

November 5, 2007

Regulation Comments
Chief Counsel's Office
Office of Thrift Supervision
1700 G Street, NW
Washington, DC 20552
Attention: OTS-2007-0015

Re: Advance Notice of Proposed Rulemaking ("ANPR"), Unfair or Deceptive Acts or Practices

Ladies and Gentlemen:

Thank you for the opportunity to comment on the ANPR on the above referenced subject. For some background information, IndyMac Bank, F.S.B. ("Indymac") is the largest savings bank in Los Angeles County, and, nationwide, it is the seventh largest thrift based on assets. Indymac makes residential mortgage loans throughout the nation, and the vast majority of the Bank's loans have historically been arranged through state-licensed and regulated mortgage brokers.

We strongly support responsible lending that is free of unfair or deceptive acts or practices. To this end, we continually strive to provide consumers with information regarding their loans in a clear and understandable manner in order to enable them to make informed decisions. We were one of the first lenders to enhance its mortgage loan disclosure documents to provide greater clarity regarding payment features, including the potential for payment shock and negative amortization. In addition, our pricing disclosures clearly identify the factors that affect the interest rate and terms, which include, but are not limited to, the specific loan and borrower financial characteristics, so that borrowers can fully understand the loan terms for which they have applied and choose the loan terms that are best for them.

One of the key advantages of the OTS charter is that the OTS has enacted regulations implementing the Home Owners' Loan Act that preempt most state laws governing lending and servicing activities of federal savings banks. Because federal law preempts conflicting state laws, a federal savings bank does not have to comply with any state law from which federal law exempts it, even if the state law does not provide an exemption for federal savings banks.

Nevertheless, regulations of the OTS and other federal agencies governing unfair or deceptive acts or practices are not comprehensive and currently offer no preemptive benefit to federal savings banks. Furthermore, current market conditions have led many states to enact laws governing unfair or deceptive acts or practices that apply directly to federal savings banks' operations in such states. In addition, state laws that apply to Indymac's brokers directly, rather than to Indymac, also impact Indymac by, in many cases, limiting the types of products that Indymac can originate through brokers. Because these laws are continuing to limit the ability of institutions like Indymac to originate legitimate mortgage loan products, we have carefully reviewed the ANPR.

Because the ANPR provides no clear indication, however, as to the OTS' intended scope or method for expanding its current prohibitions on unfair or deceptive acts or practices, it is difficult to provide specific responses to the questions that have been raised. Nonetheless, we feel it is important to communicate our support for additional rulemaking in this area by the OTS, as long as the additional rulemaking conforms to the following three general principles:

1. The OTS should ensure that any new rules that would apply to federal savings banks do not create a regulatory regime that is so different in substance that it places federally chartered thrifts at a competitive disadvantage or imposes unreasonable or unwarranted costs.
2. To the extent that a single national standard is not established and states remain free to enact their own legislation, then the OTS should ensure that the new federal regulations are preemptive of state law and the OTS should be prepared to vigorously defend this preemption.
3. The OTS should be as specific as possible, while at the same time not being overly prescriptive or restrictive, in outlining what acts or practices are unfair or deceptive.

Principle 1

With regard to Principle 1, we would like to stress that while we applaud the OTS for reviewing its regulations to ensure that customers of OTS-regulated entities are treated fairly, we believe the OTS should work with the other federal regulatory agencies (including the OCC, FDIC, HUD and FTC), as well as the other relevant state agencies, to ensure uniformity and consistency and, ultimately, a level playing field for all mortgage originators (federally or non-federally regulated).

To the extent that it is not possible or practical to develop joint regulations that would govern federally and non-federally regulated mortgage originators, the OTS should ensure that its new rules do not put federally chartered thrifts at a competitive disadvantage with non-federally regulated mortgage originators or other federally regulated financial institutions. Moreover, the OTS' regulatory scheme should not impose unnecessary or unreasonable costs of compliance, nor increase a federally chartered thrift's exposure to litigation or potential liability to third parties.

Principle 2

As further support for Principle 2, it should be noted that, according to the Supreme Court, when Congress passed the Home Owners' Loan Act, it "plainly envisioned that [federal savings banks] would be governed by what [federal regulators] – not any particular State – deemed to be the 'best practices.'" This approach is appropriate because federal banking regulators conduct regular, comprehensive, on-site reviews of banks' mortgage lending policies and practices and issue appropriate enforcement actions to address unsafe and unsound practices and violations of laws, including fraud. The effectiveness of the federal banking regulators' supervisory practices is demonstrated by the fact that federally-regulated banks have not been the primary cause of the recent mortgage problems. As a result, we would hope that preemptive rules would be the thrust of any rulemaking on deceptive acts or practices and that the OTS would vigorously defend such preemption should it be challenged in the future.

Principle 3

For the reasons set forth above, we strongly support clear, uniform rules on this topic. At the same time, we believe the OTS should not be overly prescriptive or restrictive when compiling specific acts or practices that will be prohibited. The regulations should be carefully crafted so as not to inhibit the ability of federal savings banks to innovate legitimate products and services for their customers. In addition, the OTS should not outlaw specific product features, such as stated income, negative amortization, or prepayment penalties, because these product features can, in many circumstances, be used appropriately and provide benefits to borrowers. Many of the recently enacted state laws go too far and severely restrict legitimate lending activities, which could prevent some creditworthy borrowers from obtaining loans.

As just one example, we note that several recently enacted state laws prohibit prepayment premiums on all subprime loans. We are unclear, however, why a subprime borrower should never be provided the benefit of a lower interest rate in return for prepayment protection for the lender, especially if a higher standard has been implemented in terms of assessing the borrower's ability to repay (based on the fully indexed, fully amortizing payment and taking into account applicable taxes, insurance, and assessments) and the borrower's ability and desire to refinance, at least in the short term, has likely been lessened given current conditions in the housing market, which include declining property values.

As a result, we do not support any additional rulemaking that expressly, or by implication, is modeled on state laws, and we are concerned to see that the ANPR addresses this approach as a possibility.¹ Such an approach could create the implication that federal savings banks are subject to state laws, which could increase federal savings banks' exposure to regulation by conflicting authorities and sets of rules. Additionally, many of the state laws were not well crafted, causing ambiguity that may result in further litigation to define the parameters of such laws.

¹ The ANPR states, "For mortgage lending, OTS could also prohibit specific unfair or deceptive acts or practices of the types listed in various state predatory lending laws." The ANPR then provides North Carolina's predatory lending laws as an example.

While the currently proposed Mortgage Reform and Anti-Predatory Lending Act of 2007 is not discussed in the ANPR, we would also like to communicate our concerns about certain proposed provisions of this bill. Consistent with our comments above, these concerns are focused on three areas: 1) the bill's subjective duty of care standards and anti-steering provisions, which would increase litigation exposure for federal savings banks, 2) the bill's restrictive and inflexible underwriting standards, which would inhibit legitimate lending activities and limit the availability of credit to support home ownership, and 3) the bill's lack of clear preemption.

To reduce ambiguity and make implementation more straightforward, we feel the OTS should look to and consider any specific practices that have been the subject of enforcement actions, case law, or formal or informal interpretations by the OTS, the FTC, and any other federal banking regulators. If the OTS could compile the specific acts or practices that led to these actions, cases, or interpretations into one comprehensive set of rules or guidance, we feel it could reduce gaps in the current regulatory framework.

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To conclude, we would like reiterate our appreciation for the opportunity to comment on this ANPR, and we hope our comments will be useful in your considerations. We look forward to commenting in more detail on any additional and more detailed proposals related to unfair or deceptive acts or practices. If you have any questions or comments, please do not hesitate to contact me at (626) 535-4874.

Sincerely,



Richard Wohl
President, Indymac Bank