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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: Unfair or Deceptive Acts or Practices, Docket ID OTS-2007-0015

Dear Sir or Madam:

The Independent Community Bankers of America (ICBA)[1] appreciates the opportunity to comment on the Office of Thrift Supervision's (OTS) exploration of further rulemaking to outline requirements on unfair or deceptive acts or practices for federal savings associations. The goal is to provide greater transparency about OTS' expectations on sound consumer protections and continued adequate oversight with respect to unfair and deceptive acts and practices.[2]

In part due to the recent turmoil in mortgage markets, Congress has focused on banking regulators' actions on unfair or deceptive acts or practices (UDAP). Briefly, section 5 of the Federal Trade Commission Act outlines the parameters of unfair or deceptive acts/practices. Congress assigned authority for developing UDAP regulations for banks to the Federal Reserve but the Board has not yet exercised that authority, leading House Financial Services Committee Chairman Barney Frank to comment that the agency should 'use it or lose it.' While the Federal Reserve has rulemaking authority for banks (pending legislation would expand that authority to

[1] The Independent Community Bankers of America represents 5,000 community banks of all sizes and charter types throughout the United States and is dedicated exclusively to representing the interests of the community banking industry and the communities and customers we serve. ICBA aggregates the power of its members to provide a voice for community banking interests in Washington, resources to enhance community bank education and marketability, and profitability options to help community banks compete in an ever-changing marketplace.

With nearly 5,000 members, representing more than 18,000 locations nationwide and employing over 268,000 Americans, ICBA members hold more than $908 billion in assets, $726 billion in deposits, and more than $619 billion in loans to consumers, small businesses and the agricultural community. For more information, visit ICBA's website at www.icba.org.

[2] See *Remarks of OTS Director John M. Reich to the Exchequer Club, Washington, DC, September 19, 2007.*

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the OCC and the FDIC), the NCUA has the authority to write rules for federal credit unions and the OTS has the authority to write rules for savings institutions.

The OTS is now considering whether to expand its current prohibitions on UDAP and has asked for comment.

Background

The Federal Trade Commission Act gives OTS the responsibility for developing rules that prevent savings associations from engaging in acts or practices that are unfair or deceptive to consumers. The OTS can approach this in a number of ways, including regulations that define UDAP "with specificity."

If the FTC defines an act or practice as unfair or deceptive, by statute the OTS is required to issue a substantially similar rule within 60 days.[3] For example, in March 1984, the FTC issued its *Credit Practices Rule*, and the OTS issued a substantially similar rule.[4] The *Credit Practices Rule* defines certain practices as unfair or deceptive when included in a consumer loan. The rule bans confessions of judgment, executory waivers, attempts to limit statutory exemptions from attachment on real or personal property, assignments of wages or other earnings, and nonpossessory security interests in household goods (other than a purchase-money security interest). The rule also prohibits misrepresenting the nature of a cosigner's liability (a cosigner must be fully notified about the nature of his or her responsibility) and late fees where the only reason for the fee is a delinquency caused by a prior payment.

Separately, the OTS has general authority to regulate and examine savings associations. If the OTS adopts a broad UDAP rule, it would be in addition to existing OTS rules, including the Credit Practices Rule. For example, the OTS already has the following rules which apply where UDAP comes into play:

- *Advertising Rule* – prohibits a savings association from any advertising or representation that is inaccurate in any way or misrepresents the savings association's services, contracts, investments or financial condition
- *Nondiscrimination Rule* – prohibits discrimination beyond those outlined in other fair lending laws and covers all services, not just consumer lending, and extends to other areas, such as handicap or familial status

Summary of ICBA Comments

ICBA does not believe a new separate and distinct UDAP rule is necessary. Existing consumer laws and regulations to which savings institutions are subject can adequately address specific areas of unfair and deceptive practices and a new rule would merely add a new layer of regulation. Moreover, a new rule might backfire by creating enough extra costs that it would

[3] FTC Act section 18(f)(1).
[4] Community bankers are familiar with these provisions under the Federal Reserve's Regulation AA.

discourage savings institutions from continuing to offer certain products and services, helping create a fertile environment for less-regulated non-depositories to step into the breach.

If the OTS decides to adopt a rule, the ICBA strongly urges that it apply to affiliates and subsidiaries as well. Regardless of which model OTS might use to develop a UDAP rule, the ICBA finds that uniform application across the board is critical.

ICBA does not believe a checklist of unfair or deceptive acts or practices will be helpful and is likely to become quickly outdated. A set of principles might be useful but it is the context in which a transaction occurs that is the most important aspect for determining whether something is unfair or deceptive. As a result, something that might be unfair in one instance might be perfectly reasonable in another. This subjectivity injects a level of uncertainty into compliance which the OTS should carefully consider when contemplating the need for a UDAP rule. A subjective rule can lead to conflict and even necessitate judicial interference for resolution.

Fundamentally, ICBA believes the best approach is to incorporate the elements of the current FTC guidelines into existing rules and regulations. And, the best way to enforce fairness and lack of deception is through the examination process and informal guidelines, such as answers to frequently-asked-questions, best practices, or other guidance. A new rule will only add another layer to existing regulations and unnecessarily add to regulatory burden.

Developing an OTS UDAP Rule

It is not necessary for the OTS to develop a separate and distinct rule on unfair and deceptive acts and practices. While such a rule would provide a degree of clarity and focus on fairness in dealing with customers, it is also important to recognize that banks and thrifts are closely supervised and regularly examined and that provisions to ensure fair dealing are inherent in many existing consumer rules and regulations. Merely the knowledge that examiners will be reviewing all transactions helps ensure that bankers conduct their operations fairly and without deception. The Truth-in-Lending Act, the Truth-in-Savings Act, the Equal Credit Opportunity Act, the Expedited Funds Availability Act, the Electronic Fund Transfers Act and other statutes and their implementing regulations all incorporate elements designed to ensure banks and thrifts deal with their customers fairly and honestly and disclose elements associated with a potential transaction. Requiring information to be presented clearly and conspicuously undermines the basis for deception, which requires obfuscation and disguise.

Adding a new rule on UDAP would merely add a new layer to the existing and more specific guidance already present in the myriad of rules to which savings institutions are already subjected. As acknowledged by regulators and members of Congress in numerous hearings in this session of Congress alone, regulated depository institutions have not been part of the mortgage problem. Adding a new layer of rules would only add to regulatory burden and costs. For community banks, where a particular product or service such as mortgage lending might only be marginally profitable, adding costs and burdens – including the cost of regulatory risk – could be sufficient to cause the bank to cease providing that product or service. If the

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community bank stops meeting the demand, the demand does not cease. Rather, new providers appear. This in part may account for the tremendous growth in subprime lending and payday loan providers. Therefore, ICBA strongly encourages the OTS to consider the potential for unintended consequences before adopting a new rule.

Moreover, as acknowledged in supervisory guidance over the last several years, banks must carefully consider reputation risk. Reputation is extremely important to community banks where the trust they have developed with their customers and communities is paramount. In fact, their reputation is one of the foundations of the community banking model.

Financial Products and Services. One of the questions the OTS has raised is whether any UDAP rule should be restricted to financial products and services. ICBA is not certain what other activities of a community bank might possibly be covered by a UDAP rule but believes it would be appropriate to restrict the coverage of any new rule to financial products and services.

Affiliates and Subsidiaries. ICBA strongly urges that any UDAP rule the OTS adopts be extended to affiliates or subsidiaries. Absent such a requirement, it would be possible to use an affiliate or subsidiary to evade the requirements. If the rules are intended to address a potential problem, it should naturally extend to any affiliated companies.

Possible Models

The Existing FTC Model

The FTC has established a set of guidelines to outline what constitutes an unfair or deceptive act or practice, and the Federal Reserve, FDIC and OCC have incorporated these guidelines into their own guidance on UDAP. Under current FTC guidance, an act or practice is *unfair* where the act or practice causes or is likely to cause substantial injury to consumers; consumers cannot reasonably avoid the injury; and the injury is not outweighed by countervailing benefits to consumers or to competition. When determining whether an act or practice is unfair, public policy is also taken into consideration. Separately, an act or practice is *deceptive* under the FTC guidelines if there is a representation, omission or other act or practice that misleads or is likely to mislead the consumer; where, under the circumstances, the consumer makes a reasonable interpretation; and the act or practice is material.

The FTC has taken enforcement against non-depository mortgage lenders and brokers to enforce these rules. For example, the agency has taken action to stop aggressive solicitations that misrepresent loan fees,[5] misrepresentation about origination fees,[6] or deception about the true elements of key terms of a loan.[7] ICBA finds that these enforcement actions can offer helpful guidance but should serve as examples of unfair or deceptive acts or practices and not be the foundation for a rule. When the FTC takes enforcement it is similar to action by a court of law where all the facts and circumstances are carefully considered before a final evaluation of

[5] FTC v. Associates First Capital Corporation.
[6] FTC v. First Alliance Mortgage Company (FAMCO).
[7] See FTC Letter to the Board of Governors of the Federal Reserve System, September 14, 2006.

fairness or deception is reached. ICBA finds this evaluation of the context is a critical element that must be considered before something can be classified unfair or deceptive.

Other Models

Existing Agency Guidance. To develop a UDAP rule, the OTS could draw on existing interagency guidelines designed to protect consumers and possibly convert all or some of this guidance into a new UDAP rule. For example, the agency could look to the *Interagency Statement on Working with Mortgage Borrowers* issued earlier this year, the *Interagency Guidance on Nontraditional Mortgage Products and Risk* (October 2004), the *Interagency Statement on Subprime Mortgage Lending* (July 2007), the OTS *Guidance on Overdraft Protection Programs* (February 2005) or the *OTS Guidance on Gift Card Programs* (February 2007). Another possibility would be to draw from guidance issued by another agency, including the OCC's *Guidelines Establishing Standards for Residential Mortgage Lending Practices* which list equity stripping, fee packing, and loan flipping, among other practices, as indicative of abusive lending. It is important to recognize, though, that while all these guidelines address UDAP in some way, they each focus on a separate area, product or service.

State Law Models. Another approach would allow the OTS to consider existing state law models that ban a variety of specific practices as unfair or deceptive. For example, the Michigan Consumer Protection Act bans many acts or practices that have the potential for causing confusion or misunderstanding of legal rights. Or, the OTS could follow the model of the North Carolina predatory lending law which expressly provides that a loan that violates the law is inherently unfair and deceptive.

ICBA Position

While each of the above models has appealing elements, no one model has advantage over any other. The OTS could draw from any or all to craft a UDAP rule but ***ICBA does not believe a separate UDAP rule is needed. However, the most important aspect of any rule is that it must apply uniformly to all providers***. The "un-level playing field" has helped less than scrupulous actors meet demands by taking advantage of consumers. This has helped create the problems in mortgage markets. For example, the Federal Reserve is under pressure to take action under the Home Ownership and Equity Protection Act (HOEPA) to ensure that fairness in home mortgage markets applies to *all* providers and not just depository institutions. ICBA believes that unilateral action by one agency that only applies to one segment of the market is not a satisfactory solution. In fact, added regulatory burden limited to one segment of the market might drive legitimate providers out of the market making it easier for unscrupulous actors to take advantage of the demands that still exist.

Creating a rule that applies broadly will ensure consistency and will facilitate consumer understanding. It will also help develop appropriate training for providers and simplify compliance. ICBA therefore believe that one step that is critical for any UDAP rule is interagency cooperation, possibly through the Federal Financial Institutions Examination Council (FFIEC).

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In this context, though, it is important to acknowledge that the OTS and the other banking agencies have already incorporated elements of the Credit Practices Rule into existing rules.[8] While ICBA does not believe a new rule is needed, if the OTS does decide to adopt a new rule, then the elements of the Credit Practices Rule should become a part of the new rule.

Categorizing Specific Acts or Practices as Unfair or Deceptive

Another approach the OTS is evaluating is creating a list of specific acts or practices that would be prohibited as unfair or deceptive. For example, under this approach, a possible listing of banned practices might be:

- Credit Card Lending: universal default, over-the-limit fees triggered by a penalty fee, penalty fees imposed based on prior default and not the result of a new transaction, waiver of right to trial or consent to mandatory arbitration, applying payments first to balances subject to lower rates of interest.
- Mortgage Lending: repetitive refinancings, forced placed hazard insurance without allowing a borrower an option to obtain insurance, changing terms on default, layering pricing, or failing to employ reasonable loss mitigation measures before starting foreclosure proceedings.
- Gift Cards: fees over a certain amount.
- Deposit Accounts: freezing accounts that include federal benefit payments.

ICBA finds that one advantage to creating a bright line rule is that it can be easily applied and there is no question about what is covered. However, the problem with a bright line rule is that it can become quickly outdated. Second, the very elements that make a bright line rule easy to apply for scrupulous players also make it easy for unscrupulous actors to evade. While this is true of any rule, it is especially pertinent when considering a UDAP regulation. ICBA believes it is preferable to address these within the context of existing rules. For example, the agencies are currently considering whether to develop best practices with respect to garnishment of accounts that include federal benefits. ICBA finds it preferable to deal with UDAP in guidance or rules applicable to a particular area, product or service so all the elements a bank must consider when offering that product or service are in one place, rather than crafting a broad generally applicable UDAP rule separate and apart from rules or regulations that govern the product or service.

The Context for the Transaction

Several OTS questions point to the fact that context is especially important when evaluating whether a particular action or inaction is unfair or deceptive. For example, OTS asks whether there are specific acts or practices, usually considered unfair or deceptive, that might not be so when all the facts and circumstances surrounding a particular transaction are considered.

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[8] For example, the Federal Reserve has incorporated this guidance into Regulation AA, Unfair or Deceptive Acts or Practices, 12 CFR 227.

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ICBA agrees that the context for a particular transaction is especially important for evaluating whether an action is unfair or deceptive.

For instance, a parent might establish a rule that a child is never to leave the house when the parent is not at home. However, if a fire broke out, adherence to the rule would be totally inappropriate. It is impossible to create a rule that covers every circumstance, and when dealing with an area such as UDAP, it is almost impossible to cover each and every situation. Therefore, ***ICBA does not believe a checklist approach will work***.

It is worth considering that in many of the discussions on how to define a predatory loan, it is often pointed out that a particular aspect of a mortgage product, such as prepayment penalties, low-doc/no-doc loans, balloon loans do not necessarily define whether the loan is predatory.[9] Instead, an assessment of all the facts and circumstances determines whether a particular loan is predatory. This is one of the reasons concerns are raised about imposing suitability or net tangible benefit requirements for mortgage lending. Such determinations are highly subjective and, with the variety of loan products and elements of loan products available, determining which is better for a particular borrower can be difficult for a third party to assess. Eliminating the variety might make it easier to assess whether a loan is appropriate for an individual consumer, but eliminating the variety would also make it more difficult to encourage homeownership, especially for marginal applicants. This trade-off is another reason ICBA believes it is preferable to incorporate the elements of UDAP into specific rules rather than creating a new general UDAP rule that would be overlaid on those rules.

Principles

While general UDAP principles might be helpful, principles by their very nature will be subjective in application. The flexibility that principles can provide also means disputes about the judgment involved are likely, possibly producing conflict between bankers and examiners or between bankers and customers. Any rule that incorporates the potential for inherent conflict, as any rule based on principles must do, also creates the potential for litigation and resort to the courts for judicial resolution of the conflict. ICBA believes OTS must also consider this aspect when determining whether to propose a broad, general UDAP rule.

Staying Current

The OTS recognizes that no set of principles or standards can anticipate every situation, a point with which ICBA firmly agrees. As noted above, ICBA believes a specific list of unfair or deceptive acts or practices would quickly become outdated especially since markets, technologies and delivery channels are constantly evolving and changing. Therefore, whatever step the OTS takes will need to be regularly reviewed to ensure that it is kept current.

[9] See, e.g., testimony of Comptroller of the Currency John D. Hawke before the House Committee on Banking and Financial Services, May 24, 2000.

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There are a number of options available to help ensure that any new rule or UDAP guidance stays current. For example, publication of enforcement actions, similar to steps that the FTC takes when enforcing its own UDAP guidelines can be helpful. Or the agencies could publish and update examples of unfair or deceptive acts or practices, or issue a set of best practices, answers to frequently asked questions or other guidelines that could be regularly updated.[10] However, whatever approach is used, it is critically important that the agencies make sure examiners understand that they are optional guidelines to be considered and not mandates that must be followed.

OTS Guidance and Enforcement

Whatever steps it takes, the OTS anticipates continuing to encourage savings institutions to consult with the agency whenever they have questions. ICBA recommends that the authority for responding and the primary point of contact should be the OTS regional offices. Generally, there is a greater likelihood that an ongoing relationship will exist between a banker and the regional office, facilitating the discussion. Where necessary, OTS headquarters can be consulted by the regional office or even by individual bankers. However, the regional offices should inform a designated official in Washington of the questions received as well as the guidance given to help ensure headquarters is apprised of issues that arise and can coordinate the OTS UDAP program.

ICBA also finds that the examination process, including both informal and formal steps, offers a better solution to preventing unfair and deceptive acts or practices than a formal rule. Examiners can take appropriate steps to encourage savings institutions to change or avoid any practices that might be perceived as unfair or deceptive. This process is often more effective than the existence of a formal rule and much better tailored to individual institutions and specific transactions. Moreover, addressing potential unfair or deceptive acts or practices through the examination process can also have a much more immediate impact and response. Again, to avoid inconsistencies, a designated individual in Washington should collect and coordinate information to ensure consistency and to track developments in this area. This will allow the OTS to assess instances where additional action or guidance may be needed.

Conclusion

ICBA is concerned that adding a new UDAP rule to existing regulations will merely add a new layer of regulatory burden. The hallmark of community banks is to treat their customers fairly and honestly. Community banks highly value their reputations, and rely on the trust of their customers and communities in order to stay in business.

There is no question there are problems in consumer markets, especially mortgage markets. However, legislators, regulators, the media and community activists do a grave disservice by failing to focus on where these problems originated. Lumping all lenders under

[10] It is also important to consider that best practices or answers to frequently-asked-questions are more easily updated than formal rules.

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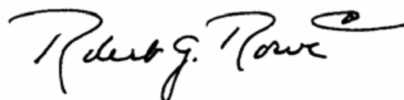
one umbrella and assuming they all operate the same leads to poorly designed solutions that often fail to solve the problem. Badly designed and poorly focused solutions can drive legitimate providers – such as community banks – away from consumer markets. This reduces competition and creates a fertile environment for unregulated predators. Previous restrictions on legitimate lenders predates the explosive growth of the subprime mortgage market and one could argue that driving legitimate lenders out of the mortgage markets made it easier for predators to take advantage of subprime consumers. ICBA strongly urges the OTS to be extremely sensitive to these types of unintended consequences before adding a new rule.

Legitimate providers, especially community banks, take serious steps to comply with the many rules and regulations that are already in place. Existing consumer rules and regulations can be seen as targeted rules to ensure against unfairness and deception. Predators pay little attention to existing requirements. Adding a new rule or regulation – especially where there is no enforcement – will not suddenly cause predators or fraudsters to behave fairly.

Similarly, it is critical that any new rule apply across the board. Again, one of the problems in existing markets is that rules are not equally applied or universally enforced even where they do apply to all providers. Unilateral action by one agency is not likely to be sufficient and may put one segment of the market at a disadvantage. Therefore, ICBA strongly recommends that OTS work closely with the FFIEC to develop a uniform approach.

ICBA looks forward to continuing to work with the OTS and other federal agencies to help address these serious problems in ways that create appropriate solutions without unintended consequences or undue costs and burdens for community banks. Thank you for the opportunity to comment. If you have any questions or would like additional information, please contact the undersigned by telephone at 202-659-8111 or by e-mail at robert.rowe@icba.org.

Sincerely,



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