

July 30, 2009

Federal Trade Commission
Office of the Secretary
Room H-135 (Annex W)
600 Pennsylvania Avenue, NW
Washington, DC 20580

Re: Mortgage Acts and Practices Rulemaking
Rule No. R-911004

Dear Sir or Madam:

The Consumer Mortgage Coalition (CMC) and the American Financial Services Association (AFSA) appreciate the opportunity to submit their comments in response to the Federal Trade Commission (FTC or Commission) Advance Notice of Proposed Rulemaking (ANPR) regarding its Mortgage Acts and Practices Rulemaking (mortgage UDAP regulations). The CMC is a trade association of national mortgage lenders, mortgage servicers, and mortgage origination-service providers, committed to the nationwide rationalization of consumer mortgage laws and regulations. AFSA is the national trade association for the consumer credit industry, protecting access to credit and consumer choice. Its 350 members include consumer and commercial finance companies, auto finance/leasing companies, mortgage lenders, credit card issuers, industrial banks and industry suppliers.

The CMC and AFSA share the Commission's concerns about the practices of some providers in the mortgage market, particularly those of entities that are not subject to the additional requirements recently adopted by the Federal Reserve Board (FRB) in amendments to Regulation Z and by Congress in the Mortgage Disclosure Improvement Act of 2008 (MDIA). At the same time, it must be recognized that the mortgage process is already subject to extensive and often duplicative or contradictory regulation at the federal, state, and local levels. Moreover, this burden has increased dramatically as the industry is faced with coming into compliance, in a short time, with the significant FRB and MDIA changes and a comprehensive revision of the disclosure requirements of the Real Estate Settlement Procedures Act (RESPA), as well as the Home Valuation Code of Conduct adopted through a consent order by the New York Attorney General, and many new state and local regulations. The industry must address this regulatory burden at the same time that it deals with the most difficult environment for housing finance since the Great Depression.

The legislation enacted by Congress this spring authorizes the Commission to issue a rule prohibiting "unfair or deceptive acts or practices [UDAP] regarding mortgage loans" through a notice-and-comment rulemaking. Thus, by definition, the Commission already has the authority to prohibit the practices by order or through a more comprehensive

rulemaking process.¹ The legislation does not change the substantive law of UDAP; rather, it expands the remedies available to the FTC and state attorneys general for engaging in UDAPs. The statute allows the FTC to define, through a more streamlined process than “Magnuson-Moss” rulemaking, certain UDAPs for which the FTC and state attorneys general will be able to obtain civil penalties and other expanded relief without first bringing a defendant under order.

Since the Department of Housing and Urban Development initiated its negotiated rulemaking regarding broker compensation in the mid-1990s, the CMC and AFSA have advocated comprehensive mortgage reform that would increase consumers’ understanding of the costs and processes of settlement services and mortgage lending and foster greater competition in the industry. All too often, however, new regulations do not achieve the goal of providing a rational, simplified disclosure regime that enables consumers to shop for and obtain a mortgage loan that best fits their needs.

As discussed in detail below, while CMC and AFSA support the Commission’s goal of addressing abuses in the mortgage process and would support a regulation specifically aimed at abuses of “trigger leads,” we believe that many of the practices discussed in the ANPR can be more effectively and efficiently addressed on a case-by-case basis. Questions such as what is an appropriate level of customer service or whether a particular fee is permissible under the mortgage contract cannot be resolved in a “one size fits all” regulation. In addition, we believe that (i) the FTC should not attempt to expand its authority under the Home Ownership and Equity Protection Act (HOEPA) or the Truth in Lending Act (TILA) in this rulemaking; (ii) any regulation must be consistent with the applicable law on unfairness and deception; (iii) the Commission should give recent changes in other statutes and regulations a chance to work before making additional revisions; and (iv) any rules that are adopted should be clear and narrowly focused.

Background

Section 626(a) of the Omnibus Appropriations Act, 2009² (Appropriations Act) requires the Commission to initiate a rulemaking “with respect to mortgage loans in accordance with section 553 of title 5, United States Code.” Section 511 of the Credit Card Accountability Responsibility and Disclosure Act of 2009³ (CARD Act), amended Section 626(a) to clarify that:

Such rulemaking shall relate to unfair or deceptive acts or practices regarding mortgage loans, which may include unfair or deceptive acts or practices involving loan modification and foreclosure rescue services.

¹ See 15 U.S.C. §§ 45(a)(1), 57a.

² Pub. L. No. 111-8, 123 Stat. 524, 678.

³ Pub. L. 111-24, 123 Stat. 1734, 1763-64.

The FTC's general rulemaking authority requires an extensive, trial-like proceeding conducted by an independent hearing officer.⁴ By contrast, the FTC may issue rules under the Appropriations Act following normal notice-and-comment procedures.⁵

The present advance notice of proposed rulemaking (ANPR) is one of two ANPRs the Commission has published pursuant to this new Congressional mandate. In this ANPR, the Commission addresses activities that occur throughout the lifecycle of a mortgage loan, including advertising and marketing, origination, appraisals, and servicing. The Commission is seeking public comment with regard to the unfair or deceptive acts or practices that should be prohibited or restricted. The other ANPR, for which CMC previously submitted comments, addresses the practices of entities (other than mortgage servicers) who offer assistance to consumers in dealing with owners or servicers of their loans, to modify them or to avoid foreclosure.

In both ANPRs, the Commission states that any rules adopted will apply to entities other than banks, thrifts, federal credit unions, and non-profit institutions. In addition, Section 511 of the CARD Act clarifies that the rulemaking authority "shall not be construed to authorize the Federal Trade Commission to promulgate a rule with respect to an entity that is not subject to enforcement of the Federal Trade Commission."⁶ Therefore, any rule adopted by the Commission would not apply to banks, thrifts, federal credit unions,⁷ or *bona fide* non-profit organizations.⁸ The Commission has taken the position that operating subsidiaries of banks and thrifts are covered by the FTC Act, and we assume, therefore, that it would seek to subject them to the mortgage UDAP regulations.⁹ At the same time, operating subsidiaries remain subject to other regulations implemented by the federal banking agencies.¹⁰

Under Section 626(b) as amended by the CARD Act, a state attorney general who has reason to believe that residents of the state are being adversely affected by a violation of an FTC rule issued under Section 626(a) by an entity subject to FTC jurisdiction may bring an action to enforce the rule. The state may obtain an injunction, damages, or restitution, as well as penalties and other relief provided by the FTC Act, and, if successful, may be awarded reasonable costs and attorney's fees.¹¹ The FTC must be

⁴ See 15 U.S.C. § 57a(b)(1)(C), (c).

⁵ Pub. L. No. 111-8, 123 Stat. 524, 678.

⁶ *Id.*, 123 Stat. at 1764.

⁷ See 15 U.S.C. § 45(a)(2).

⁸ See 15 U.S.C. § 44 ("corporation" subject to FTC jurisdiction includes an entity "which is organized to carry on business for its own profit or that of its members").

⁹ See FTC, Telemarketing Sales Rule: Final Amended Rule, 68 Fed. Reg. 4580, 4586 n.64 (Jan. 29, 2003), citing Gramm-Leach-Bliley Act, Pub. L. 106-102, Title I, § 133(a), 113 Stat. 1338, 1383. See also *Minnesota v. Fleet Mortgage Corp.*, 181 F. Supp. 2d 995 (D. Minn. 2001) (upholding position of FTC as *amicus curiae* that FTC has jurisdiction over operating subsidiaries), cited in 68 Fed. Reg. at 4586 n.65.

¹⁰ See Gramm-Leach-Bliley Act, Pub. L. 106-102, Title I, § 133(b), 113 Stat. 1338, 1383.

¹¹ Pub. L. 111-24, 123 Stat. 1734, 1764.

notified at least 60 days before the state commences the action and may intervene in the action and remove it to federal district court.¹²

Finally, Section 626(c) of the Appropriations Act gives the FTC the same remedies with respect to a violation of a regulation issued by the FRB under the Home Ownership and Equity Protection Act (HOEPA) provisions in Section 129(l)(2) of the Truth in Lending Act (TILA), 15 U.S.C. § 1639(l)(2), as if it were a violation of an FTC trade regulation rule issued under 15 U.S.C. § 57a. In other words, the FTC may obtain civil penalties and other relief for such violations, while for other TILA violations, it must first place a company under administrative order. The FRB's new regulations prohibiting UDAPs such as misleading use of the term "fixed rate" or misleading rate comparisons were promulgated under Section 129(l)(2), in contrast to other amendments such as changes to the advertising rules, which were issued under Section 105(a) of TILA, 15 U.S.C. § 1604(a), and which the FTC cannot enforce as a trade regulation rule. TILA also provides for substantial liability for creditors — but not other entities — in private lawsuits enforcing Section 129 — "all finance charges and fees paid by the consumer, unless the creditor demonstrates that the failure to comply is not material." 15 U.S.C. § 1640(a)(4).

Discussion

General Principles

Before addressing the Commission's specific questions, we discuss some general considerations that CMC and AFSA believe should guide the Commission in this rulemaking.

This Rulemaking Should Not Be Used to Expand the Power of the FTC or the States to Enforce TILA or HOEPA

The Appropriations Act creates a three-part enforcement scheme:

- Mortgage UDAP regulations issued by the FTC under the Appropriations Act may be enforced by the Commission and by state attorneys general, with the authority to seek civil penalties and other relief available to the FTC for violations of trade regulation rules.
- Regulations issued by the FRB under its HOEPA UDAP authority, Section 129(l)(2) of TILA, may be enforced by the FTC, but not by the states, as trade regulation rules.
- Other TILA regulations may be enforced by the Commission through an administrative adjudication or through injunctive relief in court.

Although the FTC might wish to treat some HOEPA and TILA violations as violations of its mortgage UDAP rule, doing so would conflict with the enforcement scheme created by Congress. Incorporating a HOEPA violation into the FTC rules would effectively confer the power to enforce HOEPA as a trade regulation rule on state attorneys general,

¹² Pub. L. No. 111-8, 123 Stat. 524, 679.

but Congress has limited that power to the FTC. Incorporating other TILA violations into the FTC's rule would give both the Commission and the states additional powers that Congress did not give them. It is important to note that Congress has recently addressed mortgage practices on three separate occasions — in the Appropriations Act, the modifications to that Act in the Card Act, and the Mortgage Disclosure Improvement Act of 2008. Congress could have expanded the FTC's or state attorneys' general enforcement power in any of those statutes, but did not do so.

The Commission notes that the banking agencies have the authority to obtain civil money penalties for TILA violations. In practice, however, they have very rarely used that authority. The CMC and AFSA are concerned that conferring such authority on the FTC and, in particular, the state attorneys general, could lead to a rash of enforcement actions over minor violations.

As noted above, it appears that the Commission would take the position that operating subsidiaries of banks and thrifts are subject to a mortgage UDAP rule. To ensure that operating subsidiaries are not subject to conflicting regulations, it is imperative that the FTC work in consultation with the federal banking agencies. CMC and AFSA urge that the question of FTC jurisdiction not be determined as part of this rulemaking, but be addressed as part of the broader policy discussion with the other agencies.

Finally, although the Commission should generally not incorporate the TILA provisions into a mortgage UDAP rule, the Commission should consider adopting the provisions that prohibit coercion in appraisal practices. Regulation Z only reaches the practices of "creditors," while most of the abuses have been committed by non-creditor mortgage brokers.

Any Regulation Must Be Consistent with the Applicable Law on Unfairness and Deception

As the Commission recognized in the preamble to the regulation, Congress gave the FTC more flexibility in addressing UDAPs but did not change substantive UDAP law in any way. The definitions of both deception (in FTC case law) and unfairness (in the FTC Act) are highly dependent on specific facts. In order for a practice to be deceptive, a representation or omission must not only be misleading, but it must also be material — *i.e.*, "likely to affect a consumer's decision to purchase or use a product or service."¹³ An unfair act or practice must be found to "cause . . . or [be] likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition."¹⁴

Although the Appropriations Act, as amended by the CARD Act, relieves the FTC of the formal requirement of the "Magnuson-Moss" provisions of the FTC Act that a trade regulation rule be supported by substantial evidence, any regulation issued by the

¹³ See FTC, Mortgage Acts and Practices: Advance Notice of Proposed Rulemaking and Request For Comment, 74 Fed. Reg. 26118, 26120 (June 1, 2009).

¹⁴ 15 U.S.C. § 45(n).

Commission could still be challenged if it is “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.”¹⁵ Since the determination that a practice is unfair or deceptive requires an evaluation of facts, as a practical matter, the Commission must have a substantial factual basis for any requirements it imposes under a mortgage UDAP regulation.

The CMC and AFSA believe that many of the provisions that the Commission is considering would not meet that standard. For example, the proposal to make a breach of the terms of the mortgage contract an unfair practice conflicts with the standards set out by the Commission in *Orkin Exterminating Co.*¹⁶ As discussed in more detail below, the Commission held in *Orkin* that an intentional, systematic breach of contract can be unfair within the meaning of the FTC Act, but stated that it would conduct a case-by-case examination of whether the injury caused by a particular breach of contract was avoidable, and if not, whether it was sufficiently substantial to meet the standard of “unfairness” and whether a substantial injury is outweighed by benefits to consumers or to competition.

Moreover, a Magnuson-Moss rule is subject to review by the federal Court of Appeals and that court’s determination (subject to review by the Supreme Court) is final, but a mortgage UDAP rule could be challenged in the course of an enforcement proceeding.¹⁷ In contrast to a Magnuson-Moss rule, the enforceability of a mortgage UDAP rule that purports to prohibit practices that are not clearly established as UDAPs may be in doubt for years after it is issued.

Other Recent Regulatory Changes Should Be Given a Chance to Work before the FTC Adds Additional Regulations

As noted above, a variety of changes have recently been made in the mortgage regulatory framework, including the FRB’s extensive revisions to Regulation Z, the MDIA, and the Home Valuation Code of Conduct. The Commission should exercise restraint in adopting even more new regulations until it can observe the effect of these recent changes.

Any Rules Should Be Clear and Narrowly Focused

To the extent that the Commission issues any new regulations, it is essential that they establish clear, bright-line requirements. Lenders must be able to know for certain that if they follow certain practices, they will be in compliance. Because any rules may be enforced by any state Attorney General, it is also vital that they be narrowly focused on specific practices that clearly meet the definition of a UDAP. As the Commission notes, it has been able to impose significant sanctions for practices it considers to be UDAPs, even in the absence of any specific regulations. *See, e.g., FTC v. EMC Mortgage Corp.,*

¹⁵ Compare 15 U.S.C. § 57a(e)(3)(A) with 5 U.S.C. § 706(2)(D).

¹⁶ *Orkin Exterminating Co.*, 108 F.T.C. 263 (1986), *aff’d*, 849 F.2d 1354 (11th Cir. 1988), *cert. denied*, 484 U.S. 1041 (1989).

¹⁷ Compare 15 U.S.C. § 57a(e)(4) with 5 U.S.C. § 706.

No. 4:08-cv-338 (E.D. Tex. Sept. 9, 2008) (approving consent decree providing for, *inter alia*, \$28 million in restitution or equitable relief for alleged violations of the FTC Act and TILA). Thus, the Commission should not presume that a specific rule is necessary to give it effective enforcement power.

Even relatively clear regulations can be counterproductive if they are difficult to comply with and discourage useful activity. For example, if the Commission does not accept our recommendation and decides to incorporate the complicated rules for credit advertising into its own regulation, creditors might decide to stop advertising specific credit terms or other details about their products because of the increased potential liability for technical violations. This would not be a good result for consumers, who would find it more difficult to comparison-shop and understand the cost of their financing.

Answers to Specific Questions

We have answered a number of the specific questions raised by the ANPR in the context of CMC and AFSA members' concerns.

A. Mortgage Advertising

1. What types of unfair or deceptive acts and practices, if any, do non-bank financial companies engage in related to advertising and marketing mortgages?

CMC and AFSA members are particularly concerned about the practices of some mortgage brokers who use information obtained through credit-bureau prescreenings. Consumers who applied for a loan have complained that they immediately receive a barrage of telephone calls from brokers who have received notice of their application through a "trigger lead" obtained from a consumer reporting agency. The other broker often poses as an employee of the consumer's current servicer, using data received from the credit bureau and other third parties to help support the pretext that he or she works for the current servicer. The caller also often does not reveal that the source of information about the consumer was a prescreened credit report from a consumer reporting agency.

For any such act or practice, please answer the following questions:

a. Why is it unfair or deceptive under Section 5 of the FTC Act?

Trigger-lead abuse is deceptive because the claim that the caller is affiliated with the lender is false; express misrepresentations are presumed to be material, and the caller cannot rebut that presumption.

b. Should it be prohibited or restricted? If so, how? For all loans or only certain types of loans? What are the costs and benefits of such prohibitions or restrictions?

The specific deceptive practices of misrepresenting that the caller is affiliated with the current lender and of misrepresenting the source of the lead should be prohibited. It is possible that some users of trigger leads would leave the business if they could no longer use those leads in a misleading manner, but this is a benefit not a cost.

- c. **What would be the effect on competition and consumers if the Commission were to prohibit or restrict non-bank financial companies with respect to the act or practice, but banks, thrifts, and federal credit unions were not similarly prohibited or restricted?**

In CMC and AFSA members' experience, the vast majority of the abuses of the trigger lead process have been committed by non-bank financial companies, so that the impact of not covering banks, thrifts, and federal credit unions on competition and consumers would be minimal.

3. **What types of unfair or deceptive acts and practices, if any, do non-bank financial companies engage in regarding Internet financial services related to mortgage loans, including but not limited to acts and practices of mortgage rate aggregators that post rate and points charts? For any such act or practice, please answer the following questions:**
 - a. **Why is it unfair or deceptive under Section 5 of the FTC Act?**
 - b. **Should it be prohibited or restricted? If so, how? For all loans or only certain types of loans? What are the costs and benefits of such prohibitions or restrictions?**
 - c. **What would be the effect on competition and consumers if the Commission were to prohibit or restrict non-bank financial companies with respect to the act or practice, but banks, thrifts, and federal credit unions were not similarly prohibited or restricted?**

We are unaware of any unfair or deceptive practices in this area.

4. **Should the FTC incorporate into a proposed rule any of the requirements or prohibitions on acts or practices related to mortgage advertising that the Board promulgated under its TILA Section 105(a) authority, thereby allowing the FTC to obtain civil penalties for any violation of TILA, HOEPA, or Regulation Z, consistent with the authority conferred on federal banking regulatory agencies?**

As the Commission notes, the FRB recently engaged in a comprehensive review of its general credit advertising requirements, particularly those related to mortgage advertising. That review resulted in a number of revisions designed to make the advertising rules more effective. The Commission should give the changes that the FRB has just made to Regulation Z some time to work before considering additional regulation of credit advertising. We note that the Commission has successfully enforced credit advertising rules issued by the FRB since the mid-1970s. As noted above, we also

believe that incorporating the TILA advertising rules into an FTC mortgage UDAP rule would be inconsistent with the enforcement scheme adopted by Congress.

5. Do any recent reports, studies, or research provide data relevant to mortgage advertising rulemaking? If so, please provide or identify such reports, studies, or research.

The FRB has just addressed this issue in the HOEPA rule that becomes effective on October 1, 2009. We also note that the FRB's recently-announced additional changes to Regulation Z relied heavily on consumer research performed by an outside consulting firm.¹⁸

B. Mortgage Origination—Underwriting, Loan Terms, and Disclosure Issues

6. What types of unfair or deceptive acts and practices, if any, do non-bank financial companies engage in related to mortgage origination? For any such act or practice, please answer the following questions:

- a. **Why is it unfair or deceptive under Section 5 of the FTC Act?**
- b. **Should it be prohibited or restricted? If so, how? For all loans or only certain types of loans? What are the costs and benefits of such prohibitions or restrictions?**
- c. **What would be the effect on competition and consumers if the Commission were to prohibit or restrict non-bank financial companies with respect to the act or practice, but banks, thrifts, and federal credit unions were not similarly prohibited or restricted?**

Alleged abuses in the mortgage origination process were extensively addressed in the FRB's HOEPA rulemaking. In particular, the FRB created a middle tier of regulation of "higher-priced" mortgages that is more extensive than the regulation of lower-cost loans but less restrictive than the rules applicable to high-cost loans. The Commission should not consider any further regulation of origination practices until the FRB's HOEPA rules, which are not yet in effect, have been in place for a long enough period to allow their effectiveness to be evaluated.

7. Are there features of any non-traditional, or alternative, mortgage loans that are unfair or deceptive? Identify any such feature, and for each, please answer the following questions:

- a. **Why is it unfair or deceptive under Section 5 of the FTC Act?**

¹⁸ See *Summary of Findings: Design and Testing of Truth in Lending Disclosures for Closed-end Mortgages*, available at <http://www.federalreserve.gov/boarddocs/meetings/2009/20090723/Full%20Macro%20CE%20Report.pdf> (July 16, 2009) (study submitted by ICF Macro to FRB).

- b. Should it be prohibited or restricted? If so, how? For all loans or only certain types of loans? What are the costs and benefits of such prohibitions or restrictions?**
- c. What would be the effect on competition and consumers if the Commission were to prohibit or restrict non-bank financial companies with respect to the feature, but banks, thrifts, and federal credit unions were not similarly prohibited or restricted?**

Non-traditional mortgage loans are addressed in the FRB's revisions to the Regulation Z advertising requirements. As noted above, it would not be appropriate to incorporate those requirements into an FTC rule.

Non-traditional mortgage loans were also extensively addressed in the interagency guidance on nontraditional mortgage loans, as well as, to some extent, the guidance on subprime lending. Although those issuances applied directly only to depository institutions, they set a standard for the entire mortgage market, and most states adopted these rules for their regulated licensees.

Because the guidance documents are intended to be used by regulated institutions and their examiners in a flexible manner, it would be inappropriate to incorporate them into a binding regulation. In addition, as a practical matter, many of the practices addressed in those documents, such as the use of low-documentation or no-documentation loans, hardly exist today because the secondary market for loans made using those practices has disappeared. Until the securitization market is revived — which may require government participation in ensuring sound underwriting standards — it would be premature for the FTC to issue regulations in this area.

- 8. Is there any specific information that non-bank financial companies should be required to disclose to prevent unfairness or deception related to the origination of mortgage loans? Identify any such type of information, and for each, please answer the following questions:**
 - a. Why is the failure to disclose the information unfair or deceptive under Section 5 of the FTC Act?**
 - b. Should disclosure be required for all loans or only certain types of loans? What are the costs and benefits of mandating its disclosure?**
 - c. What would be the effect on competition and consumers if the Commission were to require non-bank financial companies to disclose this information, but banks, thrifts, and federal credit unions were not similarly required to do so?**

See response to Question 6 above. As noted, CMC and AFSA do not believe that additional disclosures, beyond the revisions to Regulation Z recently adopted by the FRB, are warranted.

Mortgage disclosures should not be a focus of this rulemaking. Where disclosures are being provided in accordance with the requirements of TILA and RESPA, the disclosures should not be considered deceptive or misleading. Disclosures for non-traditional or alternative mortgages have been enhanced through the Nontraditional Mortgage Guidance, Subprime Statement, and new TILA and RESPA requirements.

We agree with the FTC's statement that "consumers in both the prime and subprime markets would benefit substantially from comprehensive reform of mortgage disclosures that would create a single, comprehensive disclosure of all key costs and terms of a loan, presented in language consumers can easily understand and in a form that they can easily use, provided early in the transaction to aid consumers shopping for the best loans." The FTC, together with the FRB and HUD, should work in a coordinated and collaborative way to reach this goal.

In order to provide the "single, comprehensive disclosure" that regulators, consumers and the industry all desire, there must first be a determination of what the "key costs and terms of the loan" are. Currently, there is no consensus on what costs and terms are "key" costs and terms. If all costs and terms are considered "key" then it will be impossible to provide consumers with a disclosure that they can easily understand. To the extent that disclosures required by existing laws or regulations are not disclosures of key cost and conditions, they should be streamlined or eliminated.

We note that the FTC Prototype Disclosure form included in the 2007 report by the FTC's Bureau of Economics does not include many terms currently required by TILA, including the Finance Charge, Amount Financed, or Total of Payments.¹⁹ We agree that these are not key disclosures in the mortgage context. Only after key costs and terms are defined can consumer and industry groups suggest alternative disclosure methods and regulators conduct meaningful testing of those alternative disclosure methods.

9. Should the FTC incorporate into a proposed rule any of the requirements or prohibitions on acts or practices related to mortgage disclosures that the Board promulgated under its TILA Section 105(a) authority, thereby allowing the FTC to obtain civil penalties for any violation of TILA, HOEPA, or Regulation Z, consistent with the authority conferred on federal banking regulatory agencies?

As noted above, we believe that such an expansion would be inconsistent with the enforcement scheme adopted by Congress.

C. Mortgage Appraisals

11. What types of unfair or deceptive acts and practices, if any, do non-bank financial companies engage in related to mortgage appraisals, including but

¹⁹ See Federal Trade Commission, Bureau of Economics Staff Report, "Improving Consumer Mortgage Disclosures: An Empirical Assessment of Current and Prototype Disclosure Forms" (June 2007), available at <http://www2.ftc.gov/os/2007/06/P025505MortgageDisclosureReport.pdf>, cited at 74 Fed. Reg. 26118, 26124-25 n.86.

not limited to engaging or selecting appraisers, ordering appraisals, or performing as appraisers? For any such act or practice, please answer the following questions:

- a. Why is it unfair or deceptive under Section 5 of the FTC Act?**
- b. Should it be prohibited or restricted? If so, how? For all loans or only certain types of loans? What are the costs and benefits of such prohibitions or restrictions?**
- c. What would be the effect on competition and consumers if the Commission were to prohibit or restrict non-bank financial companies with respect to the act or practice, but banks, thrifts, and federal credit unions were not similarly prohibited or restricted?**

Revised Regulation Z prohibits the coercion of appraisers and includes many specific examples of conduct that violates the prohibition, as well as of other conduct that complies with the regulation. Such practices are also addressed by the Home Valuation Code of Conduct.

In addition, although it was adopted in the context of a consent decree, the Code is “enforced” largely through actions by the major investors in mortgages, Fannie Mae and Freddie Mac. For example, an investor may decline to do business with an appraiser that does not comply with the Code.

In light of the extensive regulation of appraisal practices in both Regulation Z and the Code, and the fact that the FTC can enforce the Regulation Z provisions as if they were a trade regulation rule, we do not believe that the FTC should adopt additional requirements through a rule. Furthermore, one effect of such rules would be to grant enforcement power to state attorneys general, which would be particularly inappropriate because the appraisal industry is often regulated under state law by a different agency.

On the other hand, the FTC should consider incorporating into its regulation the provisions of Regulation Z that prohibit mortgage brokers from coercing appraisers. Although mortgage brokers are prohibited from coercing an appraiser under Section 226.36(b)(1) of Regulation Z, it is not clear that the broker who is not a creditor will have any liability if it does so because the statute applies only to creditors. In addition, if an appraiser believes it is being subjected to coercion by a creditor or mortgage broker, the FTC should require the appraiser to report the attempted coercion to the primary regulator of the creditor or mortgage broker.

The FRB determined that inflated appraisals cause substantial injury to consumers that consumers may not reasonably avoid, and that this injury is not outweighed by the benefits to the consumer or to competition. If an appraiser is being subject to coercion by a creditor or broker, it is highly likely that this is not an isolated act by the creditor or broker. Therefore, the appraiser should be required to report this coercion in order to prevent injury to consumers whose appraisals are being completed by appraisers who have succumbed to coercion by the creditor or broker.

- 12. Is there any specific information that non-bank financial companies should be required to disclose to prevent unfairness or deception related to mortgage appraisals? Identify any such type of information, and for each, please answer the following questions:**
- a. Why is the failure to disclose the information unfair or deceptive under Section 5 of the FTC Act?**
 - b. Should disclosure be required for all loans or only certain types of loans? What are the costs and benefits of mandating its disclosure?**
 - c. What would be the effect on competition and consumers if the Commission were to require non-bank financial companies to disclose this information, but banks, thrifts, and federal credit unions were not similarly required to do so?**

See response to Question 11.

- 13. Should the FTC incorporate into a proposed rule any of the prohibitions or restrictions on acts or practices related to mortgage appraisals addressed in the NYAG's settlement and Code? Identify any such prohibited or restricted act or practice, and for each, please answer the following questions:**
- a. Why is it unfair or deceptive under Section 5 of the FTC Act?**
 - b. Should it be prohibited or restricted? If so, how? For all loans or only certain types of loans? What are the costs and benefits of such prohibitions or restrictions?**
 - c. What would be the effect on competition and consumers if the Commission were to prohibit or restrict non-bank financial companies with respect to the act or practice, but banks, thrifts, and federal credit unions were not similarly prohibited or restricted?**

See response to Question 11.

D. Mortgage Servicing

- 15. What types of unfair or deceptive acts and practices, if any, do non-bank financial companies engage in related to mortgage servicing? For any such act or practice, please answer the following questions:**
- a. Why is it unfair or deceptive under Section 5 of the FTC Act?**
 - b. Should it be prohibited or restricted? If so, how? For all loans or only certain types of loans? What are the costs and benefits of such prohibitions or restrictions?**

- c. **What would be the effect on competition and consumers if the Commission were to prohibit or restrict non-bank financial companies with respect to the act or practice, but banks, thrifts, and federal credit unions were not similarly prohibited or restricted?**

As the FTC notes, the FRB revisions to Regulation Z include carefully-considered restrictions on certain servicing practices identified as UDAPs by the FRB. Specifically, the FRB regulation generally requires crediting of payments as of the date of receipt, prohibits pyramiding of late charges, and requires prompt provision of payoff statements.²⁰

The Real Estate Settlement Procedures Act (RESPA) includes a dispute-resolution procedure for mortgage loans that has generally worked well, at least until recently when it has been put under stress by abusive filings of “qualified written requests” by loan-modification firms.²¹ This “qualified written request” process mitigates the effect of any errors by servicers by ensuring that they are corrected promptly.

As discussed above with respect to other areas, the Commission should observe whether the FRB rules, as well as existing RESPA provisions, are effective before imposing additional requirements.

- 16. Should the FTC incorporate into a proposed rule any of the prohibitions or restrictions on acts and practices addressed in its settlement orders with mortgage servicers? Identify any such prohibited or restricted act or practice, and for each, please answer the following questions:**

- a. **Why is it unfair or deceptive under Section 5 of the FTC Act?**
- b. **Should it be prohibited or restricted? If so, how? For all loans or only certain types of loans? What are the costs and benefits of such prohibitions or restrictions?**
- c. **What would be the effect on competition and consumers if the Commission were to prohibit or restrict non-bank financial companies with respect to the act or practice, but banks, thrifts, and federal credit unions were not similarly prohibited or restricted?**

FTC orders often incorporate a variety of requirements that may be appropriate for a particular respondent, particularly when the Commission has reason to believe that the company is a bad actor, but may not be suitable for an entire industry. To take one example, as the Commission notes, its settlement in *U.S. v. Fairbanks Capital Corp.*, No. 03-12219 (D. Mass. 2003), included a requirement that the servicer accept partial payments. This is contrary to standard practice in the industry. Under their agreements with investors, mortgage servicers typically either do not accept partial payments, or, if

²⁰ See 12 C.F.R. § 226.36(c) (as effective October 1, 2009).

²¹ See 12 U.S.C. § 2605(e); 24 C.F.R. § 3500.21(e).

they do accept them, place them in a suspense account and do not credit them until they receive the balance of the payment. At the same time, the servicer is often responsible for advancing amounts due to investors even if the servicer has not yet received payment. Thus, requiring the acceptance of partial payments would conflict with the servicer's agreement with the investor and adversely affect the economics of the servicing industry — an industry that is already struggling to address the huge unanticipated costs generated by the mortgage crisis.

- 17. Is there any specific information that non-bank financial companies should be required to disclose, or to disclose in a particular manner (for example, through uniform or model servicing disclosures), to prevent unfairness or deception related to mortgage servicing, such as:**
- a. information about fees the servicer is authorized to charge under the mortgage contract over the life of the loan; or**
 - b. information about applicable fees the servicer has charged during a specific monthly statement period.**

Identify any such type of information, and for each, please answer the following questions:

- i. Why is the failure to disclose the information, or to disclose it in a particular manner, unfair or deceptive under Section 5 of the FTC Act?**
- ii. Should disclosure be required in a particular manner (for example, through uniform or model servicing disclosures)? Should disclosure be required for all loans or only certain types of loans? What are the costs and benefits of mandating its disclosure?**
- iii. What would be the effect on competition and consumers if the Commission were to require non-bank financial companies to make these disclosures, but banks, thrifts, and federal credit unions were not similarly required to do so?**

This question raises several issues. First, it is unclear that a disclosure that a servicer is entitled to impose fees such as reasonable property-inspection and maintenance charges would be of any particular value to consumers or would have prevented the abuses alleged by the Commission in its cases against servicers. As the Bureau of Economics report recognized, consumers are already faced with a myriad of disclosures and are already suffering from “information overload” in mortgage transactions.

Second, it is not always clear exactly which fees a servicer is entitled to charge under the Uniform Instruments, which are used in the vast majority of mortgage transactions. The meaning of various clauses in the Instruments has been the subject of extensive litigation. If the Commission were to require fee disclosures, it would also have to take on the role of arbiter of the contract to determine whether the disclosure was made properly.

Finally, if the Commission were to regulate fees, it would be important to distinguish between fees collected pursuant to the underlying contract and those for optional services requested by the consumer, such as “speedpay” fees and charges for duplicate copies of documents. Requiring that every optional service that might be offered over the 30-year life of the mortgage be specified in the original mortgage contract would adversely affect consumers because servicers could not afford to offer optional services that were not specified in that agreement, sometimes because they did not exist at the time the loan was closed.

- 18. Should the FTC consider prohibiting or restricting as unfair or deceptive certain acts and practices related to mortgage servicing fees or related charges, such as:**
- a. charging fees not authorized under the mortgage contract;**
 - b. charging fees not authorized by state law;**
 - c. charging for “estimated” attorney fees or other fees for services not rendered;**
 - d. charging late fees that are not permitted under the service agreement or that are otherwise improper (other than “fee pyramiding,” which is already prohibited under the Board’s Regulation Z amendments**
 - e. failing to disclose and itemize adequately fees in billing statements or other relevant communications with borrowers; or**
 - f. forcing consumers to buy insurance on their homes when the servicer knows or should know that insurance is already in place?**

Identify any such act or practice, and for each, please answer the following questions:

- i. Why is it unfair or deceptive under Section 5 of the FTC Act?**
- ii. Should it be prohibited or restricted? If so, how? For all loans or only certain types of loans? What are the costs and benefits of such prohibitions or restrictions?**
- iii. What would be the effect on competition and consumers if the Commission were to prohibit or restrict non-bank financial companies with respect to the act or practice, but banks, thrifts, and federal credit unions were not similarly prohibited or restricted?**

The Commission determined in the *Orkin Exterminating Co.* case that an intentional, systematic breach of contract can be unfair within the meaning of the FTC Act.²² But a breach of contract by itself is generally not a UDAP violation; some aggravating circumstance is required.²³ A regulation that treated every contractual breach as a UDAP punishable by civil penalties, as it appears the FTC is contemplating, would be inconsistent with *Orkin* and other FTC and UDAP precedent. It would have a severe economic impact on the servicing industry and would not produce countervailing benefits to consumers.

Moreover, the Commission made it clear in *Orkin* that the determination that a breach of contract is unfair requires a careful, case-by-case examination of the circumstances of a particular case:

[T]he Commission has determined that to be “unfair” under Section 5, an act or practice must result in substantial and unavoidable consumer injury that is not outweighed by benefits to consumers or to competition. Some consumer injury is inherent in any failure by a seller of goods or services to deliver according to the terms of a contract. The Commission will examine case by case whether the injury caused by a particular refusal to honor a contract obligation was avoidable, whether the injury is sufficiently substantial, either by its nature or its prevalence, to meet . . . the Commission’s standard of “unfairness,” and whether the injury is outweighed by benefits to consumers or to competition.²⁴

Thus, the Commission acknowledged, in the leading case on the subject, that a case-by-case approach is necessary to determine whether a breach of contract rises to the level of an unfair act or practice. This language in the Commission’s own precedent strongly suggests that it is inappropriate to attempt to define breaches of the mortgage contract as unfair in a “one-size-fits-all” regulation.

As noted above, the interpretation of the mortgage contract is not always clear. In addition, although the Commission has asserted that some servicers have engaged in abusive practices with regard to fees, determining whether abuse has occurred is very fact-intensive. For example, the Commission notes that it has criticized the practice of charging excessive property-inspection fees, but reasonably frequent inspections of a vacant or foreclosed-upon property are essential to preserving the value of the property. A degraded and poorly-maintained property not only can lose its value to the investor, it can also negatively affect the value of neighboring homes.

The vast majority of mortgages, including most mortgages that are not securitized by Fannie Mae or Freddie Mac, are executed under the Fannie Mae/Freddie Mac Uniform

²² *Orkin Exterminating Co.*, 108 F.T.C. 263 (1986), *aff’d*, 849 F.2d 1354 (11th Cir. 1988), *cert. denied*, 484 U.S. 1041 (1989).

²³ See generally National Consumer Law Center, *Unfair and Deceptive Acts and Practices* § 5.2.5.1 (6th ed. 2004).

²⁴ *Orkin*, 108 F.T.C. at 360.

Instruments. The Uniform Instruments were drafted in a manner similar to the drafting of a regulation and were considered in a hearing-like public meeting that included witnesses such as Ralph Nader. As one observer has noted:

In response to the public meeting, Fannie Mae and Freddie Mac developed forms that were substantially more consumer-friendly [than previous drafts] The forms have been modified over the years, . . . but they retain the consumer-friendly provisions negotiated in the early 1970s.²⁵

The “consumer-friendly” provision of the Uniform Instruments regarding property inspections reads as follows:

[Section 7] *Lender or its agent may make reasonable entries upon and inspections of the Property. If it has reasonable cause, Lender may inspect the interior of the improvements on the Property. Lender shall give Borrower notice at the time of or prior to such an interior inspection specifying such reasonable cause.*

. . . .

[Section 9] If (a) Borrower fails to perform the covenants and agreements contained in this Security Instrument, (b) there is a legal proceeding that might significantly affect Lender’s interest in the Property and/or rights under this Security Instrument (such as a proceeding in bankruptcy, probate, for condemnation or forfeiture, for enforcement of a lien which may attain priority over this Security Instrument or to enforce laws or regulations), or (c) Borrower has abandoned the Property, then Lender may do and pay for whatever is reasonable or appropriate to protect Lender’s interest in the Property and rights under this Security Instrument, *including protecting and/or assessing the value of the Property, and securing and/or repairing the Property.*

. . . .

*Any amounts disbursed by Lender under this Section 9 shall become additional debt of Borrower secured by this Security Instrument. These amounts shall bear interest at the Note rate from the date of disbursement and shall be payable, with such interest, upon notice from Lender to Borrower requesting payment.*²⁶

The repeated use of the word “reasonable” in these provisions indicates that whether the servicer has breached the contract requires a factual inquiry into the circumstances of

²⁵ Julia Patterson Forrester, *Fannie Mae/Freddie Mac Uniform Mortgage Instruments: The Forgotten Benefit to Homeowners*, 72 Mo. L. Rev. 1077, 1084-85 (2007).

²⁶ Fannie Mae/Freddie Mac California Single Family Uniform Instrument §§ 7, 9 (Jan. 2001) (emphasis added).

each case. Even if the servicer were found to have breached the contract in a specific instance, this does not equate to an unfair practice, which, as the Commission stated in *Orkin*, requires a finding that “the injury is sufficiently substantial, either by its nature or its prevalence, to meet . . . the Commission’s standard of ‘unfairness.’” Moreover, an act or practice may still not be unfair if any injury it causes is outweighed by benefits to consumers or competition. Servicers have been criticized for failing to maintain foreclosed properties properly, and a number of cities have enacted ordinances requiring proper maintenance of foreclosed and “real estate owned” (REO) properties. For example, the city of Boston requires that all vacant and “foreclosing” property be registered with the Inspectional Services Department and inspected and maintained at least monthly.²⁷ Even when inspections are not mandated by law, servicers have responded to the pressure to improve maintenance of foreclosed and REO properties by increasing the frequency of inspections, which increases the chances that some inspections will turn out to be unwarranted. If the result of a Commission rule were that servicers curtailed their use of inspections, some unwarranted inspections would be prevented, but the public would lose the benefit of preserving the value of the lender’s security and preventing the deterioration of the neighborhood by ensuring that the property is being properly maintained. For all these reasons, the practice of improperly charging inspection fees is not an appropriate subject for a rulemaking.

Other issues such as alleged abuse of force-placed insurance are also very fact-intensive and have engendered extensive litigation. The insurance provision of the Uniform Instruments provides:

Borrower shall keep the improvements now existing or hereafter erected on the Property insured against loss by fire, hazards included within the term “extended coverage,” and any other hazards including, but not limited to, earthquakes and floods, for which Lender requires insurance. This insurance shall be maintained in the amounts (including deductible levels) and for the periods that Lender requires. . . .The insurance carrier providing the insurance shall be chosen by Borrower subject to Lender’s right to disapprove Borrower’s choice, which right shall not be exercised unreasonably. . . .

If Borrower fails to maintain any of the coverages described above, Lender may obtain insurance coverage, at Lender’s option and Borrower’s expense. Lender is under no obligation to purchase any particular type or amount of coverage. Therefore, such coverage shall cover Lender, but might or might not protect Borrower, Borrower’s equity in the Property, or the contents of the Property, against any risk, hazard or liability and might provide greater or lesser coverage than was previously in effect. Borrower acknowledges that the cost of the insurance coverage so obtained might significantly exceed the cost of insurance that Borrower could have

²⁷ See Boston, Mass. Muni. Code §§ 16-52.3, 16-52.4. See also, e.g., Milwaukee, Wisc. Code § 200-22.5; Fresno, Cal. Muni. Code § 9-804.f.

obtained. Any amounts disbursed by Lender under this Section 5 shall become additional debt of Borrower secured by this Security Instrument.²⁸

Although the Commission asks whether it should prohibit “forcing consumers to buy insurance on their homes when the servicer knows or should know that insurance is already in place,” in fact, the issue in disputed force-placement cases is not whether consumers are being forced to purchase insurance. As shown in the language from the Uniform Instruments set out above, the borrower has agreed to purchase insurance. The force-placement clause allows the servicer to obtain insurance in order to maintain coverage if the consumer breaches this obligation, and to bill the consumer for the costs of that coverage. It is obviously in the interests of both the consumer and the lender for the servicer to be able to maintain coverage.

In our members’ experience, in the vast majority of instances insurance is force-placed because the borrower has, in fact, allowed the insurance to lapse. Generally, the servicer — and often the insurer as well — will notify the borrower several times of the apparent lapse in coverage before the servicer force-places coverage. For example, the following description from a court opinion reflects a typical force-placement situation:

Under the terms of the Deed, the [borrowers] were required to maintain hazard insurance on their home, with a provision allowing First Union to “force place” hazard insurance if the [borrowers] let their coverage lapse. In 1988, the [borrowers] failed to provide proof of coverage and First Union exercised its prerogative to “force place” insurance on the secured property. Rather than obtaining a policy with the [borrowers’] previous insurance company, First Union arranged for coverage by Transamerica Premier Insurance Company and then, a year later, by Balboa Insurance Company (“Balboa”), both of which charged substantially higher premiums and paid considerable commissions to First Union. . . . First Union paid for these premiums with funds from the Telfairs’ escrow account.

[Footnote:] [The borrowers] attribute . . . a nefarious purpose to First Union’s arrangement with Balboa; the change in coverage, however, was prompted by the [borrowers’] own lapse and, according to First Union, discontinuation of coverage in Georgia by the [borrowers’] previous carrier. In addition, although First Union alerted the [borrowers] to the higher rates, the [borrowers] did not secure replacement insurance until 1998, ten years after the initial lapse.²⁹

In the majority of instances where force-placed coverage is obtained erroneously, the servicer obtains the coverage because the borrower switched insurance companies and failed to notify the servicer of the change or to notify the new insurer of the existence of the mortgage. Less commonly, the new insurance carrier may have made an error in

²⁸ Fannie Mae/Freddie Mac California Single Family Uniform Instrument § 5 (Jan. 2001).

²⁹ *Telfair v. First Union Mortgage Corp.*, 216 F.3d 1333, 1341 and 1341 n.15 (11th Cir. 2000).

notifying the servicer of coverage such as providing the wrong loan number. In other cases, the borrower maintained insurance with the current insurer but that insurer stopped sending notices of coverage to the servicer. Finally, the servicer may sometimes have received a notice of coverage but failed to record it properly.

Because the process involves up to four parties — the borrower, the current and perhaps a new insurer, and the servicer, some errors do occur. When an error is brought to the servicer’s attention, the servicer will, consistent with the Uniform Instruments provision, refund or credit to the escrow account any premiums collected from the consumer.

Because force-placement “abuse” involves an asserted breach of contract by the servicer, it is subject to the same *Orkin* analysis discussed above. CMC and AFSA do not believe that regulation of force-placement practices can meet the standard of a practice that causes “injury [that] is sufficiently substantial, either by its nature or its prevalence, to meet . . . the Commission’s standard of ‘unfairness,’” and that is not “outweighed by benefits to consumers or to competition.” In addition, to the extent that alleged abuses involve the servicer or an affiliate charging insurance commissions, those practices constitute the “business of insurance,” which the Commission is specifically precluded from regulating.³⁰

Finally, several of the issues mentioned in the ANPR, including force-placement as well as issues such as attorney’s fees and late charges, are extensively regulated by state law. Any FTC rule would have to take such laws into account.

- 19. Should the FTC consider prohibiting or restricting as unfair or deceptive certain acts and practices related to how mortgage servicers handle payments, amounts owed, or consumer disputes, such as:**
- a. failing to post payments in a timely and proper manner (beyond the new prohibition under the Board’s Regulation Z amendments);**
 - b. mishandling of partial payments or suspense accounts;**
 - c. misrepresentation of amounts owed or other account terms or the status of the account;**
 - d. making claims to borrowers about their loan accounts without a reasonable basis (i.e., lack of substantiation);**
 - e. failing to have a adequate procedures to ensure accuracy of information used to service loans; or**
 - f. failing to maintain and provide adequate customer service to handle disputes?**

³⁰ 15 U.S.C. § 46(l).

Identify any such act or practice, and for each, please answer the following questions:

- i. Why is it unfair or deceptive under Section 5 of the FTC Act?**
- ii. Should it be prohibited or restricted? If so, how? For all loans or only certain types of loans? What are the costs and benefits of such prohibitions or restrictions?**
- iii. What would be the effect on competition and consumers if the Commission were to prohibit or restrict non-bank financial companies with respect to the act or practice, but banks, thrifts, and federal credit unions were not similarly prohibited or restricted?**

The revised Regulation Z requires prompt crediting of payments in consumer credit transactions secured by a consumer's dwelling. Reflecting operational realities, the Regulation Z provision does not require actual posting on the date of receipt, so long as any "delay in crediting does not result in any charge to the consumer or in the reporting of negative information to a consumer reporting agency."³¹ Regulation Z also allows a servicer to delay crediting by up to 5 days after receipt if the servicer has specified requirements for making payments in writing and the consumer has failed to conform to those requirements.

The Regulation Z requirements reflect a balance between protecting consumers and avoiding significant operational disruption to mortgage servicers. The FTC should not disrupt this balance, especially so soon after the new Regulation Z requirements go into effect.

As with the other servicing issues discussed above, it would be virtually impossible to spell out when a practice such as making a claim to a borrower without substantiation or failing to maintain "adequate" customer service rises to the level of a UDAP. The Commission has encountered situations in which it believed that customer service was clearly inadequate, but in other situations it is a closer question.

Attempting to address these issues in a rule would result in the FTC being mired in the daily customer-relations operations of hundreds of mortgage servicers. Such issues are much more appropriately handled on a case-by-case basis under the Commission's existing UDAP authority.

- 20. Should the FTC consider prohibiting or restricting as unfair or deceptive certain acts and practices related to how mortgage servicers handle loan performance and loss mitigation issues, such as:**
 - a. taking foreclosure action without first verifying loan information and investigating any disputes;**

³¹ 12 C.F.R. § 226.36(c)(1)(i).

- b. taking foreclosure action without first giving the consumer an opportunity to attend foreclosure counseling or mediation;**
- c. requiring consumers to release all claims (or other requirements, such as requiring binding arbitration agreements) in connection with loan modifications or other workout agreements/repayment plans; or**
- d. making loan modifications or other workout agreements/repayment plans without regard to the consumer’s ability to repay?**

Identify any such act or practice, and for each, please answer the following questions:

- i. Why is it unfair or deceptive under Section 5 of the FTC Act?**
- ii. Should it be prohibited or restricted? If so, how? For all loans or only certain types of loans? What are the costs and benefits of such prohibitions or restrictions?**
- iii. What would be the effect on competition and consumers if the Commission were to prohibit or re-strict non-bank financial companies with respect to the act or practice, but banks, thrifts, and federal credit unions were not similarly prohibited or restricted?**

Servicers generally attempt to avoid foreclosure because it is usually the most costly option for the investor. In addition, foreclosure practices are extensively regulated under state law and increasingly under federal programs. Servicers engage in a variety of loss-mitigation efforts to allow the borrower to remain in the home if possible, and, if not, to find an alternative that is less damaging and costly than foreclosure.

These proposals could have other perverse results. For example, the first proposal, a prohibition against “taking foreclosure action without first verifying loan information and investigating any disputes,” could allow a consumer to delay foreclosure by filing spurious disputes. Because the process can last for months if not years, servicers often initiate foreclosure to start the clock, while still hoping to resolve the problem in another manner. A well-advised borrower who has no intention of curing a default might benefit from this provision by raising new disputes that must be investigated, but that conduct would hurt the other residents of a neighborhood where property values are depressed by the many homes in foreclosure. Similarly, in at least one state where counseling is mandatory, borrowers have been failing to appear at scheduled counseling sessions, allowing them to stop the foreclosure clock.

Mandatory counseling can also have the perverse effect of preventing a modification from moving forward. This effect was noted in a recent Government Accountability Office (“GAO”) report on the Treasury’s Home Affordable Program (“HAMP”), which does mandate counseling:

Treasury officials told us that they would not require proof that the borrowers had obtained housing counseling because Treasury does not want to deny a modification to borrowers that successfully complete the trial period but may not have obtained counseling. Treasury also did not want to delay modifications under the program until servicers built systems in coordination with counselors to track whether borrowers obtained counseling.³²

The proposal to prohibit the release of all claims by the borrower could prevent the servicer from settling a claim of the borrower because the lender does not want to be exposed to additional claims beyond what the borrower has already raised. For example, a consumer may assert that the loan is rescindable under the three-year rescission provision of TILA, because all material disclosures were not delivered at consummation. *See* 15 U.S.C. § 1635(f); 12 C.F.R. § 226.23(a)(3). In many cases, the alleged failure to disclose reflects an alleged technical violation of TILA, and it is often unclear whether the disclosures in fact violated the law.

Under current law, if the servicer believes that such a claim may be valid, it may be willing to grant a loan modification in which the principal, interest rate, or both are reduced in exchange for a release of the borrower's rescission claim, as an alternative to litigating the consumer's claim. If the Commission were to prohibit releases, this outcome, which is often the best result for both the borrower and the lender, would be impossible.

As with the other proposals discussed above, abuses in loan performance and loss mitigation are better addressed on a case-by-case basis.

- 21. Should the FTC consider prohibiting or restricting as unfair or deceptive certain acts and practices related to servicing of mortgage loans in connection with bankruptcy proceedings, such as:**
- a. failing to disclose fees incurred during a Chapter 13 bankruptcy case and then seeking to collect them from the consumer after discharge/dismissal?**
 - b. filing of proofs of claim or other bankruptcy filings without a reasonable basis (i.e., impose a substantiation requirement beyond Rule 11 of the Federal Rules of Civil Procedure);**
 - c. failing to apply properly payments in bankruptcy to pre-petition/post-petition categories of the consumer's debts; or**
 - d. charging of specific unnecessary or excessive fees in bankruptcy cases (e.g., duplicative attorneys' fees)?**

³² GAO, *Troubled Asset Relief Program: Treasury Actions Needed to Make the Home Affordable Modification Program More Transparent and Accountable*, Report No. GAO-09-837 (July 2009).

Identify any such act or practice, and for each, please answer the following questions:

- i. Why is it unfair or deceptive under Section 5 of the FTC Act?**
- ii. Should it be prohibited or restricted? If so, how? For all loans or only certain types of loans? What are the costs and benefits of such prohibitions or restrictions?**
- iii. What would be the effect on competition and consumers if the Commission were to prohibit or restrict non-bank financial companies with respect to the act or practice, but banks, thrifts, and federal credit unions were not similarly prohibited or restricted?**

Bankruptcy cases are extensively supervised by bankruptcy judges and trustees. It is doubtful that the FTC has the authority to regulate bankruptcy practices, and, in any case, as a matter of policy, the Commission should leave regulation of such matters to the bankruptcy courts and trustees.

Conclusion

While the CMC and AFSA support the Commission's goal of addressing abuses in the mortgage process, we believe that many of the practices discussed in the ANPR can be more effectively and efficiently addressed on a case-by-case basis. We urge the Commission to consider carefully whether any rule is needed, and, if decides to issue a rule, to make any requirements as narrow and focused as possible.

Sincerely,



Anne C. Canfield
Executive Director
Consumer Mortgage Coalition



Bill Himpler
Executive Vice President
American Financial Services Association