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Rockport, Texas 78382
November 3, 2007

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

Attention: OTS – 2007-0015

Dear Messer's Gimble and Bennett and Ms. McQueen:

I would like to commend the OTS for soliciting comments on whether the agency should propose regulations to expand its current prohibitions against unfair or deceptive acts or practices. The timing is opportune for the agency to devote additional attention to making certain that the savings institutions, for which it is responsible overseeing, operate in ethical and fair manners. The OTS has recently begun expanding its regulatory and supervisory efforts to ensure individual consumers, as well as other customers of savings institutions and their subsidiaries are being treated consistently with regulatory requirements. However, the regulatory schema of most consumer and fair lending regulations do not take into account how quickly market factors change, particularly when competitive pressures to expand market share or short-term profit may lead to abuses which are often difficult for the supervisory agencies to address. That is why expanding the authority of the OTS pursuant to Section 5 of the Federal Trade Commission Act using Section 18(f)(1) of that Act is consistent with the spirit of the Act to make certain that the market place is open to fair competition and that unfair or deceptive acts or practices interfering in the operation of that market place are minimized.

You have requested comment on a number of specific issues involving the possibility of a proposed rulemaking. Each issue is separately listed along with my response for your consideration.

Issue 1. *Should OTS consider further rulemaking on unfair or 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 how should that scope be defined?*

The OTS should consider including other products and services in addition to consumer credit in any proposal that it determines to put forward. Limiting the rule generally to financial products and services may be the most appropriate manner for discussion at the present time since that language can cover the largest elements of activities in which savings institutions and subsidiaries are engaged. For instance, fair lending laws and regulations apply not only to consumer credit but also to individual and institutional activities and practices engaged in by some firms have been clearly deleterious to both consumers and institutions. Activities of certain subsidiaries have also been determined to be both unfair and deceptive even when the letter of the law has been adhered to.

The evolution of savings institutions during the past third of the last century has been both rapid and challenging for the industry as well as supervising agencies. Activities that brought about the demise of a considerable number of institutions might have been forestalled if agencies had utilized the authority provided to them by Section 5 of the FTC Act. Therefore, I believe it is appropriate for the OTS to consider addressing all financial services and products in any proposed rulemaking involving unfair or deceptive acts and practices.

Issue 2. *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?*

The OTS should consider further rulemaking for unfair or deceptive acts or practices to cover all associated entities owned or controlled by savings associations. This would be consistent with the existing regulatory authority of the OTS and would enable it to develop policies and procedures to ensure compliance across those entities.

Regulated institutions and their subsidiaries also engage third parties to provide various related services on their behalf, including areas tangentially related to financial services, such as advertising, mailing services, etc. Existing regulatory authority provides the OTS with the ability to hold savings institutions or their controlled subsidiaries accountable for the actions of third party service providers. If third party service providers are found to be acting in an unfair or deceptive manner in carrying out activities for which the savings institution has contracted, the institution may have liability to the OTS and the third party may have liability to another enforcement agency such as the FTC.

The OTS should consider addressing the responsibility of savings associations and their controlled subsidiaries to exercise appropriate oversight when contracting with third party service providers to ensure compliance any final regulation on unfair or deceptive acts or practices. This would be consistent with other recent regulatory requirements.

Issue 3. *What would be the impact on the industry and consumers of any of the various models and approaches discussed?*

The OTS described 5 separate models it may wish to consider in developing approaches to rulemaking for defining unfair or deceptive acts or practices. These were listed as the FTC Model, Converting Guidance into Rules, Other Federal Agency Models, State Law Models, and Targeted Practices Approach.

The FTC Model is the one that has been around longest and was given voice by the Commission in two transmittals to the Congress in December 1980 and in October 1983. In these statements the Commission articulated the broad principles that it would employ to determine when acts or practices were deemed to be unfair or deceptive. These principles have been utilized in any number of enforcement actions taken by the Commission and have been adjudicated through the judicial system. This model clearly has the benefit of experience in addressing instances of individual transgressions that provide guidance to others in the market place on activities deemed to be improper. The financial regulatory agencies, including the OTS, have extensive experience with enforcement actions against institutional and individual behavior that violates law and regulation. Utilizing their existing enforcement authority for violations of

principles involving unfair or deceptive acts or practices would have salutary impacts on both institutional behavior as well as providing protections to customers of savings associations.

Converting Guidance into Rules is the next model that the OTS listed in their ANPR. This model proposes to convert various agency guidance documents into rules that would identify specific activities as prohibited acts or practices. This approach in contrast with the FTC model provides specificity for both institutions and consumers as to which practices are considered unfair or deceptive. It also carries the burden of additional rulemaking for specific events and activities that may occur in the future thereby limiting the ability of agency staff to take more timely actions to address possible unfair or deceptive acts. The addition of specific guidance documents to the Code of Federal Regulations would also be an unintended consequence of this approach. Agency guidance can be provided to supervised institutions through a variety of methods such as OTS CEO Letters and FDIC Financial Institution Letters. These provide appropriate knowledge and direction to management of the institutions without having to engage in lengthy rulemaking.

Other Federal Agency Models was listed as another example of how the OTS might consider utilizing its authority under Section 5 of the FTC Act. The examples mentioned include the guidance propounded by the FDIC, FRB and OCC as well as HUD on various topics. These examples have been used in effective manner by those agencies to alert and advise the institutions on a variety of consumer related topics for which these agencies are responsible. However, an agency rulemaking on how it will evaluate practices that it deems to be unfair or deceptive provides that agency with substantial more enforcement authority to bring to bear on parties that might engage in such behavior. The benefits to this model again represent one of timing in providing information in a more rapid manner than by engaging in rulemaking on a subject by subject basis.

State Law Models mentioned in the ANPR appear to mirror more traditional aspects of rules such as the Federal Reserve's Regulation AA or the OTS's Credit Practices Rule in that specified types of activities or practices are listed as being unfair or deceptive acts and are prohibited by regulation. The benefits of this approach are that it provides listings of specific acts or practices that institutions may not engage in; however, the drawback as noted before would be the amount of time required for rulemaking and implementation. This approach would necessarily be detrimental to some consumers as any final action would not be retroactive.

A Targeted Practices Approach is the final model proposed in the ANPR. It proposes that the OTS could simply list a variety of practices that it considers to be unfair or deceptive. This again has the benefit of providing specificity to institutions regarding various prohibited practices. Whether this approach necessarily requires conforming to rulemaking procedures in order to add new items to the lists would be a potential impediment to action on new practices that may offend the public mores. The items listed in the ANPR as possible items that the OTS might consider as so offending public attitudes as to be prohibited as business practices by savings institutions appear to be reasonable given the recent legislation being considered by the Congress.

Issue 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?*

Expanding the items listed in the OTS's Credit Practices rule would be appropriate since it has been a significantly lengthy time since the last addition was made to this rule. Some of the practices listed in the Targeted Practices Approach model seem to this observer as worthy of consideration for designation as per se violations. Others would merit consideration as practices that while not rising to the level of per se violations could be given closer scrutiny by the agency on a case by case basis for possible enforcement action.

Issue 5. *Should OTS consider a principles-based approach to 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.*

The OTS should consider a principles-based approach to its rule making so that the rule and accompanying compliance with the requirements can evolve as market conditions change. I would recommend that the OTS consider adopting the principles articulated in the FTC's policy statements on unfairness and deception as noted in the Commission's letters to Congress in 1980 and 1983. These principles provide ample guidance as to how acts and practices can be determined to rise to a level of unfairness or deception. By incorporating these principles in a rulemaking, the OTS would have significant legal basis for reviewing acts and practices in the context of current and future marketplace activities and practices.

The OTS could provide examples within the rule of activities and practices that it considers per se violations of the rule. It could also issuance informal guidance to supervised institutions regarding activities or practices with which it becomes concerned without necessarily having to prohibit the activities per se through rulemaking. This approach should be beneficial to both industry and customers by providing guidance quickly while permitting disagreements with any guidance to be considered through the normal supervisory channels.

Issue 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 in part III of this **Supplementary Information** appropriate for OTS to consider? What other models, approaches, or principles should OTS consider?*

The principles enunciated in the FTC's policy statements of 1980 and 1983 appear to be appropriate for the OTS to utilize in making determinations regarding unfair or deceptive acts or practices for thrift institutions and their subsidiaries. These principles should form the basis of an expanded Credit Practices rule so that determinations regarding the potential unfairness or deception of future acts or practices by supervised entities could more easily be made by the OTS through its enforcement authority under the HOLA.

A combination of the FTC and Targeted Practices models appear to present a beneficial blending by providing an overall framework for the OTS to utilize in making determinations regarding specific future acts or practices while providing a listing of practices that the OTS

currently finds to be so injurious to public policy and to good business practices that it considers them to be a per se violation of the rule.

Issue 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 to the consumer? If so, how?*

On its face the acts or practices listed in the various models of part III of the Supplementary Information all appear to be ones that would be difficult to be conducted in a manner that would not be unfair or deceptive to a consumer. All these practices are ones that are not ones providing the consumer a level playing field and most provide extraordinary benefit to a creditor or detriment to the consumer.

Issue 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?*

The OTS should give consideration to enforcement actions taken by the FTC for violations of Section 5 of the FTC Act, particularly those that involve activities of a financial nature. One example would be the enforcement actions taken by the FTC against a third party debt collector for violations of Section 5 when it was trying to collect debt in a manner consistent with the Fair Debt Collection Practices Act. This example is an excellent one showing how an institution attempted to utilize the letter of a law while absolutely violating its spirit.

Issue 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 practices identified in part III would fit well into the combined approach using the FTC model and the Targeted Practices model.

Issue 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?*

The acts or practices currently listed in the OTS Credit Practices rule have been listed since the 1970's. A number of the practices listed in part III of the Supplementary Information could be added to that rule without easy circumvention. Clearly any change in the rule specifying additional practices as per se violations would have unintended consequences. Whether those would have adverse consequences to consumers is speculative at best. Some consumers might not qualify for some loans that unscrupulous creditors would otherwise make in the absence of some of the listed practices. Most financial institutions would not appear to suffer any particular loss of security from the absence of these practices.

Issue 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?*

The current rule has generally been complied with except for isolated violations of one or more of the specified practices. Including additional acts or practices in the rule would increase regulatory compliance responsibilities on institutions with its attendant cost for increased training, changing documents and manuals, etc. Agency personnel would also have increased costs for training, examination and supervision time, among other costs.

Issue 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?*

The OTS should expand its advertising regulations to incorporate either by example or reference the advertising guides issued by the FTC. These guides are used by compliance managers and consultants for assistance in monitoring advertising and marketing activities in a substantial number of financial institutions.

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

No recommendations.

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

If the OTS expands its advertising regulation to incorporate the FTC advertising guidance the industry should benefit by having more specific guidance for compliance personnel permitting better compliance in marketing their products.

Thank you for the opportunity to comment on this ANPR. I look forward to reviewing a proposed regulation in the near future.

Sincerely,



James K. Baebel