2011 Interagency Minority Depository Institutions Conference

Understanding Section 5 of the Federal Trade Commission Act: What is an unfair or deceptive act or practice?

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What is Deception Under Section 5 of the FTC Act?

1. **There must be a representation, omission, or practice that misleads or is likely to mislead the consumer.**
2. **The act or practice must be considered from the perspective of the reasonable consumer.**
3. **The representation, omission, or practice must be material.**

(FIL-26-2004)

1. **A representation, omission, or practice that misleads or is likely to mislead the consumer.**
   - For example:
     - Bank ad says, “Earn 4.5% APY on all new deposits.”
       - In practice, only deposits with a minimum balance of $25,000 earns the stated APY.
   - Most often occurs when bank says one thing, but does another.

2. The act or practice must be considered from the perspective of the reasonable consumer.

- Generally speaking, it's the AVERAGE consumer – not the most sophisticated consumer.
- When reviewing a bank's advertisements or marketing materials, ask "What claims do these convey to the average consumer, <u>acting</u> reasonably?"
- Also consider the TARGET audience, if the advertisement is specifically directed to a particular group of people.

How Do You Know What the Reasonable Consumer Thinks?

- Copy Testing (for Advertising claims)
- Consumer Complaints
- Expert Opinion

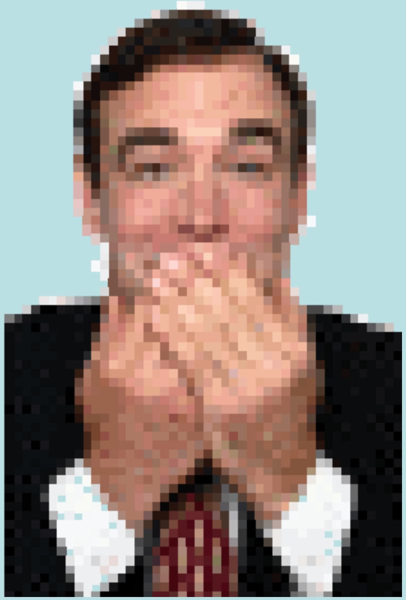
3. **The representation, omission, or practice must be material.**
   - **Is it information that is important to consumers?**
   - **Will it affect a consumer's choice of conduct?**
     - **Because of the representation or omission, did the consumer act to his/her detriment?**
     - **IN OTHER WORDS, DID THE CONSUMER RELY ON WHAT THE BANK SAID OR DID?**

Price is always material to consumers.

Examples:

1. Overdraft protection fees
2. Interest rate
3. Transaction related costs, such as NSF, POS, and ATM fees

OMISSIONS OF MATERIAL INFORMATION



“A misleading omission occurs when qualifying information necessary to prevent a claim, representation, or reasonable expectation or belief from being misleading is not disclosed.”

<u>Deception Policy Statement</u>, 103 F.T.C. 174 (1984)

Omissions

- Is the omission material?
- Would the disclosure of the omission have been something that would have influenced the consumer's buying decision?
- Was the claim misleading or deceptive because of the omitted information?

What May Be Wrong With The Following Ad?

You May Increase Your Credit Score By up to 70[1] Points When You Activate Your Account!

Get up to a $5,000 Secured Line of Credit!

Platinum

Enter your name as you would like it to appear on your card:

First Name M.I. Last Name

Please enter your email address so we can send you important updates regarding your account:

Email Address

Do you have a valid checking account? Yes No

I certify that I am a US Resident over the age of 18, and agree to the Privacy Policy and acknowledge that I will receive special email offers from our marketing partners including [redacted]

Continue

MasterCard

CARD BENEFITS

- No Credit Check
- Approved Regardless of Credit History
- Secured Line of Credit
- Accepted Everywhere MasterCard® is Accepted

MasterCard

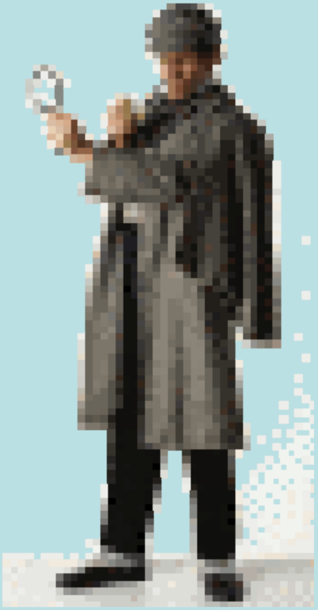
Get a [redacted] MasterCard® Credit Card!

Credit Score Notification: Because your credit score will not be checked, your new [redacted] Credit Card account could improve your credit score by up to 70 points immediately. Individual results will vary and any improvements that do occur may not be permanent. Your [redacted] Credit Card account will be reported to ALL 3 major credit bureaus. [redacted] Bank is a leader in the Banking industry. Activating your account means, depositing funds to open your Savings Account and secure your revolving line of credit with [redacted] Bank for the [redacted] Secured Master Card Credit Card.

The USA Patriot Act is a Federal Law that requires financial institutions to obtain, verify and record information that identifies each person who opens an account. You will be asked to provide your name, address, date of birth, and other information that will allow us to identify you. You will be asked to provide documentation as proof of identification. "Everyone is approve", "Guaranteed Approval" and "No One will be Turned Down" is contingent upon successfully passing this mandatory identification confirmation.

DISCLOSURES MUST BE CLEAR AND CONSPICUOUS

"Accurate information in the text may not remedy a false headline because reasonable consumers may glance only at the headline. Written disclosures or fine print may be insufficient to correct a misleading representation."



__Deception Policy Statement__, 103 F.T.C. 174 (1984)

DISCLOSURES - “CLEAR AND CONSPICUOUS”

- **PROMINENCE: Is it big enough for consumers to notice and read?**
- **PRESENTATION: Is wording and format easy for consumers to understand?**
- **PLACEMENT: Is it where consumers will look?**
- **PROXIMITY: Is it near the claim it qualifies?**

Unfairness

1. The act or practice must cause or be likely to cause substantial injury to consumers.
2. Consumers must not reasonably be able to avoid the injury.
3. The injury must not be outweighed by countervailing benefits to consumers or to competition.
4. Public policy may be considered.

(FIL-26-2004)

What is substantial injury?

- It can be a small dollar amount affecting a significant number of people or a large dollar amount affecting a few people.
- There is no set test for determining; *i.e.*, a certain percentage of bank’s customers.

What is reasonably avoidable?

- The consumer has some control over whether the act or practice occurs.
  - For example:
    - Overdrawing your account and incurring a NSF fee.
- However, when the bank has control over the act or practice, it likely will not be avoidable by the consumer.
  - For example:
    - Bank reorders the processing of items to pay highest to lowest.

What do we mean by “countervailing benefits”?

- Some practices may cause an injury to a small number of consumers, but provide a benefit to a greater number of consumers or to competition.
  - For example:
    - In FTC v. Neovi, the company argued that the utility of allowing consumers to create their own checks outweighed any costs associated with fraud.
    - HOWEVER, the FTC was able to show that the amount of fraud outweighed any such benefits.

QUESTIONS?