



ADVERTISING DEPOSIT ACCOUNTS

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DISCLAIMER

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ADVERTISING DEPOSIT ACCOUNTS

OUTLINE

I. INTRODUCTION

- A. Scope. The purpose of this presentation is to provide an overview of California and federal regulatory considerations that apply to deposit promotions.
- B. Additional Considerations. Additional out-of-scope compliance and legal considerations will apply to the extent a promotion involves products other than deposit accounts (e.g., consumer loan promotions).

II. TRUTH IN SAVINGS (REGULATION DD)

- A. Regulation DD (TISA) Advertising Disclosures. Regulation DD is the regulation that implements the Truth in Savings Act (TISA). 12 CFR 1030.8 (Banks). 12 CFR 707.8 (Credit Unions).
 - 1. Covered messages. Comment 2(b)-1 to Section 1030.2 provides that advertisements include commercial messages in visual, oral, or print media that invite, offer, or otherwise announce generally to prospective customers the availability of consumer accounts, such as:
 - a. Telephone solicitations;
 - b. Messages on automated teller machine (ATM) screens;
 - c. Messages on a computer screen in an institution's lobby (including any printout) other than a screen viewed solely by the institution's employee;

- d. Messages in a newspaper, magazine, or promotional flyer or on radio; and
- e. Messages that are provided along with information about the consumer's existing account and that promote another account at the institution.

2. Messages that are not covered ads. Comment 2(b)-2 to Section 1030.2 provides the following examples of messages that are not advertisements:

- a. Rate sheets in a newspaper, periodical, or trade journal (unless the depository institution, or a deposit broker offering accounts at the institution, pays a fee for or otherwise controls the publication);
- b. In-person discussions with consumers about the terms for a specific account;
- c. Information given to consumers about their existing accounts, such as current rates recorded on a voice-response machine or notices for automatically renewable time accounts sent before renewal;
- d. Information about a particular transaction in an existing account;
- e. Disclosures required by federal or other applicable law; and
- f. A deposit account agreement.

B. Misleading or Inaccurate Advertisement. Regulation DD prohibits an institution from distributing any advertisement that is misleading or inaccurate or that misrepresents the institution's deposit contract. Section 1030.8(a).

1. Use of the term "profit" is prohibited.
2. Advertising "free" accounts. Cannot refer to or describe an account as "free" or "no cost" (or contain a similar term) if any maintenance or activity fee may be imposed on the account.
 - a. Maintenance and activity fee examples. Examples of maintenance and activity fees include:
 - (1) Any fee imposed when a minimum balance requirement is not met, or when consumers exceed a specified number of transactions;
 - (2) Transaction and service fees that consumers reasonably expect to be imposed on a regular basis;
 - (3) A flat fee such as a monthly service fee; and
 - (4) Fees imposed to deposit, withdraw or transfer funds, including per-check or per-transaction charges.
 - b. Excluding examples. Examples of fees that do not qualify as maintenance or activity fees include:
 - (1) Fees not required to be disclosed under Section 1030.4(b)(4) (that is, any fee not required to be disclosed as part of the Regulation DD account-opening disclosures);

- (2) Check printing fees (this is true regardless of who imposes the fees; thus, check printing fees by themselves will not prevent advertising an account as “free” or “no cost”);
- (3) Balance inquiry fees;
- (4) Stop payment fees and fees associated with checks returned unpaid;
- (5) Fees assessed against a dormant account; and
- (6) Fees for ATM or electronic transfer services (such as preauthorized transfers or home banking services) not required to obtain an account.

3. Capital One “high interest” case.

- a. The CFPB announced on January 14, 2025 that it had filed suit against Capital One, N.A. (“Capital One”), alleging that the Bank’s interest payment practices on certain of its savings account products constituted TISA, Regulation DD, and UDAP violations.
- b. According to the CFPB’s complaint, although Capital One’s ads claimed that its “360 Savings” deposit account product had “one of the nation’s best interest rates,” in actuality the Bank froze the product’s rate at a low level during a time when interest rates were rising. Around this same time, Capital One launched a new account product, “360 Performance Savings,” which was almost identical to the original but offered a much higher interest rate. The CFPB alleged that the Bank misled existing 360 Savings customers about the new product to avoid giving them the 360 Performance Savings product’s higher interest rate.

- c. The CFPB alleged that Capital One deceptively marketed the original 360 Savings account product as a top-tier interest-bearing account with the “top” and “best” and “highest” interest rates, and that by opening a 360 Savings account, customers’ savings would “earn much more” in interest “than what it would in an average savings or money market account.” The Bank also allegedly “assur[ed]” customers they wouldn’t need to worry about monitoring their account rates because the Bank would honor its promises to pay customers high interest rates.
- d. However, in 2019, Capital One stopped offering 360 Savings to new customers and replaced it with 360 Performance Savings, which had a higher interest rate. The CFPB alleged that Capital One made the two products look the same, and removed references to 360 Savings from its website. Further, according to the CFPB, Capital One deceived existing customers by promising their 360 Savings accounts would be automatically converted to the higher-rate 360 Performance Savings account product when in actuality they were not.
- e. The CFPB alleged that while the rest of the banking industry raised interest rates, Capital One kept the 360 Savings rate frozen at 0.30%, well below the national average, while the Bank increased the rate for 360 Performance Savings to over 4.00%. The CFPB alleged that this tactic allowed the Bank to attract new deposits without paying its existing customers the interest they were promised, saving the Bank over \$2 billion in interest payments.
- f. As part of its action, the CFPB sought injunctive relief against Capital One, as well as customer restitution and civil money penalties.

4. M&T Bank “free checking” case.

- a. In October 2019, the CFPB ordered the bank to pay \$2.9 million to consumers who were charged fees despite ads that promised “no strings attached” free checking.

- b. According to the CFPB, the bank's advertisements failed to disclose the fact that the customer had to maintain a minimum level of account activity, or (after 90 days) the account would be automatically converted to a standard checking account with fees.
- C. Advertising Rates. If an advertisement states a rate of return, it must state the rate as an "annual percentage yield," using that term. The advertisement may also include the "interest rate," using that term, but cannot include any other rate (such as an "average" or "aggregate" percentage yield). The interest rate may be stated only in conjunction with, but not more conspicuously than, the annual percentage yield to which it relates. Section 1030.8(b).
 - 1. Abbreviation of APY. Institutions are permitted to use the abbreviation "APY" in advertisements, provided the term "annual percentage yield" is stated at least once in the advertisement.
 - 2. Special rules for tiered-rate accounts. If an institution states an annual percentage yield in an advertisement for a tiered-rate account, it must state all of the annual percentage yields for each tier, including those required to be shown as a range, as well as the corresponding minimum balance requirements.
- D. APY is a Triggering Term Requiring Additional Disclosures. Pursuant to Section 1030.8(c), if the annual percentage yield is stated in an advertisement, the advertisement must include certain information, to the extent applicable, in a clear and conspicuous manner:
 - 1. Statement that the rate may vary after the account is opened;
 - 2. The period of time the APY will be offered or a statement that the APY is accurate as of a specified date;
 - 3. Minimum balance required to obtain the advertised annual percentage yield;

4. Minimum opening deposit if it is greater than the minimum balance necessary to obtain the advertised annual percentage yield;
5. Effect of fees. A statement that fees could reduce the earnings on the account; and
6. The features of time accounts, such as:
 - a. The term of the account;
 - b. Early withdrawal penalty. The advertisement must also contain a statement that a penalty will or may be imposed for early withdrawal of the time account; and
 - c. Required interest payouts. For non-compounding time accounts with a stated maturity greater than one year that do not compound interest on an annual or more frequent basis, that require interest payouts at least annually, and that disclose an APY as equal to the interest rate, the advertisement must contain a statement that interest cannot remain on deposit and that the payout of interest is mandatory.

E. Bonus as Triggering Term Requiring Additional Disclosures.

1. Definition of “bonus”. A 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 consumer during a year in exchange for opening, maintaining, renewing, or increasing an account balance.” Section 1030.8(d).
 - a. “Bonus” exclusions. The term “bonus” does not include interest, other considerations worth \$10 or less given during a year, the waiver or reduction of a fee, or the absorption of expenses.

- b. *De minimis* items excluded. Comment 2(f)-2 to Section 1030.2 provides that institutions may rely on the valuation standard used by the IRS to determine if the value of an item is *de minimis*. Examples of items of *de minimis* value include coffee mugs, T-shirts, or other merchandise with a market value of \$10 or less.
- c. Bonus calculation. In determining whether an item valued at \$10 or less is a bonus, institutions must aggregate per account, per calendar year, items that may be given to consumers. In making this determination, institutions must aggregate per account only the market value of items that may be given for a specific promotion. Comment 2(f)-3 to Section 1030.2.
 - (1) For example, in January an institution offers to give consumers an item valued at \$7 for EACH calendar quarter during the year that the average account balance in a negotiable order of withdrawal (NOW) account exceeds \$10,000. The bonus rules are triggered, since consumers are eligible under the promotion to receive up to \$28 during the year (\$7 times 4 equals \$28).
 - (2) However, the bonus rules are not triggered if, for instance, an item valued at \$7 is offered to consumers opening a NOW account during the month of January. This is the case even if in November, the institution introduces a new promotion, such as an offer to existing NOW account holders, presenting an item valued at \$8 for maintaining an average balance of \$5,000 for the month.

2. Required disclosures if a bonus is stated in an advertisement:

- a. The “annual percentage yield,” using that term (which means that the advertisement must then contain the other applicable disclosures required when an APY is included – see Paragraph D. above);
- b. The time requirement to obtain the bonus;
- c. The minimum balance required to obtain the bonus;

- d. The minimum balance required to open the account, if it is greater than the minimum balance necessary to obtain the bonus; and
 - e. When the bonus will be paid or provided to the consumer.
- F. “Limited” Exemption for Certain Advertisements. Section 1030.8(e) provides limited exemptions for certain forms of advertisements.
 - 1. Treatment of broadcast and outdoor advertising, and telephone response machines. If an advertisement is made through certain types of media (listed below), the advertisement is not required to contain the information in the following provisions of Section 1030.8: (c)(1) (statement that rate may vary), (c)(2) (period APY is offered), (c)(4) (minimum opening deposit), (c)(5) (effect of fees), (c)(6)(ii) (early withdrawal penalty), (d)(4) (minimum balance to open account), and (d)(5) (when bonus will be paid).
 - 2. Types of exempt media advertisement. The limited exemption applies to:
 - a. Broadcast or electronic media (except for advertisements posted on the internet or sent by email), such as television or radio;
 - b. Outdoor media, such as billboards; or
 - c. Telephone response machines.
 - 3. Required disclosures for exempt media advertisements. For an advertisement in any of the media referenced in Paragraph F.2. above, the advertisement still must contain disclosures regarding (if applicable):
 - a. The minimum balance required to obtain the advertised APY and, for tiered-rate accounts, the minimum balance required for each tier (Section 1030.8(c)(3));

- b. The term of a time account (Section 1030.8(c)(6)(i));
 - c. For time deposits that are non-compounding accounts with a stated maturity greater than one year that do not compound interest on an annual or more frequent basis, that require interest payouts at least annually, and that disclose an APY as equal to the interest rate, a statement that interest cannot remain on deposit and that the payout of interest is mandatory (Section 1030.8(c)(6)(iii));
 - d. The annual percentage yield if a bonus is advertised (Section 1030.8.(d)(1));
 - e. The time requirement to obtain an advertised bonus (Section 1030.8.(d)(2)); and
 - f. The minimum balance requirement required to obtain the bonus (Section 1030.8.(d)(3)).
4. Other restrictions. Finally, rate information in advertisements in these media must be disclosed as an annual percentage yield, and the advertisement remains subject to the rules against misleading or inaccurate advertisements and against describing accounts as free if a maintenance or activity fee is imposed.
5. Indoor signs. If a rate is displayed on a sign inside the premises of a depository institution (*i.e.*, an “indoor sign”), the indoor sign need only include the annual percentage yield and a statement advising consumers to ask employees about fees and terms applicable to the advertised account. It is not necessary for the signs to provide the other Regulation DD advertising disclosures. Section 1030.8(e)(2).
- a. Types of indoor signs. Indoor signs include advertisements displayed on computer screens, banners, preprinted posters, and chalk or peg boards. Any advertisement inside the premises that can be retained by a consumer (such as a brochure or a printout from a computer) is not an indoor sign. Comment 8(e)(2)(i)-1 to Section 1030.8.

- b. Other restrictions apply. Indoor signs remain subject to the rules against misleading or inaccurate advertisements and against describing accounts as “free” if a maintenance or activity fee is imposed.
- c. Advertising rates on indoor signs. If an exempt indoor sign displays a rate of return, it must state the rate as an annual percentage yield, using that term or the term “APY.” The sign must not state any other rate, except that the interest rate may be stated in conjunction with the annual percentage yield to which it relates. If a rate is stated, the sign must also contain a statement advising consumers to contact employees for further information about applicable fees and terms. Section 1030.8(e)(2)(ii).

G. Electronic Advertisements.

- 1. Exemption exclusion. The exemption for advertisements made through broadcasts or electronic media does not extend to advertisements made by electronic communication, such as advertisements posted on an institution’s website or sent by email. Comment 8(e)(1)(i)-1 to Section 1030.8.
- 2. Triggering terms in electronic advertisements. If an electronic advertisement displays a triggering term, such as a bonus or the annual percentage yield, the advertisement must clearly refer the consumer to the location where the additional required information begins. For example, the advertisement may be accompanied by a link that takes the consumer directly to the additional information.

Note that the general rule that a simple interest rate may be stated only if it is provided in conjunction with and not more conspicuously than the related APY applies to electronic advertisements as well.

- 3. E-SIGN Act. The general advertising rules under Section 1030.8, as well as the disclosures required in connection with advertising overdraft services under Section 1030.11(b), may be provided electronically without regard to the disclosure and consumer consent provisions of the E-SIGN Act.

H. Advertising Disclosures for Overdraft Services.

1. Disclosures when promoting payment of overdrafts. An advertisement promoting the payment of overdrafts is required to disclose in a clear and conspicuous manner the following additional items of information. Section 1030.11(b).
 - a. Fees. The applicable fee or fees for the payment of each overdraft must be disclosed.
 - b. Types of transactions. In addition, the institution must disclose the categories of transactions for which a fee for paying an overdraft may be imposed.
 - c. Time period for repayment. The institution must also disclose the time period consumers have to repay or cover any overdraft.
 - d. Circumstances of nonpayment. Finally, the institution must disclose the circumstances under which the institution will not pay an overdraft.
 2. Communications not triggering additional disclosures. Certain communications regarding the payment of overdrafts fall into a safe harbor not requiring financial institutions to provide the disclosures discussed above, including, for example, overdraft programs where the payment is subject to Regulation Z.
- I. TISA Advertising Checklists. Exhibit A to this Outline provides a compliance checklist to use in determining whether an advertisement complies with Regulation DD.

III. MEMBER FDIC ADVERTISING STATEMENT

A. Recent FDIC Rulemaking.

1. Impact on advertising statements. FDIC-insured depository institutions (IDIs) must comply with the FDIC's recently revised rules on the use of the official FDIC sign and IDIs' advertising statements.
2. Official advertising statement requirements. An IDI is already required to include the official advertising statement in all advertisements that either:
 - a. Promote deposit products and services; or
 - b. Promote non-specific banking products and services offered by the institution. For example, "Anytown Bank, offering a full range of banking services." Section 328.6.
3. Official advertising statement.
 - a. Generally. The official advertising statement must be in substance as follows: "Member of the Federal Deposit Insurance Corporation." Section 328.6(b).
 - b. Optional short title and symbol. The current regulation allows IDIs to use the short title "Member of FDIC," "Member FDIC," or a reproduction of the symbol of the FDIC. In addition to these options, to provide additional flexibility, the final rule allows the use of "FDIC-Insured."
4. Exclusions. The following types of advertisements do not require use of the official advertising statement (Section 328.6(d)):
 - a. Statements of condition and reports of condition (in other words, call reports) of an IDI which are required to be published by state or federal law;

- b. IDI supplies such as stationery (except when used for circular letters), envelopes, deposit slips, checks, drafts, signature cards, deposit passbooks, certificates of deposit, etc.;
- c. Signs or plates in the IDI offices or attached to the building or buildings in which such offices are located;
- d. Listings in directories;
- e. Advertisements not setting forth the name of the IDI;
- f. Entries in a depository institution directory, provided the name of the IDI is listed on any page in the directory with a symbol or other descriptive matter indicating it is a member of the Federal Deposit Insurance Corporation;
- g. Joint or group advertisements of depository institution services where the names of IDIs and non-insured institutions are listed and form a part of such advertisements;
- h. Advertisements by radio or television, other than display advertisements, which do not exceed 30 seconds in time;
- i. Advertisements that are of a type or character that make it impractical to include the official advertising statement, including, but not limited to, promotional items such as calendars, matchbooks, pens, pencils, and key chains; and

- j. Advertisements which contain a statement to the effect that the depository institution is a member of the Federal Deposit Insurance Corporation, or that the depository institution is insured by the Federal Deposit Insurance Corporation, or that its deposits or depositors are insured by the Federal Deposit Insurance Corporation to at least the standard maximum deposit insurance amount for each depositor.
5. Restrictions on using the official advertising statement when advertising non-deposit products.
- a. Non-deposit product advertisements. An IDI is not permitted to 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 hybrid products. Section 328.6(e).
 - b. Mixed advertisements. In advertisements containing information about both insured deposit products and non-deposit products or hybrid products (“NDIPs”), an IDI must clearly:
 - (1) Segregate the official advertising statement or any similar statement from that portion of the advertisement that relates to the NDIPs; and
 - (2) Disclose that non-deposit products that are not insured by the FDIC, are not deposits, and may lose value.
6. Official advertising statement in non-English language. The non-English equivalent of the official advertising statement may be used in any advertisement, provided that the translation has had the FDIC’s prior written approval. Section 328.6(f).

7. Misrepresenting insured status. The final rule provides non-exhaustive examples of scenarios that would be deemed to be material misrepresentations, including the following:
 - a. A statement made by a person other than an IDI that:
 - (1) Represents or implies that an advertised product is insured by the FDIC, which fails to clearly and conspicuously identify the IDI(s) with which the representing party has a direct or indirect business relationship for the placement of deposits, and into which the consumer's deposits may be placed; or
 - (2) Fails to clearly and conspicuously disclose that the person is not an FDIC-insured depository institution and that FDIC insurance only covers the failure of the FDIC-insured depository institution.
 - b. A pass-through deposit insurance coverage statement that fails to clearly and conspicuously disclose that certain conditions must be satisfied for pass-through deposit insurance coverage to apply.

IV. IRS REPORTING

- A. Threshold Question. Will the giveaway be reportable as deposit interest income (IRS Form 1099-INT) or as miscellaneous income (IRS Form 1099-MISC).

IRS Regulation Section 1.6049-5(a) provides that “amounts, whether or not designated as interest” will be deemed interest if paid or credited “in respect of deposits.”

- B. 1099-INT. IRS Form 1099-INT has a \$10 annual reporting threshold (report triggered at \$10 or more) for income paid on deposit accounts.

EXAMPLE: An institution that provides a \$100 cash bonus (or Amazon gift card) when a new one-year CD is opened would report the \$100 as if it were interest paid on the CD.

1. Exception for “*de minimis*” premium. A financial institution that provides a “*de minimis*” premium will not have to treat it as interest for information reporting purposes.

- a. Calculation. A *de minimis* premium is a non-cash inducement provided by a financial institution to a depositor to open or add to an account, that does not have a value in excess of \$10 for a deposit of less than \$5,000 or \$20 for a deposit of \$5,000 or more.
 - b. Cost to the institution. The cost to the financial institution of the premium is used in determining whether the dollar limitations are met. Revenue Procedure 2000-30 (June 26, 2000).
- 2. Exemption based on customer type. Certain depositors are exempt from 1099-INT reporting, such as corporations and non-resident aliens.
- C. 1099-MISC. IRS Form 1099-MISC has a \$600 annual reporting threshold (report triggered at \$600 or more) for reporting miscellaneous compensation, subject to IRS exemptions (for example, a corporation would be exempt for compensation provided in the context of a promotion).

EXAMPLE: An institution that provides a reward to a third party for referring a friend to open a new account. The reward is not provided to the new depositor (so not 1099-INT reportable as paid to the depositor). However, the reward may be subject to 1099-MISC reporting if paid to the referring third party, depending on whether the reporting threshold is met.

QUESTION & ANSWER SESSION #1

- V. UNFAIR, DECEPTIVE, OR ABUSIVE ACTS OR PRACTICES (UDAAP)
 - A. UDAP/UDAAP. Under federal law, as well as California (and likely all other states too), it is prohibited to engage in a practice that is unfair, deceptive, or an abusive act or practice. California Business and Professions Code Section 17500, see also 15 USC Section 45.

- B. FDIC's Compliance Examination Questions. The FDIC's Financial Institution Letter FIL-26-2004 (updated 2011), entitled *Unfair or Deceptive Acts or Practices by State-Chartered Banks*, sets forth, among other things, questions examiners are expected to resolve in reviewing a bank's advertising and is available at <https://www.fdic.gov/news/financial-institution-letters/2004/fil2604a.html>. Some of the more relevant questions from the letter regarding deposit accounts are provided below.
1. Does the institution ensure that it has a reasonable, factual basis for all representations?
 2. Does the institution ensure that materials do not use fine print, separate statements, or inconspicuous disclosures to correct potentially misleading headlines?
 3. Does the institution ensure that the materials clearly disclose limitations, conditions, or restrictions on the offer when it uses terms such as "preapproved" or "guaranteed"?
 4. Does the institution ensure that the materials take account of the sophistication of the target audience so that its claims about cost, value, availability, savings, benefits, or terms are not misleading?
 5. Does the institution ensure that costs and benefits of optional or related products (such as overdraft protection) are not misrepresented, incomplete, or omitted?
 6. Does the institution avoid advertising terms that are unavailable to most customers or use unrepresentative examples?
 7. Do the materials include contact information for consumer complaints for the institution or its third-party service provider?

8. Do the promotional materials and marketing scripts:
 - a. Fairly and accurately describe the terms, benefits, and material limitations of the products or services being offered?
 - b. Not misrepresent the terms either affirmatively or by omission?
 - c. Draw the consumer's attention to key terms, including limitations or conditions important to making an informed decision?
 - d. Clearly disclose all material limitations or conditions on the terms or availability of products or services, such as:
 - (1) Special interest rates only for balance transfers;
 - (2) The date that introductory terms expire;
 - (3) Prerequisites for particular products, services, or benefits (e.g., discounts, refunds, or rebates); and
 - (4) Conditions for canceling a trial basis service without charge?
 - e. Alert consumers in a clear and timely manner about penalties and other charges and the reasons for them?

- f. Clearly inform consumers if contract provisions permit changes in the terms of the agreement?
 9. Does the institution refrain from advertising services or benefits that it does not intend or is not able to provide? Are the conditions imposed to receive such services or benefits so burdensome or difficult to meet that the advertised service or the benefit is illusory?
 10. Are the disclosures clear and accurate with respect to: (i) the product or service, such as prepaid debit cards and overdraft protection programs; and (ii) all terms, whether or not they are prepared by the institution or its third-party service provider?
- C. Substantiation of Advertising Claims. Advertisements that purport to be based on factual, objective, or clinical evidence, or that compare a product's effectiveness or safety to that of other brands or products, are subject to California Business and Professions Code Section 17508.
1. Proof of facts. The statute authorizes certain state and local government agencies to require the advertiser to provide evidence of the facts upon which such advertising claims are based. As a result, advertisers who make purportedly factual or objectively verifiable assertions must be prepared to submit the evidence on which its assertions are based, if requested.
 2. Requesting agencies. Requests for substantiation can be made by the California attorney general, any district attorney, any city attorney and the California Department of Consumer Affairs.
 3. Enforcement. These agencies can seek an immediate termination or modification of the advertising claim if the claim appears to be false. Penalties may also be imposed by a court.
- D. UDAP/UDAAP Enforcement Action Examples. The following highlights a couple UDAP and UDAAP enforcement examples.

1. Comerica Bank. On December 6, 2024, the CFPB filed suit in a Texas federal district court against Comerica Bank ("Comerica"), alleging numerous UDAAP and Regulation E-related violations in connection with Comerica's administration of the federal government's Direct Express benefits program ("Direct Express"). Direct Express is a prepaid card product that is used to provide federal benefit payments to approximately 3.4 million Americans. Since 2008, Comerica Bank administered the Direct Express program on behalf of the Treasury Department.
 - a. In its complaint, the CFPB alleged that Comerica committed a number of UDAAPs and Regulation E violations in its administration of Direct Express, including the following:
 - (1) Intentional disconnection of customer service calls and long wait times. According to the CFPB, Comerica's third-party vendor call centers deliberately disconnected at least 24 million calls from customers before they could reach a customer service representative. The CFPB also alleged that customers whose calls were not dropped were regularly subject to excessively long wait times (often several hours) to speak with a representative in order to receive assistance with issues such as unauthorized transactions, charge disputes, and lost or stolen cards. The CFPB alleges that these barriers "to protecting and accessing their funds likely have led some cardholders to give up entirely on seeking Regulation E's protections or other assistance." As such, the CFPB alleges that these call center-related problems constituted unfair practices and UDAAP violations.
 - (2) "Junk" ATM withdrawal fees. The CFPB also alleged that Comerica charged ATM fees to more than one million Direct Express cardholders under circumstances where they were entitled to free withdrawals. Comerica's customer-facing disclosure provided that cardholders were entitled to one free ATM withdrawal per month per deposit of funds into their Direct Express accounts and that Comerica would assess a fee for each additional withdrawal. The disclosure also confirmed that "[t]here is no ATM denial fee associated with this account." Due to systems processing issues, under certain circumstances Comerica improperly applied a customer's monthly ATM fee waiver to a denied ATM withdrawal transaction (a transaction to which no fee should apply), resulting in the customer incurring an ATM withdrawal fee (where the fee waiver should have applied) if the customer later went to make a subsequent ATM withdrawal after receiving a benefits payment. The CFPB alleged that this constituted an unfair practice and UDAAP violation.

- (3) "Junk" stop payment-related fees. Direct Express's Terms & Conditions listed two requirements to cancel a preauthorized payment: (1) Direct Express cardholders had to contact customer service at the provided phone number or address at least three business days before the scheduled date of payment; and (2) they also had to notify the merchant. When Direct Express cardholders submitted stop-payment requests to Comerica's third party vendor, the vendor's customer service representatives advised them they could either contact the merchant and hope the merchant would stop processing the payment or close their accounts and request a new debit card. The new account would not have the preauthorization for the transfer that was attached to the old account number. Cardholders who followed the vendor's instructions to close an account and request a new card were charged a \$4.00 fee for the replacement card. If the consumer requested expedited delivery, the consumer was charged an additional \$13.50. The CFPB alleged that in actuality, Comerica's vendor lacked the technological capability to stop such payments. Instead, customer service representatives instructed cardholders to request a new card which would not have the preauthorization attached to it, and the customer would incur the card replacement-related fee(s). In doing so, the CFPB alleged that Comerica engaged in an unfair practice. The CFPB also alleged that the vendor's failure to stop payments constituted a violation of Regulation E Section 1005.10(c)(1).

- b. The CFPB's action against Comerica represents the continuing regulatory scrutiny of so-called "junk" fees. It also emphasizes the need for appropriate oversight and management of third party vendors.

2. Navy Federal Credit Union. In November 2024, the CFPB announced that it had entered into a consent order with Navy Federal Credit Union ("Navy Federal"), stemming from allegations that Navy Federal had committed UDAAPs in connection with its overdraft fee practices. In addition to paying an \$80 million restitution order as a result of its alleged UDAAPs, Navy Federal also agreed to pay a \$15 million civil money penalty as part of the consent order.

- a. According to the CFPB, as part of its "Optional Overdraft Protection Service" (also known as OOPS), Navy Federal charged \$20 per overdraft transaction. The CFPB's statement regarding its consent

order noted that from 2017 to 2021 alone, Navy Federal's OOPS program generated nearly \$1 billion in fees.

- b. The CFPB alleged that Navy Federal's overdraft fee practices were unfair in two ways:
 - (1) Authorized positive, settle negative transactions (APSNs). APSNs occur when a customer has sufficient funds to cover a transaction at the time of authorization, but insufficient funds at settlement due to intervening transactions. In the past few years, the CFPB and other regulators have increasingly found that overdraft fees charged on APSNs are UDAAP/UDAP per se. In its action against the credit union, the CFPB alleged that "Navy Federal was aware that consumers are not likely to understand the details of how overdraft fees are assessed, due to the complexities of how various transactions are paid and the inherent uncertainties of when they are paid after being authorized."
 - (2) Misleading Peer-to-Peer Payment Processing. The CFPB also alleged that Navy Federal committed UDAAPs by failing to inform its members that funds they received through payment platforms like Zelle, PayPal, or Cash App were marked as available to spend but were not officially posted until the following business day if received after designated cutoff times. The CFPB found that Navy Federal's failure to inform members of designated cutoff times caused members to rely on seemingly available funds that instead sometimes resulted in the members incurring overdrafts and related overdraft fees.
- c. The CFPB's action against Navy Federal represented the first significant enforcement action by the Bureau against a credit union for overdraft fee-related practices. This enforcement action underscored the CFPB's commitment to holding different types of financial institutions accountable for UDAAPs, particularly with regard to areas of heightened scrutiny such as overdraft practices and vulnerable population groups like servicemembers and their families.

VI. CERTIFICATE OF DEPOSIT (CD) PROMOTIONS

- A. “Bump Rate” CDs. For this purpose, the term “bump rate” refers to a CD that allows for an interest rate increase during the CD term.
1. FDIC’s interest rate cap rule for less than well-capitalized institutions. Section 337.6 of the FDIC’s regulations relate to interest rate restrictions that apply to insured depository institutions that are not well capitalized.
 2. Rate cap. Less than well-capitalized institutions are permitted to offer the FDIC’s posted “national” rate plus 75 basis points. Any rate over this amount would violate the FDIC’s regulations.
 3. Impact on deposit promotions. Financial institutions offering increased rates (even for only a promotional period) need to be mindful of this rate cap restriction.
 4. Subsequent drop in capital status. If an institution has committed to a future rate increase, a subsequent drop in the institution’s capital status (to less than well-capitalized) could result in a conflict with the institutions’ compliance under Section 337.6.
 - a. Did the institution reserve the right to refuse the bump-rate if regulatory restrictions apply?
 - b. Are there UDAAP risks based on promises/representations already made?
- B. “Flexible” or “Liquid” CDs and Mandatory Early Withdrawal Penalties. For this purpose, the terms “flexible” and “liquid” refer to a CD that allows deposits and withdrawals during the term.
1. Deposits during the term. Regulation D defines a time deposit, in part, as follows:

A deposit that the depositor does not have a right and is not permitted to make withdrawals from within six days after the date of deposit unless the deposit is

subject to an early withdrawal penalty of at least seven days' simple interest on amounts withdrawn within the first six days after deposit.

2. Partial withdrawals during the term (even without allowing deposits during the term). Regulation D further provides the following:

A time deposit from which partial early withdrawals are permitted must impose additional early withdrawal penalties of at least seven days' simple interest on amounts withdrawn within six days after each partial withdrawal.

3. Failure to comply. If an early withdrawal penalty is not imposed, the account ceases to be a time deposit. The account may become a savings deposit if it meets the requirements for a saving deposit, otherwise, it becomes a transaction account. The account type may impact reserve and reporting requirements.

VII. MODE OF ADVERTISING CONSIDERATIONS

- A. Telemarketing, Text Message, and Email Marketing Solicitations. In light of the high penalties and ambiguous compliance challenges applicable to telemarketing, text message marketing campaigns, and email solicitations, financial institutions are discouraged from engaging in these campaigns and solicitations and are advised to seek legal counsel on these matters.

- B. Social Media Solicitations.

1. FFIEC guidance. The FFIEC issued supervisory guidance on December 17, 2013 addressing issues that arise in connection with a financial institution's use of social media as a means to attract and interact with customers (the "Social Media Guidance"). 78 FR 76297.
 - a. Compliance. Notably, the Social Media Guidance states that to the extent a financial institution uses social media to advertise or provide deposit and non-deposit services, it must comply with all applicable laws and regulations to the same extent as when it engages in these activities through other media outlets.

- b. **EXAMPLE:** If an advertisement on a social media website displays a triggering term as defined under Regulation DD (such as a bonus or the APY), then Regulation DD requires that the advertisement clearly state certain information regarding the bonus or APY, as applicable. There is no exception under Regulation DD for these advertisements presented via a social media website.

- 2. Third-party site terms and conditions. Financial institutions intending to leverage third-party platforms (e.g., Facebook or Twitter) need to be aware of the third party's terms and conditions applicable to promotions and advertisements.

VIII. PRIVACY IMPLICATIONS

- A. Generally. Although not a common element of most deposit promotional activities, it is recommended that institutions be mindful of the potential privacy considerations that may be triggered in some campaigns. For more information on privacy compliance, refer to BCG Standard Procedures Manual #20, *Financial Privacy & Information Security*.
- B. Refer-a-friend Example. For example, "refer-a-friend" promotions that result in disclosing the existence of a new account (possibly even balance information) to a "referring" party. Has the new deposit customer consented to this information sharing? How has the institution documented this consent?
- C. Data Collection and Sharing Implications. If a marketing campaign involves information sharing with another organization, the data sharing should be reviewed in light of the financial institution's privacy policies and disclosures.
 - 1. GLBA. For example, the federal Gramm-Leach-Bliley Act (GLBA) has an opt-out requirement for certain information sharing under joint marketing arrangements.
 - 2. CFIPA. In addition, the California Financial Information Privacy Act (CFIPA), California Financial Code Sections 4053-4056, require that consumers receive both an initial and annual opt-out notice before an institution may

share nonpublic personal information with nonaffiliated financial institutions for joint marketing purposes. California Financial Code Section 4053(b)(2).

3. CCPA. The CCPA imposes a number of restrictions on how information may be reused, including for marketing purposes. Therefore, institutions need to consider the extent to which the CCPA may limit an institution's ability to reuse information for a promotion. Depending on what type of information is being shared and the purposes for which it is being used, these practices may trigger various opt-out disclosure obligations or even require the institution to obtain the individual's consent prior to sharing.
 - a. If reusing the information for marketing is not something the individual would reasonably expect the institution to do with their information (based on a test set forth in 11 CCR Section 7002(a)), the institution would need to obtain the individual's consent.
 - b. "Selling" information triggers a requirement to provide an opt-out notice under the CCPA.
 - (1) Whether disclosing information to third parties (even vendors) for marketing purposes could be viewed as selling information must be seriously considered.
 - (2) The California attorney general (AG) has entered into two consent orders with companies based on disclosing information in connection with certain marketing/advertising activities.
 - c. "Sharing" information also triggers a requirement to provide an opt-out notice.
 - (1) Sharing means disclosing information to another entity to accomplish what is defined as "cross-context behavioral advertising."

- (2) “Cross-context behavioral advertising” refers to the practice of targeting of advertising to a consumer based on the consumer’s PI obtained from their activity across businesses, distinctly branded websites, applications, or services, excluding the business, distinctly branded website, application, or service with which the consumer intentionally interacts. Section 1798.140(k).
- (3) Any disclosure of information to a third party for purposes of developing targeted advertisements could be viewed as “sharing.”

d. Sensitive personal information.

- (1) If any “sensitive personal information” (Sensitive PI) is shared for marketing purposes, this may trigger Right to Limit Use (RLU) rights.
- (2) RLU gives consumers the right to prevent businesses from using or disclosing their Sensitive PI for certain reasons (see 11 CCR Section 7027(m)(1)-(8)). Businesses also have to provide disclosures to consumers related to RLU rights.
- (3) Sharing or disclosing Sensitive PI for marketing purposes could trigger the additional notice obligations.

- 4. FCRA. Information sharing could also lead to a financial institution being deemed a consumer reporting agency under the Fair Credit Reporting Act. This is just another reason why any marketing campaign that involves information sharing should be consistent with the institution’s approved internal policies developed with the advice of counsel.

5. COPPA. The FTC's Children's Online Privacy Protection Act ("COPPA") (16 CFR Part 312) imposes strict obligations on operators of commercial websites and online services directed to children younger than 13 that collect, use, or disclose personal information from children.

IX. DOT COM DISCLOSURES

- A. FTC Guidance. The Federal Trade Commission (FTC) issued revised guidance for online and mobile advertisers that explained how to make disclosures clear and conspicuous and avoid deception. The revised guidance, issued on March 12, 2013, is titled "Dot Com Disclosures: How to Make Effective Disclosures in Digital Advertising" ("Dot Com Guidance"). The Dot Com Guidance is available at **<https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-staff-revises-online-advertising-disclosure-guidelines/130312dotcomdisclosures.pdf>**.
- B. Clear and Conspicuous. When it comes to online advertisements, the basic principles of advertising law apply, such as: (i) advertisements must be truthful and not misleading; (ii) advertisers must have evidence to back up their claims, known as "substantiation"; and (iii) advertisements cannot be unfair. Unique features in online advertisements (including advertising delivered via social media platforms or on mobile devices) may affect how an advertisement and any required disclosures are evaluated.
- C. Guidelines. To make a disclosure clear and conspicuous, advertisers should:
 1. Place the disclosure as close as possible to the triggering claim;
 2. Take into account the various devices and platforms consumers may use to view an advertisement and any corresponding disclosures. If an advertisement is viewable on a particular device or platform, any necessary disclosures should be sufficient to prevent the advertisement from being misleading when viewed on that device or platform;

3. When a space-constrained advertisement requires a disclosure, incorporate the disclosure into the advertisement whenever possible. However, when it is not possible to make a disclosure in a space-constrained advertisement, it may, under some circumstances, be acceptable to make the disclosure clearly and conspicuously on the page to which the advertisement links;
4. When using a hyperlink to lead to a disclosure, institutions should: (i) make the link obvious; (ii) label the hyperlink appropriately to convey the importance, nature, and relevance of the information it leads to; (iii) use hyperlink styles consistently so consumers know when a link is available; (iv) place the hyperlink as close as possible to the relevant information it qualifies and make it noticeable; (v) take consumers directly to the disclosure on the click-through page; and (vi) assess the effectiveness of the hyperlink by monitoring click-through rates and other information about consumer use and make changes accordingly;
5. Preferably, design advertisements so that “scrolling” is not necessary in order to find a disclosure. When scrolling is necessary, use text or visual cues to encourage consumers to scroll to view the disclosure;
6. Keep abreast of empirical research about where consumers do and do not look on a screen;
7. Recognize and respond to any technological limitations or unique characteristics of a communication method when making disclosures;
8. Display disclosures before consumers make a decision to purchase or select a product, *e.g.*, before they sign up for an account online. Also recognize that disclosures may have to be repeated before the purchase or selection is confirmed to ensure that they are adequately presented to consumers;
9. Repeat disclosures, as needed, on lengthy websites and in connection with repeated claims. Disclosures may also have to be repeated if consumers have multiple routes through a website;

10. If a product or service promoted online is intended to be (or can be) purchased from “brick and mortar” stores or from online retailers other than the advertiser itself, then any disclosure necessary to prevent deception or unfair injury should be presented in the advertisement itself, *i.e.*, before consumers head to a store or some other online retailer;
11. Necessary disclosures should not be relegated to “terms of use” and similar contractual agreements;
12. Prominently display disclosures so they are noticeable to consumers and evaluate the size, color, and graphic treatment of the disclosure in relation to other parts of the webpage;
13. Review the entire advertisement to assess whether the disclosure is effective in light of other elements (such as text, graphics, hyperlinks, or sound) that might distract consumers’ attention from the disclosure;
14. Use audio disclosures when making audio claims and present them in a volume and cadence so that consumers can hear and understand them;
15. Display visual disclosures for a duration sufficient for consumers to notice, read, and understand them; and
16. Use plain language and syntax so that consumers understand the disclosures.

QUESTION & ANSWER SESSION #2

We're adjourned! Thank you for attending.

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Exhibit A

DEPOSIT ACCOUNT ADVERTISEMENTS REGULATION DD COMPLIANCE CHECKLIST

DEPOSIT ACCOUNT ADVERTISEMENTS (REG. DD) <i>[Applies to banks, savings associations and other entities subject to CFPB Regulation DD]</i>			
DEPOSIT ACCOUNT ADVERTISEMENTS (REG. DD) NAME/TYPE OF ADVERTISEMENT: _____			
TRIGGERING TERMS*	YES*	NO	
A. Annual Percentage Yield ("APY" permitted but must be defined at least once) (Interest rate also may be quoted, but not more conspicuously than APY) (§ 1030.8(b))			
B. Bonus (§ 1030.8(d))			
C. Does the advertising promote overdraft protection services offered to new or existing customers? (§ 1030.8(f))			
* If "Yes" to A. above, the following additional disclosures, to the extent applicable, are required to be disclosed in a clear and conspicuous manner:			
ADDITIONAL REQUIRED DISCLOSURES FOR APY	YES	NO	N/A
1. If a variable-rate account, a statement that the rate may change after account is opened. (§ 1030.8(c)(1))			
2. Period of time that the APY is offered, or a statement that the APY is accurate as of a specified date. (§ 1030.8(c)(2))			
3. Minimum balance requirements to obtain the advertised APY (§ 1030.8(c)(3)) (For tiered-rate accounts, the minimum balance required for each tier must be stated in close proximity and with equal prominence to applicable APY.)			
4. Minimum deposit required to open the account, if greater than the minimum balance necessary to obtain the advertised APY. (§ 1030.8(c)(4))			
5. A statement that fees (e.g., maintenance or activity fees) could reduce the earnings on the account. (§ 1030.8(c)(5))			
6. Additional features applicable to time accounts (e.g., account term, early withdrawal penalties and required interest payout). (§ 1030.8(c)(6))			
*If "Yes" to B. above, the following additional disclosures, to the extent applicable, are required to be disclosed in a clear and conspicuous manner:			

ADDITIONAL REQUIRED DISCLOSURES FOR BONUSES		YES	NO	N/A
7.	The “annual percentage yield” using that term. (§ 1030.8(d)(1))			
8.	All additional required disclosures for the APY (as set forth above in paragraphs 1-6).			
9.	The time requirement to obtain the bonus. (§ 1030.8(d)(2))			
10.	The minimum balance required to obtain the bonus. (§ 1030.8(d)(3))			
11.	The minimum balance required to open the account, if greater than the minimum balance necessary to obtain the bonus. (§ 1030.8(d)(4))			
12.	When the bonus will be paid or provided to the consumer. (§ 1030.8(d)(5))			
* If “Yes” to C. above, the following disclosures, to the extent applicable, are required to be disclosed in a clear and conspicuous manner:				
ADDITIONAL REQUIRED DISCLOSURES FOR OVERDRAFT PROTECTION SERVICES		YES	NO	N/A
13.	Fees for overdraft protection services. (§ 1030.11(b)(1)(i))			
14.	Categories of transactions for which overdraft protection fees may be imposed (e.g., “overdrafts created by check, in-person withdrawals, ATM withdrawals, or other electronic means”). (§ 1030.11(b)(1)(ii))			
15.	Time period by which consumer must repay any overdraft. (§ 1030.11(b)(1)(iii))			
16.	Circumstances under which an overdraft will not be paid (model language may be used). (§ 1030.11(b)(1)(iv))			
Advertisement Reviewed By: _____ Verify: Advertisement contains Member FDIC Statement: _____ Present _____ Not Applicable Signature & Title _____ Review Advertisement for any UDAAP Concerns: _____ Advertisement Acceptable _____ Further Review Warranted _____ Date				