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**Via Electronic Delivery**

November 5, 2007

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

Re: OTS– 2007–0015; Part 535: Unfair or Deceptive Acts or Practices (UDAP);  
72 Federal Register 43570; August 6, 2007

Ladies and Gentlemen:

The New York Bankers Association (NYBA) welcomes the opportunity to respond to the Advance Notice of Proposed Rulemaking (ANPR) issued by the Office of Thrift Supervision (OTS) regarding the OTS' review of its regulations relating to unfair or deceptive acts or practices to determine what, if any, additional regulation is needed to ensure customers of OTS-regulated entities are treated fairly. NYBA is comprised of the community, regional and money center banks and thrifts doing business in the State of New York. Our members have aggregate assets in excess of \$5 trillion and more than 300,000 New York employees.

NYBA shares the goal of the OTS to ensure that American consumers are treated fairly in financial transactions, and deeply appreciates the OTS' and Director Reich's long-standing commitment to avoid unnecessary regulatory burden for the institutions the agency regulates. In this regard, it is important to note that OTS-regulated institutions have overwhelmingly not engaged in the improper lending practices which have played a key role in the current sub-prime lending crisis. Moreover, the OTS already has significant authority to supervise and take enforcement action against those institutions it regulates which may have engaged or will in the future engage in unfair or deceptive lending practices.

Therefore, we believe that no additional rules or regulations are necessary at this time to augment the authority the OTS already has to regulate inappropriate institutional practices. We are concerned, that should such unnecessary additional new regulations be imposed, they could inadvertently harm consumers and savings institutions by limiting access to credit and impeding the development of new products. If the OTS nevertheless determines that it needs to take further steps, we urge that it employ uniform, principles-based guidance with uniform supervision and enforcement. Such guidance should also be consistent with any standards that may be established by all the other relevant regulatory agencies for savings and other financial institutions.

## **DISCUSSION**

In this ANPR, the OTS asks a number of questions regarding the appropriate regulatory framework for further UDAP guidance, regulation or enforcement. Before addressing the specific issues raised in the ANPR, we would respond generally by saying that, first and foremost, until and unless the OTS, through its enforcement authority, has indicated that there is a problem which cannot be addressed by the existing regulatory scheme, no additional regulation would appear necessary or appropriate at this time. That having been said, set forth below is a set of general principles which we believe are responsive to the many questions raised by the OTS in the ANPR and should be considered by it in its evaluation of how it can most effectively prevent unfair or deceptive acts and practices, as well as in its evaluation of enforcement approaches.

### **Ensure Consistency of Regulation**

First among these principles is that every effort be made to work with all banking and other agencies that have UDAP authority to ensure consistency in standards across these agencies, and to ensure consistency in regulations, supervision and enforcement on banks and non-bank financial market participants alike. Disparate regulation and supervision not only creates unnecessary confusion, inefficiencies and regulatory burdens for financial institutions, but perhaps even more importantly, provides an opportunity for bad actors to move their operations into the least regulated entities, to take advantage of unsuspecting consumers. In this regard, it should be noted that the Federal Reserve Board is expected to soon propose new consumer protections under their Home Ownership Equity Protection Act (HOEPA) authority to prevent unfair or deceptive acts and practices involving mortgages. We strongly believe and urge that the OTS and the other regulatory agencies promptly conform their regulations and guidance to any such new regulations – especially since these new regulations will apply to all mortgage creditors. Similarly, we urge the OTS to formally adopt the FTC standards for identification and suppression of unfair or deceptive acts or

practices under the FTC Act - as the other banking agencies have already done by issuing guidance for institutions under their jurisdiction, based on the FTC's Policy Statement on Unfairness issued in 1980. Adopting a similar policy statement, would be an excellent initial step towards uniform standards.

Uniformity in approach to UDAP is particularly necessary because of the overlapping jurisdiction of enforcement entities. As OTS notes in its ANPR, while the FTC has no enforcement authority over savings associations, it does have such authority over their affiliates and subsidiaries. Thus, if an affiliate did engage in an unfair or deceptive practice, it is conceivable that (depending on how the OTS decides to proceed with respect to related entities\*) that practice could be the subject of separate enforcement actions by the OTS, the FTC and by each state in which the affiliate operates. Without uniformity and consistency between the agencies, many institutions could be subject to consideration of different standards by different agencies with regard to UDAP violations, making risk assessment and compliance efforts extremely difficult.

#### **Coordinate Supervision and Examination Procedures**

In order to ensure that regulations are applied in a uniform and consistent manner across relevant agencies, we also believe that coordinated supervision and examination procedures are vital. Thus, we recommend that all of the banking agencies continue their UDAP oversight by coordinating through the Federal Financial Institutions Examination Council (FFIEC) joint agency guidance. An example of the need for such coordination is demonstrated in this ANPR, where the OTS asks whether it should restrict savings associations from imposing fees on gift cards that exceed a certain amount or percentage of the original gift amount. This restriction would be inconsistent with guidance on gifts cards already issued by the OCC that requires certain disclosures to consumers if there are fees associated with the gift card, but does not set a specific limit on those fees. Such potential inconsistencies create compliance difficulties and unnecessary additional regulatory burden for financial institutions while, at the

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\* We believe that the OTS should limit any rulemaking activity it may elect to engage in under its authority under Section 5 of the FTC Act, only to cover savings associations and not their related entities for two reasons. First, Section 133 of the Gramm-Leach-Bliley Act (GLBA) specifically clarified that affiliates of savings associations, including subsidiaries, are not exempt from FTC's jurisdiction under the FTC Act. This specific reservation of authority to the FTC over these entities which is contained in the GLBA raises a serious question as to whether the Congress did not specifically wish the FTC to have exclusive UDAP authority over them - despite the fact that the OTS believes that, as the thrift holding company supervisor, it also has such supervisory authority. The second reason we believe that the OTS should not asserting UDAP authority over the related entities of savings associations is that this would create a burdensome and confusing triple overlay of regulation of UDAP issues - by the FTC, the states in which the related entities operate, and by the OTS.

same time, causing confusion to consumers regarding what protections they can expect when purchasing a gift card.

### **UDAP Should be Effectuated Through Flexible Guidance**

NYBA also believes that any additional actions taken with respect to UDAP by the OTS should be effectuated through the use of flexible guidance, rather than

through regulatory initiatives. We believe that the agencies' use of guidance on nontraditional mortgages and on sub-prime mortgage lending has enabled effective and transparent supervision, which might well have been delayed or had to be modified if it had been issued as proposed regulations. Moreover, we believe, that the promulgation of static rules can result in necessary changes being made only through a lengthy formal process that is slow to adjust to market changes.

In this regard, NYBA also believes that any additional actions taken by the OTS be guided by a principles approach, focusing on specific practices rather than specific products, consistent with the statutory basis of UDAP. This focus, we believe, will allow for more regulatory flexibility in reacting to market trends, and thus be more effective in eliminating unfair or deceptive practices in the marketplace as they emerge.

### **Changes Should be Applied Prospectively**

It is also critical that any determination by the OTS that a particular act, practice or product offering is unfair or deceptive be adopted prospectively only. To do otherwise would expose banks and savings associations to legal claims and reputational peril, based on practices, not previously deemed to be illegal and accepted by regulators and the industry.

NYBA would also discourage the OTS from using a *per se* standard for labeling certain additional acts or practices as unfair or deceptive. We believe, instead, that the standard for determining whether there has been a UDAP violation should contemplate and allow for an analysis of the specific facts and circumstances. For example, the OTS in the ANPR offers a list of potential targeted practices such as mandatory arbitration, default penalty rates and acceleration of principal upon default, which, in reality, are long-standing credit terms that have never been considered to be unfair nor deceptive as implemented by savings associations.

### **Conclusion**

We commend the OTS for raising important issues in this ANPR regarding its UDAP authority. As discussed above, we believe that additional regulation for savings institutions is not necessary at this time. Nevertheless, NYBA believes

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that any additional actions taken by the OTS to address unfair or deceptive practices should be prospective only, and should be achieved in a way that ensures consistency in standards, supervision and enforcement by all affected agencies. NYBA also believes that the OTS should avoid issuing static regulations, and instead rely on flexible guidance that can be more quickly responsive to market changes.

We appreciate the opportunity to comment on this ANPR. If you have any questions, please do not hesitate to contact me. Thank you.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael P. Smith". The signature is written in a cursive style with a large initial "M".

Michael P. Smith