

Howard & Howard

law for business®

Top 10 Compliance Mistakes in Advertising

February 2015

Steve Van Beek, Esq., NCCO

Howard & Howard Attorneys, PLLC

svb@h2law.com | 248.723.0521



Today's Presenter – Steven Van Beek



Steve Van Beek is an attorney at Howard & Howard Attorneys PLLC where he concentrates his practice in the area of financial regulations. He has intimate knowledge of the operational issues facing financial institutions and the best practices they can follow to reduce compliance, strategic, and reputation risks. He is a frequent speaker at national and regional industry events delivering information on new and existing laws and regulations impacting financial institutions. Prior to joining Howard & Howard, he served as the Vice President of Regulatory Compliance and Senior Federal Counsel at the National Association of Federal Credit Unions (NAFCU). He received his Bachelor's from Hope College and his J.D. from George Mason University School of Law and is a member of the American Bar Association.

What makes *this* so frustrating?

- Numerous Advertising Requirements
 - Scattered throughout regulations
- Disclosure Requirements are Dynamic
 - Depend on content of the advertisement
 - Depend on *where* ad appears (TV, print, online)
- Product Specific Disclosures
- Unfair, deceptive, or abusive (UDAAP)

Overview

- Top 10 Compliance Mistakes
 - Equal Housing Lender
 - NCUA Official Advertising Statement
 - Auto Loans; Mortgages; Credit Cards
 - Truth in Savings
 - Online & Social Media Advertisements
- Examples & Regulatory Requirements

1. Equal Housing Disclosures

Fair Housing Act requirements

- FCUs – 12 CFR 701.31
- State-Chartered Credit Unions
 - Guidelines: 24 CFR 109.30
 - Poster: 24 CFR 110.25
 - Follow 12 CFR 701.31?
 - Lender versus opportunity?

1. Equal Housing Disclosures

Fair Housing Act – 12 CFR 701.31(d)(1):

(1) *Advertising notice of nondiscrimination compliance.* Any **federal credit union** that advertises real estate-related loans **must prominently indicate in such advertisement**, in a manner appropriate to the advertising medium and format used, that the credit union makes such loans without regard to race, color, religion, national origin, sex, handicap, or familial status.

Equal Housing Disclosures

(3) *Real estate-related loan* means any loan for which application is made to finance or refinance the purchase, construction, improvement, repair, or maintenance of a dwelling.

Equal Housing Disclosures

(2) *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 building, structure, or portion thereof”

Equal Housing Disclosures

Written and visual ads:



Equal Housing Disclosures

Written and visual ads:

- Newspaper ads;
- Member newsletters;
- Inserts;
- Billboards;
- **Website and internet ads;** and
- Much more...Twitter; Facebook...

Oral Advertisements

- Radio; Pandora; Podcast; etc.
 - “a credit union may satisfy the notice requirement by a **spoken statement** that the credit union is an ‘Equal Housing Lender’ or an ‘Equal Opportunity Lender.’”

No Exceptions

Written + Oral Advertisements

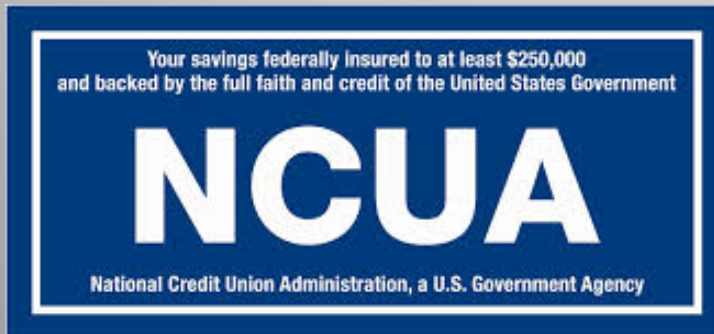
- TV; YouTube; website video, etc.
 - “the use of either of the methods specified in paragraphs (d)(1)(i) or (ii) of this section will satisfy the notice requirement.”
 - Logo or spoken statement (or BOTH)

Must be prominent in the advertisement

2. Official Advertising Statement

3 Options for Disclosure

1. “This credit union is federally insured by the National Credit Union Administration.”
2. “Federally insured by NCUA”
- 3.



NOTE: 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.

Official Advertising Statement

- “All” Advertisements
 - Exception for loan advertisements
 - Exception for TV/radio < 15 seconds
 - Other exceptions as well: 12 CFR 740.5(c)
- Annual Reports & Statements of Condition
 - Must be prominent position on cover page
- Main Internet Page

Common Mistakes

- Not included on advertisement
- Missing from Annual Report
- Not including on Pandora/YouTube ad
- Using “Member NCUA”
- Using “Federally Insured by NCUA” in a font smaller than other advertising text
- Billboard ads...

3. Closed-End Auto Loan Ads

Missing “additional disclosures” on auto loans

(1) *Triggering terms.*

- (i) The amount or percentage of any downpayment. (*credit sales only*)
- (ii) The number of payments or period of repayment.
- (iii) The amount of any payment.
- (iv) The amount of any finance charge.

Closed-End Advertising

Trigger term examples:

- 10, 20, or 30 year mortgages;
- 36 to 72 month auto loans;
- RV loans up to 108 months;
- Only \$300 origination fee; or
- “Payments as low as _____.”

Closed-End – Additional Disclosures

(2) *Additional terms.*

- (i) The amount or percentage of the downpayment. (*credit sales only*)
- (ii) The terms of repayment, which reflect the repayment obligations over the full term of the loan, including any balloon payment.
- (iii) The “annual percentage rate,” using that term, and, if the rate may be increased after consummation, that fact.

Closed-End – Additional Disclosures

- What does “terms of repayment” mean?
 - Unit-cost approach
 - “48 monthly payments of \$27.83 per \$1,000 borrowed.”
 - **Payment Example**
 - A new auto loan of \$20,000 for 48 months at 1.900% APR will have a monthly payment of \$433.07.

4. Closed-End Mortgage Advertising

Missing “mortgage insurance premium” disclosure

2. *Disclosure of repayment terms.* The phrase “terms of repayment” generally has the same meaning as the “payment schedule” required to be disclosed under §1026.18(g). Section 1026.24(d)(2)(ii) provides flexibility to creditors in making this disclosure for advertising purposes. Repayment terms may be expressed in a variety of ways in addition to an exact repayment schedule; this is particularly true for advertisements that do not contemplate a single specific transaction.

Closed-End Mortgage Advertising

For example:

- i. A creditor may use a unit-cost approach in making the required disclosure, such as “48 monthly payments of \$27.83 per \$1,000 borrowed.”
- ii. In an advertisement for credit secured by a dwelling, when any series of payments varies because of the inclusion of mortgage insurance premiums, a creditor may state the number and timing of payments, **the fact that payments do not include amounts for mortgage insurance premiums, and that the actual payment obligation will be higher.**

Closed-End Mortgage Advertising

Payment Example

A mortgage loan of \$200,000 for 30 years at 3.375% APR will have a monthly payment of \$844.00. Taxes and insurance not included, your actual payment obligation will be higher.

*Be sure to use an **actual available** APR in payment examples.*

5. Credit Card Trigger Terms

“Check out our Platinum credit card.
Low rates and no balance transfer fees!”

- Any trigger terms?
 - “Low rate” is not a trigger
- Are negative terms triggers?
 - **Yes**, 2010 change to Regulation Z

5. Credit Card Trigger Terms

“As discussed in the June 2007 proposal, the [Federal Reserve] Board believes that including negative terms as triggering terms for open-end (not home-secured) plans is necessary in order to provide consumers with a more accurate picture of possible costs that may apply to plans that advertise negative terms, such as ‘no interest’ or ‘**no annual fee.**’” 74 Fed. Reg. 5371

- **Examples:** No balance transfer fee; no cash advance fee; no foreign transaction fee

6. Credit Card Additional Disclosures

- Are we using a “trigger term”?
 - APR is a “trigger term” for open-end credit
 - *Example:*



Credit Card Additional Disclosures

- What “additional disclosures”?
 - Any minimum, fixed, transaction, activity or similar charge that is a finance charge under § 1026.4 that could be imposed.
 - Any periodic rate that may be applied expressed as an annual percentage rate as determined under § 1026.14(b). If the plan provides for a variable periodic rate, that fact shall be disclosed.
 - Any membership or participation fee that could be imposed. [**Note: Not our “par value” share**].

Credit Card Additional Disclosures

- Transaction fees for a credit card?
 - Balance transfer fee
 - Foreign transaction fee
 - Cash advance fee
- **APR**
 - If credit card is variable, must mention
 - If “as low as” APR – provide range of APRs
- Annual Fee (if applicable)

7. Missing Bonus Disclosures

- What is a “bonus”? 12 CFR 707.2(e)

(e) *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 member during a year in exchange for opening, maintaining, or renewing an account, or increasing an account balance.

The term does not include dividends, other consideration worth \$10 or less given during a year, the waiver or reduction of a fee, the absorption of expenses, non-dividend membership benefits, or extraordinary dividends.

Truth in Savings Advertising

- **Special Rules for Bonuses**

- If a bonus is stated in an advertisement:
 - (1) The “annual percentage yield,” using that term;
 - (2) The time requirements to obtain the bonus;
 - (3) 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.

Note: These are in addition to other TISA disclosures.

Truth in Savings Advertising

- **Partial Exemptions for Certain Media**
 - Broadcast or electronic media, such as television or radio (what about YouTube or Pandora?);
 - Internet ads need full disclosures
 - Outdoor media, such as billboards;
 - Telephone response machines;
 - **Indoor signs**; and
 - Member newsletters.
- 12 CFR 707.8(e)

Truth in Savings Advertising

- **Partial Exemptions for Certain Media**
 - If partial exemption, must still disclose the following when advertising a “bonus”:
 - The “annual percentage yield,” using that term;
 - The time requirements to obtain the bonus; and
 - The minimum balance required to obtain the bonus;
 - If an **indoor sign** (within the premises of a CU), the bonus disclosures are not required. However, if sign mentions APY, must advise members to contact CU employee for additional details.

8. Improper Use of One-Click Rule

- “One-Click Rule”
 - Electronic advertisements, including online, CU’s website, and social media
 - Rather than include the “additional disclosures” in the advertisement itself, the credit union can:
 - Provide the additional disclosures on a separate page via a direct link

One-Click Rule – Applicability

“One-Click Rule”

- Allowed for:
 - Reg Z additional disclosures (loans)
 - TISA additional disclosures (accounts)
- Not allowed for:
 - NCUA “official advertising statement”
 - Equal Housing Lender disclosure

9. Intro or Promo Rates

- What is a **Promotional Rate**?
 - Any APR applicable to one or more balances or transactions for a specified period of time that is lower than the APR that will be in effect at the end of that period
 - Ex: 4.99% APR for 6 Months!
- What is an **Introductory Rate**?
 - A *promotional rate* at account opening

Intro or Promo Rates

- Special Rule for **Introductory Rates**
 - If the APR is an Introductory Rate, the term *introductory* or *intro* must be in **immediate proximity to each listing** of the Introductory Rate in a written or electronic advertisement.
 - Must be in the “same phrase”

4.99% Introductory APR

Intro or Promo Rates

- For Promotional Rates (*incl. Intro Rates*)
 - Must disclose (clear and conspicuous):
 - When the promo rate will end; and
 - The APR that will apply at the end of the promotional period*

*If the Introductory Rate is on a risk-based credit card product – disclose range of rates

Intro or Promo Rates

- For written or electronic advertisements:
 - Disclosures must be in a ***prominent location closely proximate**** to the first listing of the promotional rate
 - Must be in same paragraph

*A disclosure in a footnote is not allowed

Intro or Promo Rates

- For written or electronic advertisements:
 - Disclosures for promotional rates must be “clear and conspicuous” – which means the disclosures must be:
 - **Equally Prominent**
 - Which Means: Same Type Size
 - *12 pt font = 12 pt font*

Intro or Promo Checklist

- Do we have an intro or promo rate?
 - Is the period at least six months?
 - If Intro – is that term used in each listing?
- Have we disclosed the end date and “go-to” rate?
 - If Intro – have we included a range of rates?
- For written/online ads, are our disclosures in the same paragraph as the first listing?
- For written/online ads, are our disclosures clear and conspicuous (same font size)?

Avoiding UDAAP – Credit Card Offers

- **CFPB Bulletin 2014-02**
 - Potential UDAAP issue – even if advertisement complies with Regulation Z
 - If members will lose their *grace period for purchase transactions* by accepting the CU's promotional APR offer, this fact must be prominently disclosed in the advertisement.
 - If not disclosed (or not prominent), CFPB indicates this could be deceptive or abusive

10. Using “Fixed” for Credit Cards

- Change from the **Credit Card Act of 2009**
- *Three types of credit card APRs:*
 - Variable
 - “Fixed”
 - Non-variable
- If you use the term “fixed” without a time period, it is **FIXED forever**. You have no ability to increase the APR in the future. **None.**

Be Careful With “Fixed”

- If you are using “Fixed” – consider the long-term impact of doing so. What happens if rates move up in the future?
 - Cannot raise APR on existing balances
 - Restriction applies to every type of APR
 - But, also cannot raise APR on new transactions either.
- If you moved to “non-variable” – be sure everyone is on the same page. **Double-Check.**

11. HELOC Advertising

When trigger term is used (ex: APR), must disclose:

- Any minimum, fixed, transaction, activity or similar charge that is a finance charge;
- Any membership or participation fees;
- Any loan fee that is a percentage of the credit limit and any other fees to open the plan;
- Statement if property insurance is required;
- Annual percentage rate (APR) and if a variable rate, must include that fact; and
- **Maximum APR, if variable-rate plan.**

Advertising Compliance Tips

- Know the different trigger terms
 - Understand the additional disclosures
- Do not forget the payment example
- Do not assume others got it right!
- Set up a formal ad review process
- Where will the ad be used? Any exceptions?
- Utilize the “one-click” rule...properly!

Key Takeaways

- *Advertisements are much more visible now than ever before (good & bad)*
 - Website; Facebook; YouTube
 - Members; Potential Members
 - Regulators; Attorneys; Banking Groups
- There is not a perfect “universal disclosure”
 - Set up a formal review process
- Ultimately, all about **risk management**

Questions?

Thank You!

Steve Van Beek, Esq., NCCO
Howard & Howard Attorneys PLLC
svb@h2law.com | 248.723.0521

Howard & Howard
law for business®

Appendix – Top 10

1. Equal Housing Disclosure Not Prominent
2. Issues with Official Advertising Statement
3. Missing or Incorrect Payment Example
4. Missing Mortgage Insurance Disclosure
5. Negative Credit Card Trigger Terms
6. Failing to Disclose Credit Card Transaction Fees When a Trigger Term is Used

Appendix – Top 10

7. Missing Disclosures When Offering a Bonus
8. Improper Use of “One-Click Rule”
9. Missing Disclosures When Offering a Promotional or Introductory Rate
 - And Disclosures Not Equally Prominent
10. Improper Use of “Fixed” for a Credit Card
11. Not Disclosing the Maximum APR for a HELOC Advertisement