Advertising APRs on Facebook, Phones and More: Disclosing Credit Terms in Online Advertising

Saturday, March 30
9:30-10:30am
Program Co-Chairs

• Heather Klein, Associate, Ballard Spahr LLP
• Lauren Campisi, Member, McGlinchey Stafford

Speakers

• Grace Powers, Senior Vice President & Managing Counsel, Wells Fargo
• Malini Mithal, Acting Associate Director, Division of Financial Practices, Federal Trade Commission
• Brian Harris, Director, Product Counsel, Affirm

Program Materials Coordinator

• Peter Frechette, Associate, Venable LLP
Online Credit Advertising

- Advertising credit products through online, mobile, and social media channels requires applying the TILA/Reg. Z disclosure rules to new (and changing) media.
- While the rules accommodate electronic disclosures somewhat, it is not always clear how disclosures can/should be made in space-constrained media.
- Advertisers must balance marketing considerations with legal and compliance.
Online Credit Advertising

• Specific issues/questions:
  • What disclosures are needed?
  • Must the disclosure be made “in-text” (immediately above/below/beside the advertising statement?)
  • If not, how must/should the disclosure be conveyed to the consumer?
    • Hyperlink
    • Scroll-over/tap pop-up window
    • Another location on the ad (i.e., through scrolling)
  • May the disclosure be in smaller font or otherwise set off from the ad?

• Reg. 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.

• If an advertisement states specific credit terms, it must state only those terms that actually are or will be arranged or offered by the lender.

• In addition to generally-applicable rules, TILA/Reg. Z has specific requirements apply to certain types of loans such as private education loans (student loans), home secured loans (mortgages/HELOCs), and credit card accounts.

• Consumer Loan Advertising – Closed End Credit (1026.24)
• Trigger Terms – If the ad includes (directly or indirectly):
  • The amount or percentage of any downpayment;
  • The number of payments or period of repayment;
  • The amount of any payment; or
  • The amount of any finance charge.

• The ad must clearly and conspicuously disclose:
  • The down payment amount or percentage;
  • The repayment terms for the full term of the loan (including whether there is a balloon payment); and
  • The APR (and if it can increase).

• Consumer Loan Advertising – Open End Credit (1026.16)
• Trigger Terms – If the ad includes:
  • Finance charge or APR; or
  • Any other charges.
• The ad must clearly and conspicuously disclose:
  • Transaction or other activity charges;
  • APR (and fact that it may vary, if it can); and
  • Any membership or other participation fees.
TILA/Reg. Z Advertising Rules – Credit Cards

• Rules for promotional rates and grace period
  • Must clearly disclose:
    • Additional costs associated with promotional rate
    • Limitations or benefits that may be lost if payment is not received on time
• Disclosures must be made at the time of application in a table
• CFPB Bulletin Sept. 2014
TILA/Reg. Z Advertising Rules – Mortgage Loans

• Rates: Multiple simple interest rates in ads must include:
  • Each simple annual rate of interest that will apply. In variable-rate transactions, a rate determined by adding an index and margin shall be disclosed based on a reasonably current index and margin;
  • The period of time during which each simple annual rate of interest will apply; and
  • The APR for the loan (according to Reg. Z accuracy standards)

• Payments: Amount of any payment in ads must include:
  • The amount of each payment that will apply over the term of the loan, including any balloon payment. In variable-rate transactions, payments that will be determined based on the application of the sum of an index and margin shall be disclosed based on a reasonably current index and margin;
  • The period of time during which each payment will apply; and
  • For first liens, the fact that the payments do not include amounts for taxes and insurance premiums, if applicable, and that the actual payment obligation will be greater.
TILA/Reg. Z Advertising Rules – Student Loans

• Solicitation Disclosures

• Co-branding Prohibition and Endorsed Lender Arrangements
  • Lenders may not use the following items of a school in a way that implies that the covered education institution endorses the lender’s loans:
    • Name,
    • Emblem,
    • Mascot,
    • Logo, or
    • Other school identifiers (words, pictures, or symbols)
“Clear and Conspicuous” in Space-Constrained Media

- Reg. Z rules and Official Commentary regarding *Prominence* and *Location*
- FTC’s *Com Disclosures Guide*
- CFPB enforcement position regarding hyperlinks
“Clear and Conspicuous” in Space-Constrained Media

Reg. Z rules and Official Commentary regarding Prominence and Location

• General “clear and conspicuous” standard
• Direct links for trigger term disclosures
• Equal Prominence and Close Proximity requirements for mortgage ad disclosures
“Clear and Conspicuous” in Space-Constrained Media

FTC’s .Com Disclosures Guide

1. Proximity and Placement
2. Prominence
3. Distracting Factors in Ads
4. Repetition
5. Multimedia Messages and Campaigns
6. Understandable Language

FTC v. Lending Club (April 2018)
“Clear and Conspicuous” in Space-Constrained Media

CFPB enforcement position regarding hyperlinks

- In a 2017 Consent Order (non-TILA/Reg. Z), the CFPB stated that “a disclosure is not clear and conspicuous if a consumer must take any action, such as clicking on a hyperlink or hovering over an icon, to see it”

TILA/Reg. Z Issues for Online Mortgage Ads

• Reg. Z narrows the definition of “clear and conspicuous” for certain ads of mortgage (residential property secured) loans. 1026.24(f)(2) and (3)
Compliance Risks: Agency Enforcement

- TILA is often used in conjunction with UDAP/UDAAP claims
- TILA/Reg. Z violations are often viewed by agencies and judges as “per se” deceptive – See FTC v. AMG Services