

Advertising and Issuing Credit Online

Andrew Owens

January 9, 2015



Overview

- Comparison of innovative online lenders to traditional lenders
 - Focus on distinctions between online and paper transactions involving open-end credit
- Industry overview
- Advertising credit online
 - Reg Z credit advertising rules
 - Trigger terms and triggered disclosures
 - FTC's .com Disclosures Guidance
 - UDAAP
- Applications, approvals, and disclosure delivery
 - Delivering disclosures pursuant to E-SIGN

Industry Overview

- Who advertises and issues credit online?
 - Banks and non-banks
 - Banks as a lender with a non-bank partner performing marketing and origination activities
- What products are advertised and issued online?
 - Closed- and open-end credit, including credit cards, auto loans, mortgages, personal loans, small business loans, payday, credit sales
 - Note that we will not focus on mortgages or small business loans
- Common themes
 - Marketing credit online; instant (or fast) underwriting and issuance

Reg Z – Credit Advertising Rules

- Broad application:
 - Advertising requirements apply to all persons – not just creditors but also merchants and other parties that advertise consumer credit on behalf of creditors. §1(c).
- Limited civil liability for advertising rule violations.
 - Pursuant to 15 USC § 1640(a), no civil liability for violation of §16.
 - But administrative liability still applies.

Reg Z – Credit Advertising Rules

- Credit advertisements are subject to a “clear and conspicuous” standard under Regulation Z. §5(a).
 - No format requirements, such as a specific font size or required placement of credit terms in the advertisement. Comment 16-1.
 - But disclosures in advertisements should be:
 - Provided in a reasonably understandable form;
 - Presented in a way that does not obscure the relationship of terms to each other; and
 - Legible, whether typewritten, handwritten, or printed by computer.
 - Whether an advertisement satisfies this standard will depend on the nature of the advertisement, the language used, the color, size and placement of material credit terms, and other pertinent factors.

Reg Z – Open-End Credit Advertising Rules

- Certain terms (triggers) trigger additional advertising disclosures (the triggered terms). §16(b).
 - Triggers generally include finance charges and other charges described in the account opening disclosures under §6(b)(3). Also includes:
 - Negative terms – e.g., “no interest” or “no annual membership fee”. Comment 16(b)(1)-1.
 - Implicit references where triggers may be “readily determined” from an advertisement. Comment 16(b)(1)-2.
 - If any trigger is used, must disclose the triggered terms, which generally include: certain transaction charges, an annual fee, all APRs, and minimum interest charges.

Reg Z – Open-End Credit Advertising Rules

Trigger Terms

1. Any finance charge. §6(b)(3)(ii)(A).
2. Charges imposed for failure to use the plan as agreed. This means any penalty fee. §§16(b)(1) and 6(b)(3)(ii)(B).
3. Plan termination charges. This means charges imposed for closing an account. §6(b)(3)(ii)(E).
4. Charges affecting the consumer's access to the plan, the duration of the plan, the amount of credit extended, the period for which credit is extended, or the timing or method of billing or payment. §6(b)(3)(ii)(D).

Reg Z – Open-End Credit Advertising Rules

Trigger Terms

- Non-trigger terms include:
 - Rewards;
 - Member benefits, e.g. fraud protection, credit scores, other differentiators; and
 - Customer service features.
- Tendency for issuers to focus on marketing rewards and other benefits, in lieu of APRs and other terms, criticized in recent CARD Act Report

Reg Z – Open-End Credit Advertising Rules

Triggered Disclosures

- If any trigger term is used, all of the following triggered terms must be disclosed:
 1. The “annual percentage rate,” using that term or the abbreviation “APR”. §16(b)(1)(ii).
 2. Any minimum, fixed, transaction, activity or similar charge that is a finance charge. §16(b)(1)(i).
 3. Any membership or participation fee. §16(b)(1)(iii).

Reg Z – Open-End Credit Advertising Rules

Special Rules

1. Catalog, multi-page, and electronic advertisements. §16(c).
2. Television or radio advertisements. §16(e).
3. Financing the purchase of goods and services. §16(b)(2).
4. Promotional Rates and Fees. §16(g).

Reg Z – Open-End Credit Advertising Rules

Special Rules

1. Catalog, multi-page, and electronic advertisements. §16(c).
 - Electronic advertisements: in lieu of complete advertising disclosures, trigger terms appearing anywhere in an electronic advertisement may clearly direct the consumer to the location where the table or schedule begins, which may be accomplished by describing how to navigate to the table or schedule or disclosing the specific URL where the table or schedule may be found.
 - The general rule is that a link must “clearly direct the consumer to the location where the table or schedule begins.” Comment 16(c)(1)-2.
 - “For example, a term triggering additional disclosures may be accompanied by a link that directly takes the consumer to the additional information.” Comment 16(c)(1)-2.

Reg Z – Open-End Credit Advertising Rules

Special Rules

2. Television or radio advertisements. §16(e).
3. Financing the purchase of goods and services. §16(b)(2).
4. Promotional Rates and Fees. §16(g).
 - If intro rate or fee required to be disclosed in the Schumer box, must say “intro” or “introductory” in immediate proximity to (in the same phrase as) the rate or fee.
 - Only applies to promotional rate offered in connection with the opening of an account.
 - If promo rate or fee (including intro rate) then:
 - Disclose:
 - Expiration date.
 - Go to rate/fee. If variable rate, must comply with accuracy rules in §60. If can't be determined, then disclose specific rate/fee or range.
 - Disclosure must be clear and conspicuous, meaning that it must be equally prominent to the promotional rate or promotional fee to which it applies, e.g. same type size as the promotional rate or promotional fee to which it applies. Comment 16-2.ii.

Reg Z – Open-End Credit Advertising Rules

Special Rules

4. Promotional Rates and Fees. §16(g). Cont....

– Formatting:

- Electronic or written.
 - Same paragraph is permitted; footnote is not sufficient.
 - Disclosures must appear in the same paragraph as the “first listing” of the promo rate or fee. This means the most prominent listing of rate/fee on front side of the first page of the principal promotional document (the document designed to be seen first by the consumer in a mailing, such as a cover letter or solicitation letter). Comment 16(g)-3 and 4.
- Exception – promo rate disclosures not required on envelope, banner ad or pop-up ad. §16(g)(5).

Reg Z – Open-End Credit Advertising Rules Special Rules

4. Promotional Rates and Fees. §16(g). Cont....

– What is a banner advertisement?

- Not defined by Reg Z.
- Banner ads are typically (1) embedded on a third-party website and (2) subject to space-constraints that limit the ability to convey information. Therefore, reasonable consumers expect to receive additional information after clicking on a banner advertisement.
 - Supp. Info states that “Interested consumers generally . . . [are aware that they must] click on the link in a banner advertisement or pop-up advertisement in order to learn more about an offer...” 74 Fed. Reg. 20791 (May 5, 2009).
- Banner ads are distinguished in the Supp. Info from stand-alone ads that warrant the advertising disclosures, such as posters, billboards, and take-one applications.



– What disclosures are required for banner ads?

- Exemption from §16(g)(5) – regarding disclosure of the go to rate and promo period – if the banner ad is “linked to an application or solicitation provided electronically.”
 - No further guidance, so some flexibility exists, e.g. learn more or click here for more details.]
- No exemption from general advertising disclosure requirements if triggers used.



FTC's .com Disclosures Guidance

- .com Disclosures guidance is cited in the CFPB's exam practices manual with respect to UDAAP.
- 4Ps to determine if a disclosure is clear and conspicuous:
 - Proximity: Is the information in close proximity to the claim it qualifies?
 - Placement: Is the placement of the information in a location where consumers can be expected to look or hear?
 - Prominence: Is the disclosure prominent enough for the consumer to notice?
 - Presentation: Is the information presented in an easy-to-understand format that does not contradict other information in the package and at a time when the consumer's attention is not distracted elsewhere?

FTC's .com Disclosures Guidance

■ Proximity

- Disclosure should be placed near the claim information, product, or service to which it relates.
- Scrolling may be problematic – consumers can miss information presented off the screen.
 - Text or visual cues should direct consumers to additional disclosures, e.g. “see below for important information on ____.”
 - How page is displayed may or may not indicate that consumers need to scroll; if scrolling is necessary to see a disclosure, it should be unavoidable (i.e., unable to proceed without scrolling).
 - Scroll bars alone are NOT sufficiently effective visual cues.
 - Mobile disclosures – pages should be optimized to eliminate right / left scrolling to view disclosures.

FTC's .com Disclosures Guidance

Example: Card Aggregators

CompareCards.com
Compare. Pick. Save.

FIND A CREDIT CARD ▼ GUIDES & TOOLS > CREDIT REPORTS & SCORES >

1-800-747-3893 (M-F 8:30-5:30pm EST)

0 COMPARE

American Express Credit Card Offers

602 reviews for top rated card ★★★★★

- Easily compare American Express credit card offers, a CompareCards partner
- Independent ratings and reviews of American Express credit card offers
- Instant & secure online approval process

Blue Cash Preferred® Card from American Express

Apply Now
APPLY SECURELY

Intro Purchase APR: 0% for 15 Months
Bonus Cash: \$100 Cash Back*
Regular Purchase APR: 12.99%-21.99% (Variable)*

Sign Up Offer

Intro Purchase APR	0% for 15 Months
Intro Balance Transfer	0% for 15 Months

Ongoing Information

Regular Purchase APR:	12.99%-21.99% (Variable)*
Annual Fee:	\$75
Credit Needed:	Excellent

Highlights

- Get one year of Amazon Prime plus \$100 back after you make \$1,000 in purchases with your new Card in the first three months.
- You will receive \$100 back in the form of a statement credit.
- Hassle-free cash back: no enrollment required, the same great reward categories year-round.
- Earn Cash Back: 6% US supermarkets up to \$6,000 per year in purchases, 3% US gas stations & select US dept stores, 1% on other purchases. Terms and limitations apply.
- Cash back is received in the form of Reward Dollars that can be redeemed as a statement credit.
- 0% intro APR on purchases and balance transfers for 15 months, then a variable rate, currently 12.99% to 21.99%, based on your creditworthiness and other factors.
- Terms and limitations apply.

ADVERTISER DISCLOSURE

TRUST & SECURITY

VeriSign Secured
ACCREDITED BUSINESS A+
TRUSTe CERTIFIED PRIVACY
No. 1 Online Credit Card Guide 2012
Over 1,250,000 cardholders since 2005

AS SEEN IN

CNNMoney
THE WALL STREET JOURNAL
USA TODAY
The New York Times
PBS
Forbes

FTC's .com Disclosures Guidance

- Proximity cont....
 - Hyperlinked disclosures are appropriate for disclaimers that are not integral to the triggering claims, provided certain conditions are met, as follows:
 - Integral disclosures (e.g., cost, health and safety, significant unexpected additional fees) should be on same page, immediately next to claim, and sufficiently prominent so that claim and disclosure are read at the same time.
 - Key considerations for evaluating effectiveness of hyperlinks:
 - Labeling or description of hyperlink;
 - Consistency in use of hyperlink styles;
 - Placement and prominence of hyperlink on page or screen; and
 - Handling of disclosure on click-through page or screen.

FTC's .com Disclosures Guidance

- Proximity cont....
 - Examples from .com Disclosures Guidance

Proximity of “Imitation” clearly disclaims that pearls are not real.



“3/4 Ct.” link does not adequately disclaim variations in product, an integral aspect of the product.



FTC's .com Disclosures Guidance

■ Prominence

- Disclosure should be noticeable – factors include size, color, and graphics in relation to other parts of the material – when considering the entire advertisement.
 - Don't bury disclosures in long paragraphs of unrelated text, e.g. terms of use. Contract terms are viewed separately from disclosures.
 - Don't use graphics or sounds that distract from the disclosure.
 - Repeated disclosures may be necessary if sites and applications are long or claims are repeated.
- Must account for viewing on mobile devices – ensure that text isn't too small and can be enlarged by consumer, and that text wraps to fit on the screen.
- Give disclosures in same medium as claims, e.g. audio claims require audio disclosures.

FTC's .com Disclosures Guidance

- Prominence Cont....
 - Examples from FTC .com Disclosures Guidance

Disclosures are not prominent because they contrast poorly with the background and are easy to miss.

FROST-A-TRON
so fresh & cool

Order Now | FAQ | Reviews | Contact Us

Home Order Now FAQ Reviews

For space travel, scientists had to find something better than traditional refrigeration... They discovered a solid-state component now available to anyone on the move.

Think about your next road trip with the family. You're cruising along, making great time and – you guessed it – one of the kids is hungry.

Relax. Your Frost-a-tron is plugged into one of your 12 volt outlets and stocked with fruit, sandwiches, cold drinks, fried chicken ... fresh and cold.

Price: \$129

Color:

Qty:

ORDER NOW

Only \$129, plus shipping & handling

Frost-a-tron may not keep perishable food items cold enough to prevent the growth of bacteria when the temperature is over 80F, such as in a hot car. Use in these conditions could lead to food-borne illness.

AS SEEN ON TV

Satisfaction is guaranteed.

[Restocking fee applies to all returns.](#)

Buy now and get 2 for just **\$199.99!**

FTC's .com Disclosures Guidance

- Collect data and monitor effectiveness of disclosures.
 - If hyperlinked disclosures are not being used by consumers, another method of disclosure may be necessary.
 - If consumers frequently complain about terms that are being disclosed, disclosure might not be effective.

UDAAP in Marketing

- What are unfair, deceptive, and abusive acts and practices?
 - Unfairness: an act or practices that “[1] causes or is likely to cause substantial injury to consumers [2] which is not reasonably avoidable by consumers [and [3] the] injury is not outweighed by countervailing benefits to consumers or to competition.” 12 USC § 5531(c)(1).
 - See also FTC Policy Statement on Unfairness (December 17, 1980).
 - Deception: a material representation, omission, act or practice that misleads or is likely to mislead a consumer, provided the consumer’s interpretation is reasonable under the circumstances. CFPB Examination Manual V.2, UDAAP 5 (October 2012)
 - See also FTC Policy Statement on Deception (October 14, 1983).

UDAAP in Marketing

- What are unfair, deceptive, and abusive acts and practices? Cont....
 - Abusiveness: an act or practice that:
 - “[1] materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service;”
 - “[2] takes unreasonable advantage of [either]:
 - “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 the interests of the consumer in selecting or using a consumer financial product or service; or
 - “the reasonable reliance by the consumer on a covered person [such as a bank or other financial institution] to act in the interests of the consumer.” 12 USC § 5531(d).
 - Largely applied through enforcement, with a few exceptions.

Recent CFPB Enforcement Actions Involving UDAAP

paymentlawadvisor
LEGAL COMMENTARY AND RESOURCES FOR THE PAYMENT INDUSTRY

Davis Wright
Tremaine LLP

Home About Payments Team Events Contact

Search

UDAAP Enforcement Action Database

PLA presents below a database of enforcement actions that include allegations of unfair, deceptive, or abusive acts or practices (UDAAP) in connection with consumer financial products. The database focuses on enforcement actions by the Consumer Financial Protection Bureau, the Office of the Comptroller of the Currency, and the Federal Trade Commission. PLA intends the database to facilitate analysis of the themes and patterns in these agencies' UDAAP enforcement actions.

We've sorted the actions by agency in the sequence indicated above. (Some actions involved multiple federal and/or state regulators, but for simplicity they're grouped under the CFPB, OCC or FTC.) The comments column offers data about selected issues such as whether the action involves claims of abusive practices.

A couple of disclaimers: first, although we'll be supplementing the database from time to time, it's not currently comprehensive. Second, while the PLA site has a search function, there's no search function specifically for the database. If you're on this page and need to search it, we'd recommend you use your browser's "find" function.

We hope the database is useful and would welcome your feedback. Please [contact us here](#) with your suggestions.

Agency	Date of Action	Party	Documents	Activity	Product/ Service	Comments
CFPB	10/09/14	M&T Bank	Consent Order ; Press Release	Marketing	Checking accounts	
CFPB	09/29/14	Flagstar Bank, F.S.B.	Consent Order ; Press Release	Customer service	Mortgage servicing; Mortgage	

Our Payments Team addresses changes and continuities in the payments industry every day—leveraging our many years of industry experience and our presence on both coasts and in China. On paymentlawadvisor, we offer commentary on new developments that seem particularly significant, as well as resources that we believe can be helpful to others who are tasked with anticipating, understanding and addressing these developments.

STAY CONNECTED

[RSS](#) [Facebook](#) [Twitter](#)

Subscribe to this blog by Email

Your Email Address

SUBMIT

DEVELOPMENTS AND COMMENTARY

[Credit/Debit Payments Resources](#)

[Deals and Technology](#)

[Financial Services Litigation and Enforcement](#)

[General](#)

[Global Insights](#)

[Litigation and Enforcement Resources](#)

[Mobile Resources](#)

Applications for Credit

- TILA requires that account opening disclosures be provided before an open-end account is first used, or for closed-end credit, before the consummation of the loan. 1026.5(b)(1)(i) and 1026.17(b)
- Delivering disclosures electronically requires E-SIGN Act consent – essential for instant issuance and paperless experiences
 - Disclosures
 - Affirmative consent
 - Retainable format

The E-SIGN Act

- Consent to receive electronic records must follow delivery of the following disclosures – 15 USC 7001(c)(1)
- Affirmative consent must be given *in a manner that reasonably demonstrates that the consumer can access the information in the electronic form* that will be used to provide the information as an electronic record. 15 USC 7001(c)(1)(A)-(C) (emphasis added).

The E-SIGN Act

- Challenges in delivering disclosures that are retainable
 - Mobile devices – not all can print or save
 - When the electronic device does not belong to the consumer – e.g. an in-store iPad
 - Verifying an email address

E-SIGN Act Exceptions: Open-End Credit

- Exception for Schumer box
 - “For an application or a solicitation that is accessed by the consumer in electronic form, the disclosures required under this section may be provided to the consumer in electronic form on or with the application or solicitation.” 1026.60(a)(2)(v)
- Commentary clarifies that if the Schumer Box is provided electronically, it must be in close proximity to the application or solicitation and either:
 - Automatically appear on the screen with the application;
 - Be located on the same Web page as the application if the application has a clear and conspicuous reference to the location of the disclosures and indicates that the disclosures contain rate, fee, and other cost information, as applicable;
 - A link to the electronic disclosures is provided on or with the application as long as consumers *cannot bypass the disclosures* before submitting the application. The link would take the consumer to the disclosures, but the consumer need not be required to scroll completely through the disclosures; or
 - On the same Web page as the application without necessarily appearing on the initial screen, immediately preceding the button that the consumer will click to submit the application or reply. Comment 60(a)(2)-1.ii

Approvals and Rejections

- Underwriting requirements
 - Regulatory basis to ensure consumers can repay the loan; for example:
 - Ability to pay requirements for credit cards
 - CFPB scrutiny of payday lenders and consumers inability to repay those loans leading to a cycle of debt
- Deliver certain notices after an application is approved or rejected
 - Risk-based pricing notices
 - Adverse action notices
 - TILA estimates for closed-end credit
- Approvals contingent on fraud checks / customer verification / AML