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Words, Words, Words...

AND WHY THEY MATTER IN ADVERTISING AND MARKETING

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LAWS REGULATING ADVERTISING AND MARKETING
OVERVIEW

Advertising and Marketing of Consumer Credit Products: A Highly Regulated Practice

- Truth in Lending Act (“TILA”), Credit Card Accountability Responsibility and Disclosure Act (“CARD” Act), Regulation Z (Advertisements of closed-end and open-end credit), and Regulation M (Advertisements related to consumer leasing)
- Truth in Savings Act (“TISA”) and Regulation DD (Advertisements of accounts related to a depository institution)
- Regulation N – Mortgage Acts and Practices Rule (“MAP” Rule)
- Telemarketing Sales Rule (“TSR”)
- Controlling the Assault of Non-Solicited Pornography and Marketing (“CAN-SPAM”)
- Sections 1031 and 1036 of Dodd-Frank’s Consumer Financial Protection Act (“CFPA”) – Prohibiting unfair, deceptive and abusive acts or practices (“UDAAP”)
- Section 5 of the FTC Act – Prohibiting unfair and deceptive acts or practices (“UDAP”)

FTC and CFPB Guidance

- FTC has released guides related to:
 - How to make compliant disclosures for products advertised online (the “.Com Disclosure Guide”).
 - How to market products as “free” (the Guide Concerning the Use of the Word “Free”).
 - How to advertise using endorsements and consumer testimonials (Guides Concerning the Use of the Endorsements and Testimonials in Advertising).
 - How businesses can comply with the TSR and CAN-SPAM Act.
- CFPB has issued bulletins related to:
 - Marketing of Credit Card Promotional APR Offers (Bulletin 2014-02)
 - Prohibition of UDAAPs in the Collection of Consumer Debts (Bulletin 2013-07)
 - Marketing of Credit Card Add-on Products (Bulletin 2012-06)
- CFPB’s Supervision and Examination Manual contains additional guidance on TILA, the MAP Rule, TSR, and UDAAP

What is Advertising and Marketing?

- The CFPB and FTC (among other regulators) look at a wide range of advertising and marketing practices, including:
 - Telemarketing activities
 - Email and direct mail campaigns
 - In-person marketing
 - Television and radio advertisements
 - Prizes, sweepstakes, and other promotions
 - Online advertisements, including:
 - Banner advertisements
 - Websites (including information/disclosures in an application flow)
 - Social media accounts
 - Rates published with third party lead aggregators
 - Search engine results
 - URLs

What is Advertising and Marketing?

- The definition “advertising,” “marketing,” or “commercial messages” depends on the law.
 - Transactional-based communications are not covered by TILA’s advertising restrictions.
 - CAN-SPAM also excludes messages where the primary purpose is transactional or relationship-based.
 - The Telemarketing Sales Rule does not apply to business-to-business calls (unless they involve retail sales of nondurable office or cleaning supplies, or solicit sales or charitable contributions from employees).
- Even if a type of activity is excluded from a specific law, however, it may be covered by UDAAP/UDAP.

- Sections 1031 and 1036 of the CFPA:
 - Prohibit unfair, deceptive, and abusive acts and practices.
 - Statute defines “unfair” and “abusive” (although how the CFPB intends to apply the “abusive” prong remains a bit of a question mark)
 - CFPB Supervision and Examination Manual adopts FTC’s standard for deception.
- Section 5 of the FTC Act:
 - Prohibits unfair and deceptive acts and practices.
 - Deception test requires disclosures to satisfy the “Four P’s” – prominence, placement, presentation, and proximity.

Significant Penalties for Failure to Comply with Laws

- The CFPB has authority to levy substantial monetary penalties for violations of TILA, the MAP Rule, and the CFPA's UDAAP prohibitions up to:
 - \$5,000 for violations.
 - \$25,000 for “reckless” violations.
 - \$1 million per violation per day for “knowing” violations.
 - After July 14, 2016 these amounts increase by 8.475% to \$5,437, \$27,186, and \$1,087,450.
- The FTC has authority to fine up to \$16,000 per violation for violations of Section 5 of the FTC Act, the CAN-SPAM Act, and the Telemarketing Sales Rule.

Don't Forget About the States

- States may have advertising and marketing requirements that go beyond federal law requirements.
 - For instance, certain states require disclosure of license number, license type, NMLS identifier, or other state-specific information on mortgage advertisements. (*See, e.g.*, Massachusetts, Virginia, Texas)
 - Several states have requirements for advertising motor vehicles regulating so-called “yo-yo sales” (*See, e.g.*, Alaska, Arizona, Oregon)
- Violations of advertising requirements in state licensing laws could lead to examination findings and fines.
- State Attorneys General are often the first recipients of consumer complaints related to advertising practices and actively bring actions for violations of state unfair trade laws.

ONLINE ADVERTISING BEST PRACTICES

DISCLOSURES IN THE DIGITAL AGE

FTC Guidance on Online Disclosures

- The “Four Ps” (prominence, placement, presentation, and proximity) still apply in online advertising.
 - Material disclosures should appear in the ad itself – even if space is at a premium.
 - Other disclosures can clearly and conspicuously appear on the website linked in the ad.
 - Avoid hyperlinked advertisements or scroll down advertisements wherever possible.
 - Pay attention to font size and color of disclosures.
 - Avoid distracting features, like flashing text or animations.
 - Disclosures should be clear and conspicuous regardless of the viewing platform (computer, ipad, or mobile device).
 - Repeat disclosures where necessary.

Disclose, and then Disclose Some More.

- Required disclosures may go beyond what is expressly outlined by law.
 - For instance, recent CFPB enforcement actions indicate that UDAAP may require disclosure of *all* relevant terms and conditions in a transaction, not just those outlined under TILA.
 - In a 2016 matter, the CFPB alleged that an auto dealer unlawfully advertised misleadingly low 9.99% APR without disclosing required repair warranty, required GPS payment reminder device, and other credit costs as finance charges. (\$700,000 in consumer redress, \$100,000 in CMPs)
 - In a 2014 matter against a mortgage lender, the CFPB alleged deceptive advertising for failure to disclose discount points and credit score despite the fact APR was prominently disclosed in advertisements. (\$14.8 million in consumer redress, \$6 million in CMPs)

Pay Attention to How Your Rates are Advertised on Third Party Lead Generation Sites

- The CFPB and FTC have looked at potential deceptive advertisements on third party lead generator sites.
 - In two 2014 cases, the FTC alleged that mortgage lead generators advertised “fixed” rates where neither the defendant nor third party purchasers would offer the advertised rates.
 - In a 2014 matter, the CFPB alleged rates advertised on a third-party rate publisher were not available when consumers clicked through to the lender’s website.
- Remember the “First Contact” rule.
 - If a regulator comes to the conclusion that advertised rates were designed to attract consumers who would not qualify for those rates, it may not be enough that the lender provided sufficient disclosures later in the process.

Don't Forget About Social Media

- Review information on products and services posted on Facebook, Twitter, YouTube, and other corporate social media accounts.
 - For mortgage lenders: Does the Equal Housing logo or slogan appears in your account profile?
 - If you work with veterans or students: Should your profile contain a disclaimer of non-government affiliation?
- Disclosures may still be necessary, even given space constraints.
 - Be wary of advertising rates or using trigger terms in Tweets – 140 characters does not provide much room for disclosures.
- Monitor what your employees are posting on social media.

Using Behavioral Sciences to Design a Better Disclosure

- The Theory of Behavioral Economics as applied to the consumer credit industry.
 - Consumers are not rational decision makers. Certain weaknesses cause consumers to make decisions that are not in their best economic interest.
 - Used by the CFPB when developing new disclosures (for instance, proposed disclosures related to overdraft fees)
- Executive Order: Using Behavioral Science Insights to Better Serve the American People (Sept. 15, 2015)
 - Directs regulators to “improve how information is presented to consumers, borrowers, program beneficiaries, and other individuals, whether as directly conveyed by the agency or in setting standards for the presentation of information, by *considering how the content, format, timing, and medium by which information conveyed affects comprehension and action by individuals as appropriate.*”

RECENT ENFORCEMENT TRENDS

THE RISE OF UDAAP

General Enforcement Trends

- Marketing and advertising practices have become a CFPB enforcement priority.
- Since 2011, the CFPB has brought over **130** enforcement actions.
 - At least **half** of these actions involve some claim of unfair or deceptive practices under UDAAP.
 - Over **40** of these enforcement actions specifically alleged unfair, deceptive, or illegal advertising or marketing practices.
 - The CFPB's advertising and enforcement actions have resulted in nearly **\$3 billion** in fines and direct consumer remediation.

Advertising Enforcement Trends

- Recent enforcement actions have alleged unlawful, unfair or deceptive marketing and advertising practices in connection with:
 - The disclosure of non-government affiliation
 - The use of the word “free”
 - The sale of add-on products

Misrepresentation of Government Affiliation

- Warning letters from FTC and CFPB in November 2012 about deceptive marketing practices related to misrepresentation of government affiliation.
- Alleged violations primarily relate to direct mail marketing of FHA and VA loans.
 - The CFPB settled enforcement actions with three mortgage lenders in early 2015 alleging deceptive marketing of FHA and VA products through direct mail marketing. (\$250,000 in CMPs for each lender).
 - The FTC settled an enforcement action against a lender in July 2013 alleging similar deceptive marketing of FHA and VA products (\$7.5 million in CMPs).

Misrepresentation of Government Affiliation

- Recent actions brought by the CFPB also include misrepresentations through telephone and online marketing.
 - In 2016, the CFPB settled a matter against a loan debt relief company that allegedly misrepresented affiliation with Department of Education in its telemarketing sales activities. (\$50,000 CMPs and the company was required to shut debt relief down operations)
 - In 2012, the CFPB obtained an injunction against a mortgage assistance relief provider who allegedly misrepresented affiliation with government entities in direct mail solicitations and phone sales pitches.
 - Also in 2012, the CFPB obtained an injunction against a mortgage assistance relief provider who allegedly used domain names and web content virtually identical to government websites and sent emails and mailers to consumers with HUD, SEC, OCC, and Treasury markers.

Misrepresentation of Government Affiliation

- Themes in recent enforcement actions:
 - Use of official looking seals or government logos.
 - Letter or envelopes designed/formatted to appear like official government notices.
 - Failure to disclose (or prominently disclose) lack of government affiliation.
 - Statements indicating a relationship with or endorsement from the government.
 - Use of misleading URLs, website content, or email addresses.

Use of the Word “Free” In Advertisements

- Enhanced regulator scrutiny when companies advertise “free” services.
 - In a 2014 matter against a regional bank, the CFPB alleged misleading marketing of free checking accounts via TV, print, and radio without properly disclosing certain eligibility provisions. (\$2.9 million in consumer redress, \$200,000 in CMPs)
 - Advertisements used phrases such as:
 - “Free yourself from monthly service fees. Get free checking...”
 - “Untangle yourself from monthly service fees. Get a free checking account... No strings attached.”

Sale of Add-On Products

- The CFPB has recovered over half a billion dollars in restitution and civil money penalties for deceptive marketing and sale of credit card add-on products.
 - In a 2014 case, the CFPB alleged that a bank did not require customer service representatives to use marketing scripts and engaged in misleading telemarketing practices regarding the availability, consumer eligibility, and cost of certain add-on products offered by the bank. (\$225 million in restitution, \$3.5 million in CMPs).
 - Similar allegations in settlements with six other major banks and credit card companies.

Sale of Add-On Products

- CFPB Bulletin 2012-06: Marketing of Credit Card Add-on Products
 - References consumer complaints about being misled by the marketing and sales practices associated with credit card add-on products.
 - Outlines the “Four Ps” Test for disclosures for add-on products (prominence, proximity, placement, and presentation).
- Products like fraud checks and special payment programs have been the subject of recent enforcement actions but the CFPB’s theory could apply to almost any add-on product or service.

ADVERTISING AND MARKETING BEST PRACTICES

TIPS FOR IMPROVING COMPLIANCE

Tips for Online Advertising Compliance

- The content of online advertisements and disclosures (including those on third party websites and social media) should be reviewed carefully prior to publication.
- Testing before rolling out new marketing campaigns can help identify potential compliance weaknesses in online disclosures or application flows.
 - Are disclosures clear and conspicuous in different viewing platforms? Pay particular attention to how advertisements appear in mobile browsers.
 - Does the order of disclosures create any consumer confusion?
- Make sure advertisements are current.
 - For instance, old YouTube videos may advertise rates or products that are no longer available.
 - Have policies for monitoring rates published by third party lead generators.

Lessons Learned from Recent Enforcement Actions

1. Strict compliance with other consumer finance laws does not guarantee UDAAP compliance.
2. Marketing materials (including scripts) and advertisements should be reviewed carefully – paying particular attention to key UDAAP risk areas.
3. Due to the CFPB's broad enforcement authority, companies should consider enhancing insurance coverage accordingly.
4. Strong vendor oversight is key to an effective UDAAP compliance management system.
5. Companies should track and analyze consumer complaints carefully to determine UDAAP risks.
6. In addition to compliance with federal laws, companies should consider investor-specific advertising requirements (*i.e.* HUD, VA, Fannie/Freddie, and Dept. of Ed requirements).

PRESENTER BIOS

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Mr. Kaplan concentrates his practice in matters related to consumer financial products. His practice includes (i) advising clients on compliance with federal and state laws; (ii) acting as regulatory counsel in connection with investments, acquisitions or financings; (iii) performing specialized regulatory compliance due diligence; (iv) assisting with structuring operations and developing compliance and due diligence programs; and (v) representing clients in federal and state supervisory matters, investigations and enforcement proceedings. He is ranked by *Chambers USA* and *Best Lawyers*. Steve serves as co-leader of Mayer Brown's Financial Services Regulatory & Enforcement Practice.

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