



November 5, 2007

Via Electronic Transmission and Hand Delivery to:

Guard's Desk
East Lobby Entrance
1700 G Street, NW
Washington, DC
Attention: Regulation Comments
Chief Counsel's Office
OTS-2007-0015

Gentlepersons:

RE: Office of Thrift Supervision Advance Notice of Proposed Rulemaking, Docket Number ID OTS-2007-0015, 72 FR 43570 (August 6, 2007)

The Mortgage Bankers Association¹ (MBA) appreciates the opportunity to comment in response to the captioned Advance Notice of Proposed Rulemaking (ANPR) issued by the Office of Thrift Supervision (OTS) regarding whether and to what extent OTS should expand its current prohibitions against unfair or deceptive acts and practices (UDAPs) in carrying out its regulatory mission respecting savings associations. MBA appreciates OTS's consideration of these important issues and, most importantly, its decision to seek the views of the public through this ANPR before issuing proposed rules.

¹ The Mortgage Bankers Association (MBA) is the national association representing the real estate finance industry, an industry that employs more than 500,000 people in virtually every community in the country. Headquartered in Washington, D.C., the association works to ensure the continued strength of the Nation's residential and commercial real estate markets; to expand homeownership and extend access to affordable housing to all Americans. MBA promotes fair and ethical lending practices and fosters professional excellence among real estate finance employees through a wide range of educational programs and a variety of publications. Its membership of over 3,000 companies includes all elements of real estate finance: mortgage companies, mortgage brokers, commercial banks, thrifts, Wall Street conduits, life insurance companies and others in the mortgage lending field.

I. INTRODUCTION

The ANPR asks eighteen questions (below) about potential future OTS actions regarding UDAPs, including, which entities and what types of matters should be covered, how will various approaches such as adopting the FTC's guidance or listing specific prohibitions affect the industry and consumers, as well as soliticing responses to the other questions. OTS invites commenters to respond to the questions presented and to offer comments or suggestions on any other issues relating to unfair or deceptive acts or practices, including what other steps OTS might take instead of, or in addition to, further rulemaking in this area.

This comment provides brief responses to the questions asked. MBA, however, strongly believes that uniform national standards are the best and most cost effective means of protecting consumers and lowering their borrowing costs. For this reason, following a discussion of the legal and regulatory background, MBA prefaces its comments with the general comment below. It states that rulemaking by OTS should await what is expected to be significant new rules from the Board of Governors of the Federal Reserve (Board) under the Homeownership Equity and Protection Act (HOEPA). By waiting, OTS can determine if additional rules are necessary and how they may complement the Board's rules. If OTS determines to proceed, MBA strongly urges that subsequent actions by OTS should be coordinated with and taken in concert with other federal financial regulators to the greatest extent possible.

Over the last two years, the federal financial regulators have been extraordinarily successful in working together to address major lending issues. Most recently, with the assistance of organizations of state regulators, substantially equivalent guidance to that issued by the federal regulators also has been adopted by states. MBA profoundly believes that consistency, resulting from the regulators' cooperation, is the best approach for the mortgage market and the consumers it serves and that is the reason MBA strongly requests that future UDAP rulemaking be concerted as well.

MBA also urges that OTS and the other federal regulators consider the fact that several legislative proposals are under very active consideration in Congress. For this reason, any additional rulemakings should be undertaken carefully, in light of the real possibility that major changes may be forthcoming by statute which would significantly add to the compliance responsibilities of institutions.

II. LEGAL AND REGULATORY BACKGROUND

A. OTS's UDAP Authority

OTS cites the Federal Trade Commission Act (FTC Act), 15 USC 41-58, and the Home Owners Loan Act (HOLA), 12 USC 1461 *et seq.*, as the bases for its authority to prohibit unfair and deceptive acts and practices by savings institutions. Specifically, the ANPR describes OTS's authority to regulate unfair and deceptive acts or practices as follows.

B. OTS Authority Under the FTC Act

The ANPR states that under section 18 (f) (1) of the FTC Act, 15 U.S.C. 57a (f) (1), OTS is exclusively responsible for prescribing regulations to prevent unfair or deceptive acts or practices by savings associations. OTS points out that Section 18(f) provides that, whenever the Federal Trade Commission uses its authority to prescribe a rule defining with specificity which acts or practices are unfair or deceptive, within 60 days after the rule takes effect, OTS must promulgate substantially similar regulations. OTS says the FTC Act does not limit OTS's authority or set ceilings on OTS's authority. OTS's ANPR states that this provision is to ensure that OTS's rules are consistent unless the Board determines that the act or practice is not unfair or deceptive or that implementation would conflict with monetary and payments systems and OTS publishes a finding to that effect in the Federal Register. Section 18 of the FTC Act assigns the same authorities to the Board for banks and the National Credit Union Administration (NCUA) with respect to federal credit unions.

Section 18(f) (3) expressly authorizes OTS to enforce the regulations it promulgates under section 18(f) through section 8 of the Federal Deposit Insurance Act (FDIA), 12 USC 1818.

C. OTS's Rulemakings

OTS has exercised its rulemaking authority in the area of unfair or deceptive acts to parallel FTC's rulemakings. The FTC issued its Credit Practices rule in 1984² and the Federal Home Loan Bank Board (FHLBB), OTS's predecessor agency, issued substantially similar rules in 1985.³ OTS's Rule prohibits certain unfair or deceptive acts or practices by savings associations in connection with consumer credit.

Under OTS regulations, 12 CFR 535.1(b), the term "consumer credit" means "credit extended to a natural person for personal, family or household purposes, including loans secured by mobile homes and leases of personal property to consumers that may be considered the functional equivalent of loans on personal security, provided, the savings association relies substantially upon other factors, such as general credit standing of the borrower, guaranties, or security other than the real estate or mobile home, as the primary security for the loan. ... Among the types of credit included within this term are consumer loans, educational loans; unsecured loans for real property alteration, repair or improvement, or for the equipping or real property; loans in the nature of overdraft protection; and credit extended in connection with credit cards."

² 40 FR 7740 (March 1, 1984)

³ 50 FR 19325 (May 8, 1985)

The OTS's Credit Practices rule includes prohibitions that include, among others: (1) entering into or enforcing a consumer credit obligation a savings association purchases that contains confession of judgment and other provisions (2) misrepresenting the nature of cosigner liability and (3) imposing a delinquency charge on payment, when the only delinquency is due to late fees and delinquency charges on a prior payment, and the payment otherwise qualifies as a full and timely payment of principal and interest.

D. OTS Authority Under HOLA

The ANPR describes the FTC Act as granting OTS exclusive authority to promulgate unfair or deceptive acts or practices regulations applicable to savings associations. HOLA gives OTS authority to promulgate regulations, including unfair and deceptive act or practice regulations, applying to subsidiaries owned in whole or in part by savings associations, service corporations owned by savings associations, savings and loan holding companies, subsidiaries of savings and loan holding companies, certain service providers as well as savings associations themselves.

The ANPR states that OTS has used HOLA to impose consumer protections not otherwise mandated by federal law for home loans made by savings associations. These include OTS's Advertising Rule which prohibits inaccurate advertising by savings associations. It has also used HOLA to regulate late charges, prepayment penalties, and adjustments to the interest rate, payment, balance or term to maturity. For example, rules require a federal savings association not to assess a late charge on a home loan for any payment received within 15 days of the due date.

The ANPR points out that OTS also has issued a Nondiscrimination Rule (12 CFR part 528), which extends beyond the federal fair lending laws by prohibiting discrimination not covered by the laws.⁴ OTS also has required savings associations to report the reasons for denials under the Home Mortgage Disclosure Act (HMDA), although it is optional to other lenders.

E. Board and FDIC's Authority Under FTC Act

In 2004, the Board established standards for unfair or deceptive practices in guidance issued with the Federal Deposit Insurance Corporation (FDIC) (2004 Guidance).⁵ Importantly, the Board recognized that determining whether an act or practice is "unfair or deceptive" often depends on the specific facts or circumstances involved. The Board also clarifies that the standards for determining "unfair" and "deceptive" are different.

⁴ OTS's Nondiscrimination Rule prohibits discrimination in lending on the basis of handicap and familial status regardless of whether or not the loan is residential real estate related, whereas the Equal Credit Opportunity Act does not prohibit discrimination on these bases and the Fair Housing Act, while it prohibits discrimination on these bases, only covers residential real estate-related transactions.

⁵ Board of Governors of the Federal Reserve System & Federal Deposit Insurance Corporation, *Unfair or Deceptive Acts or Practices by State-Chartered Banks* (Mar. 11, 2004).

According to the legislative history of HOEPA,⁶ in determining standards for “unfair” and “deceptive,” the Board should look to state unfair and deceptive trade practices acts and the Federal Unfair and Deceptive Practices Act (15 U.S.C. §45(a)(1)).

1. 2004 Guidance Standard for Unfair

The 2004 Guidance sets forth the following standards for determining an “unfair” practice and provides that all three elements should be met: An act or practice is unfair where it (1) causes or is likely to cause substantial injury to consumers, (2) cannot be reasonably avoided by consumers, and (3) is not outweighed by countervailing benefits to consumers or to competition. Public policy may also be considered in the analysis of whether a particular act or practice is unfair.

The 2004 Guidance further provides additional interpretation about the meaning of these elements. Specifically, it states that “trivial or merely speculative harms are typically insufficient for a finding of substantial injury. Emotional impact and other more subjective types of harm will not ordinarily make a practice unfair.”

The 2004 Guidance clarifies that consumers cannot reasonably avoid injury from an act or practice if it interferes with their ability to effectively make decisions. Withholding material price information until after the consumer commits to purchase a product, for example, would qualify as preventing someone from making an informed choice. The Board also indicated that it will not second guess the wisdom of particular consumer decisions.

Further, the 2004 Guidance states that for a practice or act to be unfair “it must be injurious in its net effects meaning that the injury cannot be outweighed by any offsetting consumer or competitive benefits that are also produced by the act or practice.” The Board qualified lower prices or wider availability of products as examples of offsetting benefits.

The 2004 Guidance also provides greater explanation about public policy considerations. It states, “[p]ublic policy, as established by statute, regulation, or judicial decisions may be considered with all other evidence in determining whether an act or practice is unfair. For example, the fact that a particular lending practice violates a state law or a banking regulation may be considered as evidence in determining whether the act or practice is unfair. Conversely, the fact that a particular practice is affirmatively allowed by statute may be considered as evidence that the practice is not unfair.”

2. 2004 Guidance Standard for Deceptive – Representation, Omission or Practice

The 2004 Guidance sets out a three-part test to determine whether a representation, omission or practice is “deceptive.” First, the representation, omission or practice must

⁶ H.R. Rep. No. 103-652, (1994).

mislead or be likely to mislead the consumer. Second, the consumer's interpretation of the representation, omission or practice must be reasonable under the circumstances. Third, the misleading representation, omission or practice must be material.

In determining whether an act or practice is misleading, the consumer's interpretation or reaction to the representation, omission or practice must be reasonable under the circumstances. The test for determining this is "whether a consumer's expectations or interpretation are reasonable in light of the claims made." The guidance indicates that a representation, omission, or practice is material "if it is likely to affect a consumer's decision regarding a product or service."

F. Board Authority Under HOEPA

The Board has broad authority under HOEPA to address practices in connection with mortgage loans it deems "unfair" or "deceptive" or designed to evade HOEPA's requirements and to address refinance mortgage loans the Board deems abusive as set out under provisions (A) and (B) of section 129(l)(2).

III. GENERAL COMMENT

MBA believes that, in the interest of consistency, rulemaking by OTS should await impending rules from the Board and that, notwithstanding past actions, any actions by OTS should be coordinated and in concert with other regulators.

While MBA strongly supports efforts to protect consumers against abusive lending, it believes that these efforts should be directed at establishing uniform national standards rather than developing disparate sets of agency regulations. Uniform standards can continue to be developed as interagency guidance, through joint regulations or through the legislative process.

Over the last two years, as they have expressed concerns about lending practices, federal financial regulators⁷ have coordinated their efforts to propose and then finalize key regulatory guidance to address abuses in the mortgage market, including the Interagency Guidance on Nontraditional Product Risks (the Guidance) and the Statement on Subprime Mortgage Lending (the Statement). These issuances detail the regulators' expectations of regulated entities regarding underwriting, risk management and consumer protection regarding "nontraditional" and "subprime mortgages," respectively. The Guidance initially applied only to federally regulated institutions. Subsequently, as recommended by associations of state regulators, the Guidance has been adopted by 40 states and the District of Columbia and the Statement has been

⁷The agencies include Board of Governors of the Federal Reserve; Office of the Comptroller of the Currency, Treasury, Office of Thrift Supervision, Treasury, Federal Deposit Insurance Corporation, National Credit Union Administration.

adopted by 26 states and the District of Columbia.⁸ While MBA did not agree with every aspect of these documents at the rulemaking stage, it applauds the process of concerted action by the regulators that resulted in consistent guidance among the federal financial regulators and then the states. At this time, the lending industry is implementing these issuances which are having a significant and broad impact on mortgage lending.

Earlier this year, the Federal Reserve conducted a hearing and received written comments under its UDAP authority pursuant to HOEPA. Sec. 129 of HOEPA requires the Board, by regulation or order, to prohibit acts or practices in connection with (A) mortgage loans that the Board finds to be unfair, deceptive or designed to evade the provisions of this section, and (B) refinancings of mortgage loans that the Board finds to be associated with abusive lending practices, or that are otherwise not in the interest of the borrower. The Board's rules will likely have a broad effect. Officials of the Board have testified that the Board will publish proposed rules by the end of this year.

OTS's ANPR points out that "OTS recognizes that consumers have benefited from consistency in rules and guidance as the federal agencies have uniform or very similar rules in many areas. OTS is mindful of the goal of consistent interagency standards as it considers issues relating to unfair or deceptive acts and practices." MBA shares this view and believes that consumers benefit from consistency in several ways. Consistency provides the industry clear rules, lessens compliance costs and permits a level playing field, which fosters competition. Consumers are protected uniformly and their costs are decreased.

As OTS is aware, this is a period of great challenge for the mortgage market. A cooling residential real estate market and other economic factors, such as job losses and outmigration in several states, have combined to increase mortgage delinquencies which, in turn, have created profound difficulties for many borrowers seeking mortgage credit. Additional regulation directed to only one portion of the market is likely to exacerbate matters by causing regulated entities in that sphere to shy away from lending in certain markets while risks presented by diverse regulations are evaluated. This is likely to most impact subprime borrowers, who have been underserved by the credit markets, as well as others where the market is experiencing the greatest illiquidity.

For all of these reasons, OTS should await the Board's new HOEPA rules before embarking on rulemaking. Review of the rules will help OTS determine if additional rulemaking by OTS is warranted. Waiting will also assure that if OTS goes forward, its rules complement the Board's rules.

⁸ The Conference of State Bank Supervisors (CSBS) and the American Association of Residential Mortgage Regulators (AARMR) both adopted the Guidance on Nontraditional Mortgage Product Risks on January 31, 2007 and the Subprime Statement on July 17, 2007.

If OTS decides to go forward, MBA strongly urges that OTS build on the success of the recent guidance and again work in concert with the other regulators to assure consistent regulation and to avoid unnecessarily burdening entities with diverse regulations. In this vein, in developing any new provisions, MBA strongly encourages that OTS rely on the standards for unfair and deceptive that have been published in 2004 guidance issued by the Board and the FDIC.⁹

In sum, as an overarching principle reflecting MBA's view of the mortgage market, we cannot underscore enough the importance of consistency. The market has already reacted severely to current financial, economic and political conditions by tightening credit standards. As stated, the Board's HOEPA rules are impending. Legislators are considering a variety of bills some with strong prospects of being passed by the House of Representatives this year. We therefore encourage OTS to take a cautious approach in promulgating new UDAP regulations when other new laws in this area are forthcoming. If it decides to proceed, as indicated, action should be concerted with other regulators. We remain extremely concerned that the availability of mortgage credit will continue to be tight in the coming months. MBA's members want to be able to continue to serve consumers and homeowners who are in need of mortgage finance without unduly increasing costs.

IV. COMMENTS ON SPECIFIC PROVISIONS

As stated, MBA shares OTS's commitment to protecting consumers against abusive lending practices and has been long committed to enactment of a uniform national standard for this purpose. At the same time, MBA believes that once consistency is assured, efforts to protect consumers should be carefully targeted and balanced so that such efforts do not have a detrimental impact on the availability and affordability of legitimate mortgage credit. We have serious concerns about the overbroad use of OTS's authority. If new standards under this authority restrict credit, these standards are likely to exacerbate the credit crunch that borrowers are currently facing. Beyond that, an overbroad application of new standards will make it difficult for prime borrowers as well as first-time homebuyers to access affordable mortgage credit. We are fearful that the result of overbroad standards would be to exacerbate an already difficult credit environment.

B. Answers to Specific Questions

- 1. Should OTS issue new rules on unfair and deceptive acts or practices that would cover products and services in addition to consumer credit? If so, should the rule be limited to financial products and services and, if so, how should that rule be defined?**

⁹ Board of Governors of the Federal Reserve System & Federal Deposit Insurance Corporation, *Unfair or Deceptive Acts or Practices by State-Chartered Banks* (Mar. 11, 2004).

MBA believes narrow standards allow the market to function best. It is not clear that there are abuses in products and services in addition to “consumer credit” that warrant separate rules. If, after awaiting the Board’s rules, OTS determines in concert with the other regulators, to propose UDAP rules, OTS should offer for public comment objective standards concerning specific products or services that OTS believes warrant attention.

Any new standards should apply only to those categories of products and services deserving new protections. Determining which products and services deserve such protections should be defined carefully.

2. Should OTS UDAP rules cover more than savings institutions, including related entities?

MBA supports consistent guidance applicable to lenders. If OTS determines, in concert with the other regulators, that action is warranted, the regulators should work to provide consistent guidance for lenders. Whether that guidance is extended to lenders or to lender related entities as well should be determined by whether such lenders or entities’ practices require regulation.

3. What would be the impact on industry and consumers of the following approaches to regulating unfair and deceptive acts or practices including:

A. Adopting the Federal Trade Commission guidance on unfair or deceptive acts or practices?

As stated, MBA believes the guidance of the federal financial regulators should be consistent and issued in a coordinated and concerted manner. In this vein, following the Board’s HOEPA rulemaking, OTS should consider adopting the guidance issued by the FTC as OTS’s standard.

As indicated, in 2004, the Board, in conjunction with the FDIC, established the 2004 Guidance standards based on FTC guidance. If the FTC changes its rules or one of the agencies believes its approach should be revised, the agencies should act in concert to develop new rules and propose them for public comment.

B. Converting the recent Guidance from federal financial regulators into rules?

MBA does not believe that this action is necessary or warranted at this time. MBA notes that the Nontraditional Guidance and the Subprime Guidance (Guidance) have been effective. Regulated institutions are operating under these issuances and will be reviewed under their standards. Moreover, both issuances have been adopted

by numerous states for state regulated entities. Unilateral adoption by OTS of these issuances as regulations would only establish asymmetrical requirements for savings associations.

Congress is considering converting some of the Guidance into law but it may be revised in that process. This is an area where MBA believes that regulators should consider awaiting the legislative process.

C. Following other Federal agencies' models?

The ANPR cites OCC's Guidelines Establishing Standards for Mortgage Lending Practices as advising national banks against becoming involved, directly or indirectly, in residential mortgage lending activities involving abusive, predatory, unfair or deceptive lending practices. The Guidelines provide examples such as equity stripping, fee packing, loan flipping, refinancing special mortgages and encouragement of default. The ANPR also cites HUD's Housing Goals rule as prohibiting certain loans with specified predatory features from counting under the housing goals.

MBA supports careful rulemaking to establish clear and objective standards that protect consumers against true UDAPs but does not deprive them of market innovations and competition. Assuming that, following the HOEPA rules, the federal financial regulators in a coordinated and concerted fashion decide to propose clear and objective standards for true UDAPs, MBA would welcome an opportunity to provide comments and otherwise assist in the rulemaking.

D. Following state law models of listing specific prohibited acts or practices?

The ANPR points out that the Michigan Consumer Protection Act prohibits dozens of specific acts or practices such as causing a probability of confusion or misunderstanding as to legal rights, obligations or remedies of a party. It also suggests that that OTS could use North Carolina law as a model to prohibit specific unfair or deceptive practices. North Carolina limits or prohibits prepayment penalties financing credit insurance, flipping and default incentives.

Again, assuming that following the HOEPA rulemaking, the federal financial regulators in a coordinated and concerted fashion decide to propose clear and objective standards for true UDAPs, MBA would welcome an opportunity to provide comments and otherwise assist in the rulemaking. As stated, proposal of such standards should be

coordinated with and in concert with Federal financial regulators following the Board's action.

E. Adopting a targeted practices approach?

The ANPR describes this as simply listing a number of specific practices that it would prohibit as unfair or deceptive, such as OTS proscribed in the area of credit card lending, residential mortgage lending, gift cards and deposit accounts. The ANPR cites repetitive refinancing without benefit to the consumer as one possible prohibition and imposing changes in loan terms upon default, such as significant interest rate increases, as another.

MBA would caution that if both of these practices are to be proscribed, these and other UDAP identified practices should be explained with clear standards so that lenders will know what is and is not proscribed behavior. Specific practices should only be targeted through clear and objective standards that are proposed through concerted action of other regulators as well, following the Board's actions, if necessary.

- 4. OTS's Current Credit Practices rule lists specific acts or practices that are unfair or deceptive per se; it prohibits such practices regardless of the specific facts or circumstances. Would it be appropriate for OTS to determine that additional acts or practices are unfair or deceptive per se regardless of the specific facts or circumstances?**

Most unfair or deceptive acts or practices depend to some extent on the facts and circumstances of the case. MBA would only support *per se* treatment where the act can be well defined and *per se* treatment is undeniably appropriate.

- 5. Should OTS consider a principles-based approach to a potential rulemaking that can evolve as products, practices and services change? If so, what principles should OTS consider in determining that a specific act or practice is unfair or deceptive? Please provide examples.**

MBA believes a principles based approach has negative and positive elements. If a principles based approach is established that is broad enough to encompass market changes and relatively undefined, it may have the unintended consequence of actually stemming those changes. On the other hand, if a principles based approach is used it can avoid hardwiring static standards, like a fixed debt to income ratio, into the rules. Overall though, assuming that additional rules are needed, coordinated and concerted, MBA supports carefully conceived, clear and objective standards developed through rulemaking.

Beyond that, MBA generally supports the issuance of regulatory guidance where consumers benefit from lender innovation and flexibility. The market reacts to guidance as though it were regulation. Any guidance should be proposed for comment and any authority should be targeted carefully, in a surgical manner. In order to facilitate lender innovation, we would recommend that consideration be given to establishing new provisions in the form of guidance, again in concert with the other regulators.

- 6. Are the principles in the FTC guidance appropriate for the thrift industry? Should OTS consider adopting and incorporating them as part of an enhanced rule on unfair or deceptive acts or practices that includes standards to determine whether a particular act or practice is unfair or deceptive? Are any of the other models or approaches discussed of this Supplementary Information appropriate for OTS to consider? What other models, approaches or principles should OTS consider?**

The Board and the FDIC have adopted the FTC guidance for the banking industry which bears similarities to the savings industry. MBA believes that, as a general matter in the interest of consistency, where federal financial regulators have UDAP authority, they should coordinate their efforts to develop, propose and adopt consistent guidance such as the FTC principles. The Board/FDIC guidelines provide an analytical framework for UDAPs. OTS could adopt them in the absence of other UDAP standards through rulemaking. MBA is providing comments on other approaches in these comments and will do so in rulemaking.

- 7. Can the acts or practices encompassed within any particular model or approach described in Part III of this Supplementary Information be conducted in a manner that is not unfair or deceptive for the consumer? If so, how?**

Yes. Prepayment penalties, for example, which many state laws limit, can benefit consumers. They can result in a lower rate for the borrower and, in some cases, a loan where one might not otherwise be available. Each practice must be fairly examined during the rulemaking process to determine whether it is unfair or deceptive or whether there are circumstances which it is not. Clear and objective standards, including clear safe harbors, can do that job.

- 8. The FTC has taken enforcement actions for violations of section 5 of the FTC Act. Should OTS draw specific examples of unfair or deceptive practices from FTC enforcement actions? If so, which examples?**

Again, following the Board rulemaking, MBA would urge that if the regulatory agencies decide to provide additional regulations on unfair and deceptive practices that such regulations be proposed in a coordinated and concerted fashion. If specific examples are drawn, they should be as uniform as possible

across the financial services industry to limit compliance costs and maximize competition.

9. How would the practices in OTS's current Credit Practices rule and those identified in Part III of this Supplementary Information fit into any of those approaches?

The ANPR points out that OTS's current Credit Practices rule includes prohibitions that include, among others: (1) entering into or enforcing a consumer credit obligation a savings association purchases that contains confession of judgment and other provisions (2) misrepresenting the nature of cosigner liability and (3) imposing a delinquency charge on payment, when the only delinquency is due to late fees and delinquency charges on a prior payment, and the payment otherwise qualifies as a full and timely payment of principal and interest.

These provisions, in MBA's view, might fit into the approaches at 3 C-E above provided they are regarded as unfair and deceptive acts or practices under the 2004 guidance following rulemaking.

10. Are the acts or practices currently listed in the Credit Practices rule the only ones that are capable of targeting specific conduct without allowing for easy circumvention or having unintended consequences?

MBA does not believe that these are the only practices that may warrant proscription. MBA would support prohibiting other practices that are truly unfair or deceptive. Before a practice is proscribed, it should be carefully assessed with an eye to determining whether it may be easily circumvented or have unintended consequences. During the rulemaking process, these concerns will also be considered. Finally, any rulemaking in this area, again, should follow the HOEPA rules and be coordinated and in concert with other regulators.

11. Has the current rule been easy to circumvent or created unintended consequences? What would be the impact, in this regard, of including additional acts or practices in the rule?

We do not have information on whether the current rule has been easy to circumvent or has unintended consequences. If additional acts or practices are to be added to the rule, it would obviously increase the compliance responsibilities of regulated entities and, if too many proscriptions were added, it would lessen competition. Both factors would increase costs for borrowers.

12. Should OTS expand its regulations on advertising to incorporate guides on advertising the FTC has issued under the FTC Act. If so, which examples or principles should OTS consider?

MBA opposes deceptive advertising but it does not believe that OTS should unilaterally expand these regulations. The Federal Reserve has regulatory authority under the Truth in Lending Act (TILA) respecting advertising and the FTC has recently acted in this area. Assuming that, following the HOEPA rules, the federal financial regulators in a coordinated and concerted fashion decide to propose clear and objective standards for true UDAPs concerning advertising, MBA would welcome an opportunity to provide comments and otherwise assist in the rulemaking.

13. What other acts or practices that may not currently be covered by OTS's advertising regulation should OTS consider prohibiting and unfair or deceptive in the advertising or marketing of products or services offered by OTS supervised entities?

MBA is not aware of any at this time. Again, the Federal Reserve has regulatory authority under the Truth in Lending Act (TILA) respecting advertising and the FTC has recently acted in this area. Assuming that, following the HOEPA rules, the federal financial regulators in a coordinated and concerted fashion decide to propose clear and objective standards for true UDAPs, MBA would welcome an opportunity to provide comments and otherwise assist in the rulemaking.

14. What would be the impact on the industry and consumers of expanding OTS's advertising regulation?

Assuming that, following the HOEPA rules, the federal financial regulators in a coordinated and concerted fashion decide to propose clear and objective standards for true UDAPs, MBA would welcome an opportunity to provide comments and otherwise assist in the rulemaking. Targeted, appropriate rules could add to the protections of consumers and facilitate "good competition." On the other hand, overbroad or misdirected rules will only add to compliance costs and harm competition.

Additional Points

MBA believes there are several steps that could be taken to help consumers protect themselves in the mortgage process. First and foremost should be establishment of a uniform national standard containing clear and objective standards and effective rights for individual borrowers. This could be accomplished by law or consistent rules or guidance from federal and state regulators. However, only a statutory change would assure needed preemption and rid consumers of the costs of the current patchwork of state and local laws.

MBA also supports the establishment of a uniform disclosure regime that is simple and clearly conveys loan costs and terms to borrowers at an early time. This disclosure should include the costs and functions of mortgage brokers.

Finally, we support a robust financial literacy program to help consumers navigate the mortgage market to get the best loan for them. Educated consumers are in the best position to protect themselves from rogue players in the marketplace.

Further, there should be a more aggressive pursuit of bad actors in transactions and enforcement should be increased to ensure existing laws are followed.

All new requirements should be prospective and allow lenders sufficient time to implement systems, train personnel and fully comply.

Conclusion

MBA has long supported strong actions to protect against abusive lending in the form of a uniform national standard. While MBA supports OTS's ongoing review of these important issues under its authorities under HOLA and the FTC Act, it wishes to make certain that any exercise of OTS's authority is coordinated with the actions of other federal financial regulators in order to achieve consistent regulation in the direction of uniform national standards. MBA is deeply concerned that inconsistent regulation unnecessarily increases compliance costs and keeps competitors from entering markets harming consumers with higher costs. We would recommend that if OTS, in concert with the other regulators, utilizes its authority, such action should await the Board's rulemaking.

As indicated, MBA generally supports the issuance of regulatory guidance where consumers benefit from lender innovation and flexibility. The market reacts to guidance as though it were a regulation. Any guidance should be proposed for comment and any concerns should be targeted carefully, in a surgical manner.

We appreciate the opportunity to provide these comments. Please contact Ken Markison, Senior Director and Regulatory Counsel, MBA Government Affairs, at (202) 557-2930 if you have any questions.

Most sincerely,

A handwritten signature in black ink, reading "Jonathan L. Kempner". The signature is written in a cursive style with a large initial "J".

Jonathan L. Kempner
President and Chief Executive Officer