

## Real Estate Advertising Advisory

All ad departments struggle over the wording of real estate classified ads. Getting the wording just right is a matter of following the law. The federal government has one set of requirements, and the state of Illinois has its own consumer laws. The purpose behind all these laws is to protect consumers by providing full disclosure and giving them the chance to make an informed choice. To that end, the federal government has created Regulation Z (commonly known as Reg Z). Established in conjunction with the Truth-in-Lending Act, Reg Z governs the advertising of mortgage information. Almost anyone who advertises real estate financing information is subject to Reg Z. That includes you, as well as homebuilders, lenders or creditors, and government agencies. Reg Z covers advertising in any of the following media:

- Newspapers, leaflets, flyers catalogues, direct mail, magazines, and other printed materials
- Radio, television, and public address systems
- Displays inside or outside the real estate office, including window displays
- Point-of-sale literature, signs, and billboards.

The regulation applies only to ads for residential properties that are to be owner-occupied. That may include mobile homes, houseboats, duplexes or separated units on a property with one legal description, co-ops, condos, townhouses, and farms or ranches used primarily for residential purposes. Generally, ads discussing FHA, Department of Veterans Affairs, and conventional loans must comply. Reg Z may be the most misunderstood law affecting residential real estate. Some advertisers find the regulations so intimidating that they avoid publishing financing information. The law is complex, and the penalties for violating it range from public embarrassment to civil damages, from cease-and-desist orders to fines of up to \$10,000 per infraction, and even criminal contempt charges. Rather than simply leaving the information out of ads, it makes more sense to learn how to comply with Reg Z. The law applies to any real property financing that requires four or more payments. It is triggered when the ad mentions any of the following terms:

- Monthly payment
- Term of the loan
- Dollar amount of any finance charges

As with most laws, Reg Z contains a number of gray areas and exceptions. For example, mention of only a down payment in an ad doesn't trigger the need for

further disclosures unless the seller of the property is financing the transaction and meets the definition of creditor. A creditor is defined as one who regularly extends credit. In practice, that means someone who has financed at least five transactions secured by mortgages in the prior year. In addition, ads describing seller financing arrangements are exempt from Reg Z. If the ad states the seller will provide 30-year financing at 9 percent, the advertiser need not disclose further information. The ad may advertise other terms the seller is offering without triggering Reg Z. Finally, subject to financing such as wraparound mortgages or all-inclusive deeds of trust, is also exempt. Seller financing is covered, however, when the seller is a creditor. The advertiser is most likely to encounter this situation when advertising property that has been repossessed by a lender. If the financing is offered by the lender that owns the property, and the lender meets the definition of a creditor, the ad must comply. Interestingly, in such a situation, down payment also becomes a triggering term that requires further disclosure. In general, it's far easier to comply all the time than try to figure out when the ad does not need to comply with Reg Z. If the financing options and property the advertiser wants to advertise are covered according to these rules, pay close attention to the triggering terms. The term used will dictate what other financing information that is required to be included. The following are the key requirements for fixed-rate loans: 1. If the ad includes the monthly payment, term, or amount of any finance charges (or down payment if the seller is a creditor), the ad must include all the following:

- Annual percentage rate (APR)
- Down payment
- Monthly payment

The ad must include the simple interest rate, but only if it also includes the APR. The APR (which may be abbreviated as APR in the ad) can appear by itself without triggering the need for additional information. That is because the Truth-in-Lending Act's basic goal is to give consumers an easy way to compare financing alternatives, and disclosure of the APR is the primary method used to accomplish that goal. The APR reflects more than the simple interest rate; it also considers fees the consumers must pay to obtain a loan. The law contains a list of the fees used in the APR calculation, and it allows for a margin of error in the calculation. Fixed-rate loans can be off by .125 percent, and variable-rate loans can miss the mark by .25 percent. Once it has been determined that the ad must meet Reg Z requirements, simply plug in the necessary components. Keep the following five rules in mind when composing the ad: **1.** A monthly payment may represent either principal and interest or PITI, but it does not have to be labeled as one or the other. **2.** The payment must include the cost for mortgage insurance premiums. **3.** The loan length may be presented in years (30-year financing) or months (360 monthly payments). **4.** The simple interest rate may not be shown more conspicuously than the APR. If you use ten-point type for the simple interest rate, the type for numerical portion of the APR should be no smaller than ten point. **5.** The abbreviation APR should appear in capital letters. Reg Z provides specific guidance on advertising buy-downs. Homebuilders have effectively used buy-down financing in ads for years. But real estate agents have been slow to embrace this technique even with its proved success for builders. Concern about added cost and making proper disclosures may cause this reluctance.

Under Reg Z, the advertiser can advertise the lowered rate if the ad also shows how long the rate will last, what the simple interest rate will be for the remainder of the loan, and what the APR will be. The ad may also show how much the buy-down lowers the monthly payment without making additional disclosures. The government

also has special rules for variable rate loans. For Reg Z purposes, Uncle Sam defines a variable-rate transaction as one that includes at least one future interest rate change not known at the time of the transaction. That may include an ARM or a variation on an ARM, such as the blended Stable mortgage or the two-step mortgage. Ads for variable-rate financing, like those for fixed-rate loans, must state the APR. That may seem impossible given that future rate increases seem impossible to predict. However, the law requires that the advertiser make some assumptions about rate changes on the basis of payment caps. The ads must also state that the rate may change. The Federal Trade Commission (FTC) suggests that rates subject to increase after closing will satisfy the requirement. An ad may show the simple starting rate but, unlike ads for buy-downs, need not show the simple interest rate for the period after the discount. The ad may also show how the starting rate reduces the payment without triggering the need for other disclosures. Whether offering a fixed-rate, variable-rate, or buy-down plan, Reg Z allows the advertiser to use simplified disclosures when advertising many properties with different prices. Grouping ads together improves the pulling power of the ad for the advertiser. Instead of making separate disclosures for each property, the ad may contain one disclosure that covers all the properties.

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**MORTGAGE FORECLOSURE PUBLICATION** The Illinois Mortgage Foreclosure Law has been amended to include many changes intended to make the foreclosure process easier to understand. One such change was expanded sale procedures designed to obtain a price more closely related to the fair market value of property, rather than the amount due under the terms of the mortgage being foreclosed. To help accomplish this, the Illinois Mortgage Foreclosure Law now requires a publication in the legal notice section of a newspaper, as well as, one in the display advertisement section where other real estate is commonly advertised. The intent of the additional publication requirement is to provide notice of the sale to persons who would not otherwise read the legal notices. The law does not, however, require that the legal description be duplicated in the ad running in the real estate section. The law also provides an exception for those publications that do not contain a separate real estate advertisement section. In such situations, a single publication in the legal notices section will be sufficient.

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### **Policy Statement**

Each newspaper should adopt a policy statement. The statement should be approved by the highest ranking officer (usually the publisher) of the newspaper. A copy of the statement along with a cover letter from the publisher explaining the newspaper's commitment to adherence of the Fair Housing Act should be distributed to the newspaper's employees.

A sample policy statement follows:

#### **FAIR HOUSING LAWS**

"The Federal Fair Housing Act prohibits discrimination in the sale, rental, leasing and financing of housing, as well as discriminatory advertising, on the basis of RACE, SEX, COLOR, RELIGION, NATIONAL ORIGIN, MENTAL or PHYSICAL HANDICAP, or FAMILIAL STATUS. (Our local jurisdictions also have specific applicable regulations).

“These laws cover any potential or actual sale, lease, rental, eviction, price, terms, privileges or any service in relation to the sale of or use of housing. They not only prohibit advertisements which clearly restrict access to housing based on the protected categories, but also prohibit advertisements which indicate a preference for or against a person based on a protected category. In particular circumstances, use of colloquialisms, symbols or directions to real estate for sale or rent may indicate a discriminatory preference.

“It is the intent and goal of this newspaper to have each advertiser who wishes to place a covered advertisement in the newspaper comply with the Fair Housing laws. Any advertisement which is perceived to contain language contrary to these laws will be rejected or changed to remove the offending reference. There may be situations where it is not clear whether particular language is objectionable. Such advertisements should be referred to a supervisor for consideration and determination. Under certain circumstances, advertisers may claim that because of the nature of the housing being advertised, they are not subject to the Fair Housing laws. Such claims are irrelevant for purposes of considering advertisements for publication in this newspaper. Every housing advertisement published in this newspaper is subject to the Fair Housing laws.”

### **Applicability**

The Fair Housing Act of 1968 begins: “It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States.”

All subsequent provisions of the Act and its administrative rules are based on the premise that obtaining fair housing must be a choice free of practices or influences that would limit such choice because of race, color, religion, sex, national origin, handicap or familial status.

“Blockbusting” and “steering” are two discriminatory practices that are specifically mentioned in the Act. Blockbusting includes engaging in conduct which conveys the impression that a neighborhood is about to undergo certain changes and, thus, panic owners into selling their properties. Steering involves guiding an individual seeking housing toward or away from particular property for discriminatory reasons.

Suits can be brought against the persons who wrote and placed the ad, as well as against the persons who accepted the ad, the owner and management company of the property advertised, plus the newspaper management, publisher and owner.

The Fair Housing Act covers all “dwelling units” or single units of residence for a family of one or more persons. The definition includes condominiums, cooperative and mobile homes. A dwelling unit can be all or part of any building or structure that is occupied or intended as a residence by a person or family.

The only legal discriminatory housing transaction is one between private parties when there is no use of advertising, a real estate broker, an appraiser, or commercial financing. Use of any of these causes the Fair Housing Act provisions to be applicable. It is permissible to discriminate by sex for a roommate when living areas are shared.

### **Complaints**

Complaints pursuant to the Fair Housing Act may be filed by:

1. Individuals who believe they have been discriminated against
2. HUD and other local, state and federal agencies
3. Fair Housing organizations

Anyone who can show that they have been "injured" by a discriminatory housing practice can file civil charges. The Act has expanded the number of protected classes as well as strengthened provisions for relief for claimants and penalties against defendants. Injured parties have up to a year to file a claim with the Department of Housing and Urban Development (HUD).

Aggrieved person is anyone who claims to have been injured by a discriminatory housing practice or who believes that such an injury is likely to occur. Injured parties include individuals for whom housing was made unavailable because of discrimination; however, fair housing organizations can also sue, charging interference with their efforts to promote equal housing opportunity. Suits are sometimes brought by "testers," persons hired to check for discrimination by pretending to be bona fide renters or buyers.

Fines, damages and attorney fees may be awarded as the result of a successful conclusion of a complaint. Fines may begin at \$10,000 and increase to as much as \$50,000. Fines may be assessed against corporations, individuals and owners.

### **Liability**

Anyone who makes prints or publishes advertisements (or causes them to be made, printed or published) needs to be concerned about housing discrimination. This definition includes all advertising and media, i.e. broadcast, brochures, billboards, direct mail, flyers, newspapers, poster, shoppers, etc. This provision extends to prohibit the use of discriminatory words, phrases, photographs, illustrations, symbols or forms.

The Department of Housing and Urban Development, which investigates complaints, takes the position that newspapers face civil suits if they publish advertisements that encourage discrimination (or even indicate a preference) relative to protected classes.

You might wonder if the Fair Housing Act and regulations hinders free speech as espoused in the First Amendment of the U.S. Constitution. The answer is NO.

There is a distinction between free public speech and commercial speech. Advertisements are commercial speech and, thus, are subject to regulation.

Newspapers are not in the practice of accepting advertisements for anything illegal, such as prostitution, stolen property, or "street" illegal drugs. Because discrimination is against the law, newspapers cannot accept ads that discriminate.

In order for newspapers to comply with all of the Fair Housing Act and regulations, publishers of housing advertisements should do the following:

- provide a printed copy of their nondiscrimination policy to each employee and officer;
- post copies of the policy in conspicuous locations in their businesses;
- make copies available for advertising customers;
- include a Fair Housing notice at the beginning of the real estate advertising section;
- avoid referring to the kinds of people who might live in or buy a particular dwelling in advertisements.

### **Tips**

Describe the PROPERTY, not the seller, or the neighbors, or the landlord, or "appropriate buyers and tenants." Seemingly harmless words can get newspapers into trouble. It is important that words used in discriminatory contexts are avoided. Examples are: restricted, exclusive, private, integrated, traditional, board approval required. Some of these words, especially together or in certain local contexts, are used as "code" to create an atmosphere of discrimination.

Beware of code words that carry hidden or subtle discriminatory meanings.

When a word causes doubt, do without.

Furthermore, avoid symbols or logos that imply or suggest a preference based on one of the protected classes. Examples: crosses, the Star of David. By expressing a preference for one class of person, other classes are discriminated against. Such use might suggest to "outsiders" that they are not welcome in such a place.

The use of human models in advertising is scrutinized in the same way that words are, because it is possible to indicate a preference for certain types of individuals by using certain kinds of models. The exclusive use of one kind of model can be interpreted as indicating a "non-preference" for persons in a protected class who do not look like the model. It does not matter whether the models are real individuals appearing in photographs or drawings in artists' illustrations. When models are used in any series of housing advertisements, provide fair representation, over time, of the different kinds of people found in your market areas.

The common sense approach to Fair Housing advertising is to use language or artwork or photography that is inclusive, not exclusive.

There are exemptions under the Fair Housing Act:

- Reasonable restrictions on the maximum number of occupants in a dwelling unit may be made.
- Under certain circumstances, religious organizations and private clubs may limit the sale, rental or occupancy of housing owned or operated for other than commercial purposes.
- The Act does not apply to an owner of dwelling containing living quarters for no more than four families (if the owner lives in one of the units), not to an owner of single-family dwellings (if the owner has no more than three). Yet it does apply if these same owners use a real estate broker and/or if they use discriminatory advertising.