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Chief Counsel's Office  
Office of Thrift Supervision  
1700 G Street, NW  
Washington, DC 20552

Attn: OTS-2007-0015; Unfair or Deceptive Acts or Practices; 72 Fed. Reg. 43570  
(August 6, 2007)

Dear Sir or Madam:

WaMu appreciates the opportunity to comment on the Advance Notice of Proposed Rulemaking (ANPR) issued by the Office of Thrift Supervision (OTS) in its review of its regulations relating to unfair or deceptive acts or practices (UDAP). We share the OTS's goal to ensure that all customers of OTS-regulated entities are treated fairly and offer these comments with this goal in mind.

As noted in the ANPR, OTS and its predecessor, the Federal Home Loan Bank Board, have taken numerous actions to promote consumer protections and to prevent UDAP. These actions include a rigorous enforcement regime to combat UDAP and to ensure compliance with consumer protection laws; the promulgation of specific regulations on UDAP and consumer protections; and the issuance of consumer protection guidance related to specific savings association activities.

In the ANPR, the OTS requests comments on various regulatory approaches it could take to enhance this already robust UDAP and consumer protection regulatory framework. Of the approaches listed, WaMu favors the principles-based approach that other federal regulatory agencies have adopted. As we discuss in more detail below, such an approach would be most beneficial to consumers because it would ensure a consistent federal government approach to preventing UDAP and be an appropriate measured response given that savings associations, generally, have not been found to be engaging in UDAP. We would oppose the OTS adopting a UDAP framework that would target specific UDAP through regulations without coordinating such an approach with the other appropriate federal agencies and without undertaking an extensive analysis regarding the need, benefits and cost of such an approach.

### **OTS's Action Should Be Consistent With the UDAP Actions Taken by Other Agencies**

We are appreciative of OTS's recognition in the ANPR that consumers and the financial services industry benefit from consistent rules and guidance and that it will be mindful of the goal of interagency standards as it considers the appropriate regulatory framework for UDAP. We would also note that Congress encourages, and in some cases requires, consistent application of UDAP under the Federal Trade Commission Act (FTC Act). Consistent application of a UDAP regulatory framework not only prevents competitive inequities among industry participants, but ensures that the protections apply to a greater number of consumers. It is for this reason that we would support the OTS adopting UDAP guidance consistent with the guidance adopted by the other agencies and urge that OTS coordinate any other changes to its UDAP approach with the other agencies.

### **Savings Associations Not Engaged in UDAP**

As outlined in the ANPR, the OTS has taken the lead in ensuring that customers of its regulated entities are treated fairly. This leadership is an important reason why OTS-regulated entities have generally not been found to be engaging in UDAP. For instance, OTS-regulated entities, as well as other federally insured institutions, have not been the focus of predatory lending allegations. Instead, many of the concerns with predatory lenders have been with non-bank entities that are regulated for UDAP by the Federal Trade Commission (FTC) under the FTC Act. This observation is important for two reasons. First, OTS's current regulatory response and the principles-based response by the other federal banking agencies to consumer protection and UDAP are working for customers of their regulated entities. Second, to effectively protect consumers, any regulatory approach regarding UDAP and consumer protections must be applied consistently by the FTC and the other agencies. We understand the desire of the OTS to continue to be a leader in promoting consumer protections, as is evidenced by the issuance of the ANPR. But as noted above, the OTS can provide effective leadership if it works for a consistent and uniform approach.

### **OTS Should Consider Increased Regulatory Burdens in Determining Appropriate UDAP Regulatory Framework.**

The ANPR provides a good overview of the number of guidelines, regulations, and laws that OTS-regulated entities are subject to in order to promote important consumer protections. The OTS also has a complete array of enforcement powers to ensure savings associations and their affiliates comply with such consumer protection mandates. Compliance with these laws and regulations imposes a heavy burden on the industry. We would request that the OTS not add to this burden through yet more regulations, especially regulations that target specific practices, without demonstrating a clear need for them and without factoring in this increased compliance burden.

### **Issues For Comment**

In addition to the general comments above, WaMu offers the following responses to some of the issues listed by the OTS in the ANPR.

*Should OTS consider further rulemaking on UDAP that would cover products and services in addition to consumer credit? If so, should the rule be limited to financial products and services and how should that scope be defined?*

We would support the OTS issuing the statement on UDAP that was issued by the other agencies, such as the Federal Reserve Board and FDIC for state chartered banks.

If the OTS does go with a targeted approach, we would request that the OTS conduct extensive research through consumer contact and industry outreach to determine whether such an approach is necessary for the targeted area. We would also request that the OTS include the rationale for why a specific practice or product is being targeted.

We would oppose imposing new mandates under the UDAP regulatory framework for areas that are already covered by specific consumer protections statutes. For instance, currently the Federal Reserve Board is considering prohibiting or limiting certain mortgage lending practices under its UDAP authority in the Home Ownership and Equity Protection Act (HOEPA). We have supported the Federal Reserve Board to take such an approach under HOEPA. The advantage of having the Federal Reserve Board address predatory mortgage lending practices under its HOEPA authority is that its regulations will apply to virtually all lenders, including savings associations and their affiliated entities.

There are other federal laws, such as the Truth in Savings Act, Fair Credit Reporting Act, and Fair Debt Collection Practices Act, that address UDAP or provide consumer protections for certain practices. Congress enacted these specific statutes to ensure consumers are protected nationwide and that the restrictions and mandates in these statutes apply uniformly to all market participants. Therefore, UDAP concerns for practices regulated under specific federal laws would be better addressed under these specially created regulatory frameworks than to have the OTS duplicate another one under its UDAP authority.

*Should OTS consider further rulemaking on unfair or deceptive acts or practices that would cover more than just the savings association, but related entities as well?*

If the OTS rulemaking were to cover related entities, the OTS should ensure that such entities are not subject to conflicting FTC rulemaking or state laws. Section 133 of the Gramm-Leach-Bliley Act specifically clarified that affiliates of savings associations, including subsidiaries, are not exempt from FTC's jurisdiction. To impose yet another UDAP framework on these related entities would be unnecessary and could pose conflicting standards. Accordingly, the best course of action may be to limit the rulemaking to only cover savings associations and not their affiliates. We would also note that if the OTS were to coordinate any UDAP rulemaking with the other federal agencies, coverage of entities related to the savings association would not be necessary.

Also, any UDAP rulemaking should explicitly reiterate that state consumer protection laws, including state UDAP laws, would not apply to entities afforded federal preemption

under the Home Owners' Loan Act. Such an approach would ensure that these entities are not subject to conflicting and overlapping consumer protection standards at the state level, thereby creating a more effective regulatory framework for combating UDAP.

*What would be the impact on the industry and consumers of any of the various models and approaches discussed?*

We believe the targeted practices approach would be detrimental to consumers and thrift organizations. As Federal Reserve Board Governor Randall S. Kroszner noted in a June 13, 2007 hearing before the House Committee on Financial Services, “[c]rafting effective rules under the ‘unfair or deceptive’ standard presents significant challenges” because of the potential negative impacts such rules could have on consumers.<sup>1</sup>

We also oppose converting existing OTS guidance on regulatory matters, such as mortgage lending, overdraft protection programs, and gift cards into UDAP regulations. As the Comptroller of the Currency noted in the same Congressional hearing referenced above, UDAP under the FTC Act “present relatively extreme situations.”<sup>2</sup> The conduct generally covered under these guidance documents does not rise to a level of being characterized as being unfair or deceptive. We would also note that many of the restrictions being imposed in these guidance documents are intended primarily to advance the safety and soundness of institutions and not consumer protection.

While we have not commented on the specific practices OTS has listed in the ANPR as being potential UDAP, our general observation is that many of the practices listed do not present extreme situations that involve deception or that are *per se* unfair. And as noted in the comments of the Financial Services Roundtable and other bank trade groups, many of these practices actually benefit consumers.

That is why we support a principles-based approach for combating UDAP and, as noted above, would support the OTS issuing the statement on UDAP that was issued by the Federal Reserve Board and FDIC for state chartered banks.

*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*

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<sup>1</sup> “Crafting effective rules under the ‘unfair or deceptive’ standard presents significant challenges. Whether a practice is unfair or deceptive depends heavily on the particular facts and circumstances. To be effective, rules must have broad enough coverage to encompass a wide variety of circumstances so they are not easily circumvented. At the same time, rules with broad prohibitions could limit consumers' financing options in legitimate cases that do not meet the required legal standard.”

[http://www.house.gov/apps/list/hearing/financialsvcs\\_dem/htdugan061307.pdf](http://www.house.gov/apps/list/hearing/financialsvcs_dem/htdugan061307.pdf)

<sup>2</sup> “Practices that rise to the level of ‘unfairness’ or ‘deception’ under the standards of the FTC Act generally combine both an inordinate degree of risk or harm to the consumer and deficiencies in the information provided that disable the consumer from appreciating the risk or harm in question. They present relatively extreme situations. As a result, recent banking practices that some have criticized as ‘unfair’ in layman’s terms – such as ATM fees or the high level of ‘penalty’ credit card interest rates – are not likely to be treated as unfair or deceptive under existing FTC Act precedents if adequately disclosed.” [http://www.house.gov/apps/list/hearing/financialsvcs\\_dem/htdugan061307.pdf](http://www.house.gov/apps/list/hearing/financialsvcs_dem/htdugan061307.pdf)

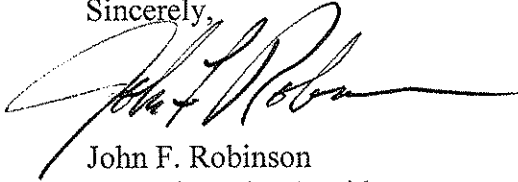
*deceptive acts or practices that includes standards to determine whether a particular act or practice is unfair or deceptive? Are any of the other models or approaches discussed in part III of this Supplementary Information appropriate for OTS to consider? What other models, approaches, or principles should OTS consider?*

As indicated above, we support the OTS advancing the principles outlined in the FTC guidance through guidance similar to that issued by the Federal Reserve Board and FDIC for state chartered banks. We don't believe such guidance needs to be adopted as a regulation.

### **Conclusion**

In summary, WaMu supports OTS issuing guidance to its regulated savings associations on the standards that it will consider in enforcing prohibitions on UDAP under the FTC Act. Such an approach would be effective in ensuring consumers are treated fairly by OTS-regulated entities and consistent with the approach taken by other federal agencies.

Sincerely,

A handwritten signature in black ink, appearing to read "John F. Robinson", with a long horizontal flourish extending to the right.

John F. Robinson  
Executive Vice President  
Corporate Risk Management