Advertising Rules

- There are special rules for broadcast or electronic media, outdoor media (e.g., billboards) or telephone response machines.



TISA: Overdraft Promotions

- There are additional disclosures for institutions that promote the payment of overdrafts in advertisements.
 - If bank promotes payment of overdrafts in an advertisement, must make certain separate disclosures on periodic statements.
 - On January 1, 2010, disclosures must be provided on periodic statements with or without promotion.

TISA: Overdraft Promotions

- Overdraft promotions that do not trigger periodic statement disclosures:
 - ✓ Advertising overdraft credit under Regulation Z;
 - ✓ Communicating (in any media) in response to a consumer initiated inquiry but not in response to a balance inquiry made through an automated system (e.g., telephone response machine, ATM, or Internet web site);
 - ✓ Engaging in in-person discussion;
 - ✓ Making required disclosures;

TISA: Overdraft Promotions

- ✓ Providing notice or information on periodic statement regarding overdraft;
- ✓ Including right to pay overdrafts in a deposit account agreement;
- ✓ Providing notice to consumer that completing transaction may trigger overdraft;
- ✓ Providing informational material concerning overdrafts, provided institution's overdraft service isn't discussed;
- ✓ An opt-in or opt-out notice for overdraft services (*January 1, 2010*).

TISA: Overdraft Promotions

- Advertisement promoting overdraft service must disclose in a *clear and conspicuous* manner:
 - Fee for payment of overdraft
 - Categories of transactions for which fee payable (except for ATM screens or telephone response machines)
 - Time period by which consumer must pay overdraft
 - Circumstances under which institution will not pay overdraft (except for ATM screens or telephone response machines)

TISA: Overdraft Promotions

- Some communications are exempt from additional disclosure requirement regarding payment of overdrafts.

TRUTH IN LENDING ACT AND REGULATION Z ADVERTISING RULES



Regulation Z Advertising Rules

- Existing Rules
- New Rules (effective October 1, 2009)
- Even “Newer” Rules (effective July 1, 2010)



General Rules: All Credit Subject to TILA

- “Advertisement” is defined in Regulation Z as a commercial message that promotes, directly or indirectly, a credit transaction.
- A creditor only may advertise terms it is actually prepared to offer.

General Rules: All Credit Subject to TILA

- Advertisements generally are subject to a *clear and conspicuous* standard.
- For some disclosures, Regulation Z now defines what is needed to be *clear and conspicuous*.

General Rules: All Credit Subject to TILA

- For some disclosures, *clear and conspicuous* requires:
 - ✓ *Close proximity* – immediately next to or directly above or below (not in a footnote)
 - ✓ *Equally prominent* – same type size

General Rules Applicable to All Open-End Credit Subject to the Truth in Lending Act



General Rules: All Open-End Credit Subject to TILA

- If “trigger terms” are advertised, explicitly or implicitly, also must *clearly and conspicuously* disclose:

General Rules: All Open-End Credit Subject to TILA

- If “trigger terms” are advertised, explicitly or implicitly, also must *clearly and conspicuously* disclose:
 - Minimum, fixed, transaction, activity or similar charge
 - APR
 - If plan is variable rate, this fact must be disclosed
 - Discounted variable rate
 - Membership or participation fee

Home Equity Line Rules

- These rules for HELOCs are **in addition to** the general rules applicable to all open-end credit.

Home Equity Line Rules

- “HELOC trigger terms” are:
 - ✓ Finance charge
 - ✓ Late payment charges
 - ✓ Charges imposed in connection with real estate transactions
 - ✓ Payment terms of the plan

Home Equity Line Rules

- Negative as well as positive statements will be “HELOC trigger terms.”
- Examples:
 - “No Annual Fees”
 - “No Points”
 - “No Closing Costs”

Home Equity Line Rules

- If “HELOC trigger terms” are advertised, explicitly or implicitly, also must *clearly and conspicuously* disclose:
 - ▶ Any loan fee
 - ▶ Estimate of any other fees imposed
 - ▶ **APR***
 - ▶ Maximum APR that may be imposed.
 - ▶ That APR may vary

Home Equity Line Rules

▶ APR*

If an advertisement states an initial rate not based on the index and margin used to make later rate adjustments, the advertised APR must include the initial rate, and with *equal prominence* and in *close proximity* to the initial rate, a statement of how long it will remain in effect, and a reasonably current indexed rate.

Home Equity Line Rules

If advertisement contains statement of amount of any minimum periodic payment and a balloon payment may result if only minimum payments are made, advertisement also must state with *equal prominence* and in *close proximity* to the minimum payment that a balloon payment may result and the amount and timing of the balloon payment.

Home Equity Line Rules

Advertisement referring to the deductibility of interest must not be misleading.



Home Equity Line Rules

If paper or Internet advertisement is for a plan secured by **consumer's principal dwelling**, and *states* (not just implies) that credit may exceed fair market value of the home, advertisement must state *clearly and conspicuously* that interest on portion of credit that is greater than fair market value of home is not tax deductible for income tax purposes and consumer should consult tax advisor regarding deductibility of interest and charges.

Home Equity Line Rules

Promotional Rates and Promotional Payments



Home Equity Line Rules

Promotional Rates

A promotional rate in a variable rate plan means any APR not based on and less than a reasonably current APR derived from the index and margin that will be used to make rate adjustments.



Home Equity Line Rules

Promotional Rate “Safe Harbors” for Current Index and Margin

- ✓ For direct mail, in effect within 60 days before mailing
- ✓ For electronic, in effect within 30 days before ad is sent to consumer’s e-mail address, or if ad made on Internet, when viewed by the public
- ✓ For printed ad available to general public, including catalog, magazine, or other generally available publication, in effect within 30 days before printing

Home Equity Line Rules

Promotional Payments

- ✓ In a fixed rate plan, is less than other payments required under the plan.
- ✓ In a variable rate plan, is any minimum payment for a promotional period that is not derived by applying index and margin to outstanding balance when index and margin will be used to determine other minimum payments under the plan (and is less than a minimum payment that would be derived by applying a reasonably current index and margin).

Home Equity Line Rules

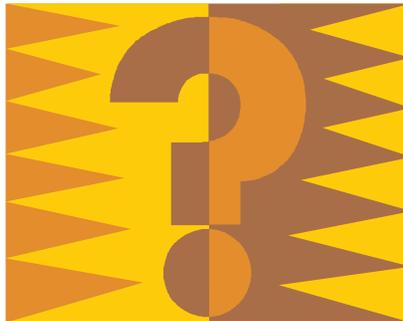
Promotional Period

Promotional period is a period of time during which a promotional rate or payment will be in effect.



Home Equity Line Rules

Distinction between *promotional rates* and
discounted and premium rates



Home Equity Line Rules

- Rule: Except on envelope or in electronic banner or pop-up advertisement, if a promotional rate or payment is stated, also must disclose in *clear and conspicuous* manner with *equal prominence* and in *close proximity* to each listing of promotional rate or payment:

Home Equity Line Rules

- . . . also must disclose:
 - Period of time the promotional rate or payment will apply
 - For promotional rate, APR
 - For promotional payments, amounts and time periods of any payments that will apply (if variable rate plan, must use reasonably current index and margin)

Home Equity Line Rules

Promotional Rates and Payments

Required disclosure of amounts and time periods of all payments, including balloon payment.

Home Equity Line Rules

No advertisement may contain any misleading terms.



General Rules for Closed-End Credit subject to the Truth in Lending Act



General Rules: Closed-End Credit

- If rate of finance charge is stated, it must be stated as APR
- If APR is subject to increase, this fact must be disclosed
- No rate other than APR may be stated except a simple annual rate or periodic rate applied to an unpaid balance may be stated in conjunction with, but not more conspicuously than, the APR

General Rules: Closed-End Credit

- Disclosure, explicit or implicit, of any “trigger terms” requires additional disclosures.
- “Trigger terms” are:
 - Amount or percentage of any downpayment;
 - Number of payments or repayment period;
 - Amount of any payment; or
 - Amount of any finance charge.

General Rules: Closed-End Credit

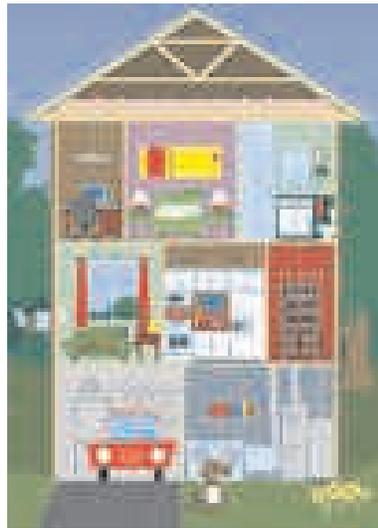
- If “trigger terms” are disclosed, all of the following terms must be disclosed:
 - ✓ Amount or percentage of downpayment;
 - ✓ Terms of repayment, **which reflect the repayment obligations over full term of loan, including any balloon payment;**  and
 - ✓ APR, and if APR is variable, that fact.

General Rules: Closed-End Credit

- TV or radio ad stating “trigger terms” may comply with disclosing additional terms either by stating *clearly and conspicuously*:
 - Each additional disclosure; or
 - The “annual percentage rate” using that term, and if APR is variable, that fact, and listing a toll-free telephone number, along with reference that such number may be used to obtain additional cost information.



New Rules: Closed-End Credit that is Secured by a Dwelling



Rules: Closed-End Credit Secured by Dwelling

These rules are **in addition to** the general rules for closed-end credit.

Rules: Closed-End Credit Secured by Dwelling

- Two types of new rules:
 - New Advertising Disclosures
 - New Prohibitions Regarding Advertising

Rules: Closed-End Credit Secured by Dwelling

New Advertising Disclosures

In this context, *clearly and conspicuously* disclosed means that the required information must be disclosed with *equal prominence* and *in close proximity* to any advertised rate that triggered the required disclosures.

Rules: Closed-End Credit Secured by Dwelling

- Recall: No rate other than APR may be stated except, that a simple annual rate applied to unpaid balance may be stated in conjunction with, but not more conspicuously than, APR

Rules: Closed-End Credit Secured by Dwelling

- If advertisement states a simple annual interest rate and more than one simple annual interest rate will apply over the loan term, advertisement must disclose in a *clear and conspicuous* manner:

Rules: Closed-End Credit Secured by Dwelling

- Each simple annual interest rate that will apply.
 - In variable rate transactions, determine rate by adding an index and margin based on reasonably current index and margin;

- Period of time during which each simple annual interest rate will apply; and

- APR

Rules: Closed-End Credit Secured by Dwelling

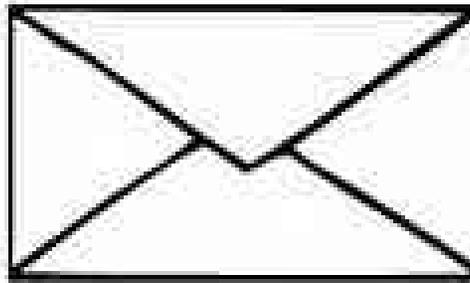
- All advertisements must disclose in a *clear and conspicuous* manner:

Rules: Closed-End Credit Secured by Dwelling

- Amount of each payment that will apply over term of loan, including any balloon payment.
 - In variable-rate transactions, determine payments based on a reasonably current index and margin;
- Period of time during which each payment will apply; and
- If advertising credit secured by a first lien, fact that payments do not include amounts for taxes and insurance premiums, if applicable, and that the actual payment obligation will be greater.

Rules: Closed-End Credit Secured by Dwelling

New rules do not apply envelopes or
electronic advertisement or to
television or radio advertisement.



Rules: Closed-End Credit Secured by Dwelling

Special Rule for Principal Dwelling

- If credit for loan secured by consumer's ***principal*** dwelling may exceed the fair market value of dwelling, ad must *clearly and conspicuously* state:
 - Certain interest is not tax deductible; and
 - Consumer should consult a tax adviser.

Prohibited Acts or Practices ("UDAP") in Advertisements for Closed-End Credit Secured by a Dwelling



UDAP: Closed-End Credit Secured by Dwelling

- Certain acts or practices are prohibited in advertisements for closed-end credit secured by a dwelling.
- Rule was promulgated under authority making violation a “high liability” concern.



UDAP: Closed-End Credit Secured by Dwelling

- ▼ Misleading advertising of the word “fixed” referring to rates, payments, or the credit transaction
- ▼ Misleading comparisons between actual or hypothetical credit payments or rates and any payment or simple annual rate that will be available under the advertised product for a period less than the full term of the loan

UDAP: Closed-End Credit Secured by Dwelling

- ▼ Misrepresentations about government endorsement or sponsorship
- ▼ Misleading use of name of the consumer's current lender
- ▼ Misleading claims of debt elimination
- ▼ Misleading use the term “counselor”
- ▼ Misleading use of foreign language

Questions





Thank you!

Carla Stone Witzel and Marjorie A. Corwin

Gordon, Feinblatt, Rothman, Hoffberger & Hollander, LLC

233 East Redwood Street

Baltimore, Maryland 21202

410-576-4192 410-576-4041

cwitzel@gfrlaw.com

mcorwin@gfrlaw.com