

DEPARTMENT OF THE TREASURY

Office of Thrift Supervision

12 CFR Part 535

Docket ID OTS-2007-0015

RIN 1550-AC17

Unfair or Deceptive Acts or Practices

AGENCY: Office of Thrift Supervision, Treasury (OTS).

ACTION: Advance notice of proposed rulemaking (ANPR).

SUMMARY: OTS is reviewing its regulations relating to unfair or deceptive acts or practices to determine whether and, if so, to what extent, additional regulation is needed to ensure customers of OTS-regulated entities are treated fairly. This ANPR seeks input and information on issues OTS is considering as part of this review.

DATES: Comments must be submitted by [Insert date that is 90 days from the date of publication in the Federal Register].

ADDRESS: You may submit comments, identified by OTS-2007-0015, by any of the following methods:

- Federal eRulemaking Portal: Go to www.regulations.gov, select “Office of Thrift Supervision” from the agency drop-down menu, then click submit. Select Docket ID “OTS-2007-0015” to submit or view public comments and to view supporting and related materials for this advance notice of proposed rulemaking. The “User Tips” link at the top of the page provides information on using Regulations.gov, including instructions for submitting or viewing public comments, viewing other supporting and related materials, and viewing the docket after the close of the comment period.

- Mail: Regulation Comments, Chief Counsel’s Office, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552, Attention: OTS-2007-0015.
- Hand Delivery/Courier: Guard’s Desk, East Lobby Entrance, 1700 G Street, NW., from 9 a.m. to 4 p.m. on business days, Attention: Regulation Comments, Chief Counsel’s Office, Attention: OTS-2007-0015.
- Instructions: All submissions received must include the agency name and docket number for this rulemaking. All comments received will be entered into the docket and posted on Regulations.gov without change, including any personal information provided. Comments, including attachments and other supporting materials received are part of the public record and subject to public disclosure. Do not enclose any information in your comment or supporting materials that you consider confidential or inappropriate for public disclosure.
- Viewing Comments Electronically: Go to www.regulations.gov, select “Office of Thrift Supervision” from the agency drop-down menu, then click “Submit.” Select Docket ID “OTS-2007-0015” to view public comments for this advance notice of proposed rulemaking.
- Viewing Comments On-Site: You may inspect comments at the Public Reading Room, 1700 G Street, NW., by appointment. To make an appointment for access, call (202) 906-5922, send an e-mail to public.info@ots.treas.gov, or send a facsimile transmission to (202) 906-6518. (Prior notice identifying the materials you will be requesting will assist us in serving you.) We schedule appointments on business days between 10:00 a.m. and 4:00 p.m. In most cases, appointments will be available the next business day following the date we receive a request.

FOR FURTHER INFORMATION CONTACT: Glenn Gimble, Senior Project Manager, Compliance and Consumer Protection Division, (202) 906-7158; Suzanne McQueen, Consumer Regulations Analyst, Compliance and Consumer Protection Division, (202) 906-6459; or Richard Bennett, Compliance Counsel, Regulations and Legislation Division, (202) 906-7409, Office of Thrift Supervision, 1700 G Street, NW, Washington, DC 20552.

SUPPLEMENTARY INFORMATION:

I. Purpose and Goals of this ANPR

The mission of OTS is “to supervise savings associations and their holding companies in order to maintain their safety and soundness and compliance with consumer protection laws, and to encourage a competitive industry that meets America's financial services needs.”¹ Consistent with our mission, OTS is issuing this ANPR to determine whether the agency should expand its current prohibitions against unfair or deceptive acts or practices.

The ANPR identifies some of the issues that may warrant OTS’s review. The discussion is not exhaustive of all the issues that could be raised. OTS invites commenters to respond to the questions presented and to offer comments or suggestions on any other issues related to unfair or deceptive acts or practices, including what other steps, OTS might undertake instead of or in addition to further rulemaking in this area. OTS recognizes that the financial services industry and consumers have benefited from consistency in rules and guidance as the federal banking agencies have adopted 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.

¹ OTS Mission Statement, *available at* www.ots.treas.gov/mission.cfm?catNumber=39.

II. Legal Background

The primary legal bases for this rulemaking are the Federal Trade Commission Act (FTC Act), 15 U.S.C. 41-58, and the Home Owners' Loan Act (HOLA), 12 U.S.C. 1461 et seq.

A. The FTC Act

1. Statutory Provisions

Under section 18(f)(1) of the FTC Act, 15 U.S.C. 57a(f)(1), OTS is responsible for prescribing regulations to prevent unfair or deceptive acts or practices by savings associations in or affecting commerce, including acts or practices that are unfair or deceptive to consumers.² In granting this authority, Congress allowed OTS great flexibility in determining the appropriate regulatory approach.

Section 18(f)(1) also provides that OTS's regulations may take a variety of approaches "including" (but not limited to) regulations "defining with specificity" which acts or practices are unfair or deceptive, as well as regulations "containing requirements prescribed for the purposes of preventing such acts or practices." Thus, in addition to listing specific acts or practices that are unfair or deceptive OTS may also impose measures designed to prevent such acts or practices from occurring.³ The use of the word "including" reveals that even these two regulatory approaches are not meant to be the only options for OTS rulemaking. For example, OTS could issue principles-based regulations that articulate general principles and standards for evaluating

² We note some outdated language in the statute, but find that it has no bearing on OTS's rulemaking authority. First, the statute refers to OTS's predecessor agency, the Federal Home Loan Bank Board (FHLBB), rather than to OTS. However, in section 3(e) of the HOLA, Congress transferred this rulemaking power of the FHLBB among others to the Director of OTS. 12 U.S.C. 1462a(e). Second, the statute refers to "savings and loan institutions" in some provisions and "savings associations" in other provisions. Although "savings associations" is the term currently used in the HOLA, *see e.g.*, 12 U.S.C. 1462(4), the terms "savings and loan institutions" and "savings associations" can be and are used interchangeably.

³ The legislative history gives as an example an FTC rule that mandates certain testing procedures to determine the octane rating of gasoline to avoid unfair or deceptive octane ratings being posted on gasoline pumps. Senate Conference Report No. 93-1408, December 18, 1974 (to accompany S. 356), reprinted in 1974 U.S.C.C.A.N. 7702, 7764.

whether acts or practices are unfair or deceptive, similar to OTS's principles-based Advertising rule (12 CFR 563.27). This provision of the FTC Act assigns the same rulemaking authority to the Board of Governors of the Federal Reserve System (Board) with respect to banks and to the National Credit Union Administration (NCUA) with respect to federal credit unions.

Separately and additionally, section 18(f)(1) provides that whenever the Federal Trade Commission (FTC) uses its authority in section 18(a)(1)(B) to prescribe a rule defining with specificity which acts or practices are unfair or deceptive, within 60 days after such rule takes effect OTS generally must promulgate substantially similar regulations prohibiting savings associations from engaging in substantially similar acts or practices and imposing similar requirements. Thus, this provision specifies procedures to ensure that the regulations of the OTS – at a minimum – are consistent with regulations the FTC may prescribe. It does not limit OTS's rulemaking authority or set a ceiling on the acts or practices that OTS can address in its regulations. However, it does set a floor for OTS's regulation, subject to two exceptions.⁴ Section 18(f)(1) assigns the same rulemaking authority to the Board with respect to banks and to the NCUA with respect to federal credit unions.

The two grants of rulemaking authority to OTS in section 18(f)(1) give OTS exclusive authority to promulgate unfair or deceptive acts or practices regulations applicable to savings associations. Section 5(a)(2) of the FTC Act, 15 U.S.C. 45(a)(2), expressly provides that the FTC's power to prevent unfair or deceptive acts or practices in or affecting commerce does not apply to savings associations, banks, or federal credit unions among others.

⁴ One exception is if OTS finds that such acts or practices are not unfair or deceptive. This portion of section 18(f)(1) assigns the Board (with respect to banks) and the NCUA (with respect to federal credit unions) the same ability to make findings creating exceptions. The second exception is if the Board finds that implementation of similar regulations by banks, savings associations, or federal credit unions would seriously conflict with essential monetary and payments systems policies and the Board publishes such a finding and the reasons for it in the *Federal Register*.

Section 18(f)(3) expressly provides that OTS is to enforce the regulations it promulgates under section 18(f) through section 8 of the Federal Deposit Insurance Act (FDIA), 12 U.S.C. 1818. Section 8 of the FDIA authorizes OTS to take appropriate enforcement actions against savings associations for violations of any “law, rule, or regulation.” This enforcement authority includes enforcement actions for violations of section 5 of the FTC Act.⁵ Section 18(f)(6) clarifies that OTS may use other authority it possesses to issue rules governing enforcement of the regulations it prescribes under section 18(f) regardless of any FTC Act rules issued by the Board.

2. OTS Unfair or Deceptive Acts or Practices Rulemaking under the FTC Act to Date

OTS has exercised its rulemaking authority in the area of unfair or deceptive acts or practices to parallel the FTC’s rulemakings. The FTC issued its Credit Practices Rule over 20 years ago. 49 FR 7740 (March 1, 1984). The FTC’s rule took effect on March 1, 1985. Shortly after that effective date, the FHLBB (OTS’s predecessor agency) issued a substantially similar rule. 50 FR 19325 (May 8, 1985). OTS’s Credit Practices Rule (12 CFR part 535) is also similar to that of the Board (12 CFR part 227) and the NCUA (12 CFR part 706).

OTS’s Credit Practices Rule protects consumers by prohibiting certain unfair or deceptive acts and practices by a savings association in connection with consumer credit.⁶

⁵ OTS Op. Chief Counsel (June 9, 2006) at 11 n.52, *available at* www.ots.treas.gov/docs/5/56218.pdf and OTS Op. Chief Counsel (October 25, 2004) at 10 n.37, *available at* www.ots.treas.gov/docs/5/560404.pdf.

Section 18(f)(5), 15 U.S.C. 57a(f)(2), clarifies that the Office of the Comptroller of the Currency, the Board, and the Federal Deposit Insurance Corporation may exercise, in addition to section 8 of the FDIA, any other authority conferred on them by law and that, with respect to these agencies, a violation of any regulation prescribed under section 18(f) constitutes not just a regulatory violation, but a statutory violation as well. While this language does not reference OTS, section 8 itself authorizes OTS to take enforcement action for a violation of regulations, including applicable FTC Act regulations.

⁶ The rule also applies to an operating subsidiary of a federal savings association. *See* 12 CFR 559.3(h)(1).

“The term ‘consumer’ means a natural person who seeks or acquires goods, services, or money for personal, family, or household purposes, and who applies for or is extended ‘consumer credit’ as defined in § 561.12

1. Entering into, or enforcing provisions in a consumer credit obligation a savings association purchases, containing any of the following unfair credit practices (subject to certain exceptions): (a) a cognovit or confession of judgment; (b) an executory waiver or limitation of exemption from attachment on real or personal property; (c) an assignment of wages or other earnings; or (d) a nonpossessory security interests in household goods other than a purchase-money security interest.
2. Misrepresenting the nature or extent of cosigner liability or entering into a consumer credit transaction prior to notifying any cosigner about the extent of the cosigner's liability; and
3. Imposing a delinquency charge on a 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 any principal and interest owed.⁷

of [OTS's regulations]." 12 CFR 535.1(b) (definition of a consumer). In turn, OTS's section 561.12 regulation provides:

The term *consumer credit* means credit extended to a natural person for personal, family, or household purposes, including loans secured by liens on real estate and chattel liens 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 the general credit standing of the borrower, guaranties, or security other than the real estate or mobile home, as the primary security for the loan. Appropriate evidence to demonstrate justification for such reliance should be retained in a savings association's files. 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 of real property; loans in the nature of overdraft protection; and credit extended in connection with credit cards.

For further information about OTS's Credit Practices rule *see* OTS Examination Handbook section 1355 (December 1999), *available at* www.ots.treas.gov/docs/4/422242.pdf.

⁷ OTS's Credit Practices Rule allows OTS to determine, upon application by an appropriate state agency, that provisions of the rule will not be in effect in a state that administers and enforces a state requirement or prohibition that affords a level of protection to consumers that is substantially equivalent to, or greater than, the protection afforded by the rule. 12 CFR 535.5. According to OTS records, it has granted one such application, to the State of Wisconsin. 51 FR 45879 (December 23, 1986).

B. HOLA

1. Statutory Provisions

While the FTC Act grants OTS *exclusive* authority to promulgate unfair or deceptive acts or practices regulations applicable to savings associations, HOLA gives OTS authority to promulgate regulations, including regulations on unfair or deceptive acts or practices, applicable to a variety of other entities within the savings association and savings and loan holding company structure. These other entities would also be subject to FTC rules on unfair or deceptive acts or practices.⁸

Under HOLA, OTS has the authority to regulate and examine savings associations, subsidiaries owned in whole or part by a savings association, service corporations owned in whole or in part by a savings association, savings and loan holding companies, subsidiaries of savings and loan holding companies other than a bank or subsidiary of a bank, and certain service providers.⁹ However, regulation of functionally regulated subsidiaries is subject to the functional regulation principles in the Gramm-Leach-Bliley Act.¹⁰

⁸ Section 133(a)-(b) of the Gramm-Leach-Bliley Act, Pub. L. 106-102 (Nov. 12, 1999), clarified that while certain subsidiaries and affiliates of savings associations would not be deemed to be savings associations for purposes of the FTC Act, OTS could exercise its other authority over these entities under federal banking law. 15 U.S.C. 41 note.

⁹ 12 U.S.C. 1462a(b)(2), 1463(a), 1464(a), 1464(d)(7)(A), 1464(d)(7)(D), 1467a(b), 1467a(g), 1467a(o)(7), and 1820(d); 12 CFR 559.3(o)(1), 559.3(o)(2), 563.170, and 584.1(g). OTS exercises enforcement authority over these entities under 12 U.S.C. 1464(d), 1464(d)(7)(C), 1467a(g), 1467a(o), 1813(q)(4), 1818 and 12 CFR 559.3(h)(1).

Service providers are subject to OTS regulation and examination to the extent they perform authorized services for: (1) a savings association; (2) a subsidiary of a savings association; or (3) a “savings and loan affiliate or entity” (*i.e.*, a savings and loan holding company or a subsidiary other than a bank or subsidiary of that bank that is wholly- or partially-owned by a savings and loan holding company) that is regularly examined or subject to examination by the Director of OTS. 12 U.S.C. 1464(d)(7)(D). Some service providers are institution-affiliated parties (*e.g.*, certain agents or independent contractors) for purposes of OTS enforcement authority. *See* 12 U.S.C. 1813(u) and 1818.

¹⁰ Section 45 of FDIA, 12 U.S.C. 1831v, and section 10 of the Bank Holding Company Act, 12 U.S.C. 1848a, as added and amended by sections 112 and 113 of GLBA.

OTS is considering using its rulemaking authority under HOLA to issue regulations on unfair or deceptive acts or practices that would cover savings associations, non-functionally regulated subsidiaries owned in whole or part by a savings association, service corporations owned in whole or in part by a savings association, savings and loan holding companies, and non-functionally regulated subsidiaries of savings and loan holding companies other than a bank or subsidiary of a bank. OTS is not contemplating covering service providers directly with such a rulemaking at this time. Of course, savings associations and others covered directly by the rule would remain responsible for compliance with the rule, even if they outsource operations to a third party.

Exercising HOLA authority in this manner would be consistent with HOLA's mandate that OTS ensure safety and soundness, since engaging in unfair or deceptive acts or practices can pose risk, including reputation risk, compliance risk, and legal risk. HOLA also assigns the Director of OTS a broad mandate to prescribe such regulations as he may determine necessary for carrying out the HOLA *and all other laws within his jurisdiction*. 12 U.S.C. 1462a(b)(2) (emphasis added). The other laws within OTS's jurisdiction include over thirty federal consumer protection statutes and regulations. OTS has jurisdiction to examine for compliance with and enforce these statutes and regulations, including section 5 of the FTC Act.

2. OTS Consumer Protection Rulemaking under HOLA to Date

In recognition of OTS's consumer protection mission and the mandate that the Director give primary consideration to the best practices of thrift institutions in the United States (12 U.S.C. 1464(a)), the agency has supplemented its Credit Practices Rule with other regulations issued under HOLA and other statutes. These rules are unique among the federal banking agencies in the way they protect consumers.

One example is OTS's long-standing Advertising Rule, which prohibits savings associations from using advertising or making any representation that is inaccurate in any particular manner or that in any way misrepresents a savings association's services, contracts, investments, or financial condition. The rule encompasses all forms of advertising, including print or broadcast media, displays or signs, stationery, and all other promotional materials.¹¹ OTS enforces its Advertising rule under section 8 of the FDIA.¹²

OTS has also used HOLA to impose consumer protections not otherwise mandated by federal law for home loans made by federal savings associations. These protections encompass regulation of late charges, prepayment penalties, and adjustments to the interest rate, payment, balance or term to maturity. For example, a federal savings association may not assess a late charge on a home loan for any payment received within 15 days of the due date.

OTS has also issued a Nondiscrimination Rule (12 CFR part 528), which extends beyond the federal fair lending laws by prohibiting discrimination not covered by those laws. For example, OTS's Nondiscrimination Rule covers all services offered by a savings association, not just lending. 12 CFR 528.2. OTS's Nondiscrimination Rule also 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. 12 CFR 528.2. Further, the rule imposes a requirement prescribed for the purposes of preventing lending discrimination by aiding in assessing fair lending compliance; it requires savings association and other lenders who

¹¹ This rule dates back nearly 50 years. *See* 23 Fed. Reg. 9917 (December 23, 1958).

¹² OTS Op. Acting Chief Counsel (September 3, 1993), *available at* 1993 OTS LEXIS 34.

file Home Mortgage Disclosure Act (HMDA) Loan Application Registers with OTS to enter the reason for denials, whereas this information is otherwise optional under HMDA. Compare 12 CFR 528.6 with 12 CFR 203.5(c)(1).

OTS recognizes that acts or practices that are unfair or deceptive might also violate other statutes or regulations addressing similar conduct. Conversely, an act or practice may be unfair or deceptive even though it does not violate other statutes or regulations addressing similar conduct.

C. Issues

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?

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?

III. Principles in Defining Unfair or Deceptive Acts or Practices

Part 535 of OTS's regulations address prohibited consumer credit practices. However, to date, OTS has not provided comprehensive guidance explaining which principles define unfair or deceptive acts or practices. Similarly, OTS has not provided comprehensive guidance on which specific acts or practices it considers unfair or deceptive other than those articulated in the Credit Practices rule. OTS is considering a variety of approaches to provide further definition, including the following, either individually or by combining two or more approaches.

A. FTC Model

OTS could adopt guidance issued by the FTC as OTS's standard and incorporate it into an OTS regulation.¹³ We note that other federal banking agencies have used the FTC guidance in developing guidance on unfair or deceptive acts or practices for entities they regulate.¹⁴

In sum, the FTC guidance provides that acts or practices are unfair where: (1) the act or practice causes or is likely to cause substantial injury to consumers; (2) consumers cannot reasonably avoid the injury; and (3) the injury is not outweighed by countervailing benefits to consumers or to competition. Public policy is also considered in analyzing whether a particular act or practice is unfair. Acts or practices are deceptive where the act or practice involves a representation, omission, or other practice that (1) misleads or is likely to mislead the consumer; (2) the consumer reasonably interprets under the circumstances; and (3) is material.

B. Converting Guidance Into Rules

OTS, both individually and on an interagency basis, has issued several important pieces of guidance to the industry on consumer protection issues. OTS could convert all or portions of this guidance into regulatory requirements under the rubric of unfair or deceptive acts or practices. For example, the recently issued interagency Statement on Working with Mortgage Borrowers encourages institutions to consider prudent workout arrangements that increase the potential for financially stressed residential borrowers to keep their homes for those borrowers

¹³ See FTC's Policy Statement on Unfairness, issued on December 17, 1980, *available at* www.ftc.gov/policystmt/ad-unfair.htm; FTC's Policy Statement on Deception, issued on October 14, 1983, *available at* www.ftc.gov/bcp/policystmet/ad-decept.htm.

¹⁴ See Board and FDIC guidance entitled, "Unfair or Deceptive Act or Practices by State-Chartered Banks," issued on March 11, 2004, *available at* www.fdic.gov/news/news/financial/2004/fil2604a.html and OCC guidance in Advisory Letter 2002-3, "Guidance on Unfair or Deceptive Acts or Practices" issued on March 22, 2002, *available at* www.occ.treas.gov/ftp/advisory/2002-3.doc.

who have demonstrated a prior willingness and ability to repay the loan according to its terms.¹⁵

OTS could identify, as a principle, that failing to consider and implement reasonable workout arrangements is an unfair practice and incorporate such a finding into a rulemaking.

Other recent guidance OTS could similarly draw from includes:

- Interagency Guidance on Nontraditional Mortgage Product Risks, 71 Fed. Reg. 58609 (October 4, 2006).
- Interagency Statement on Subprime Mortgage Lending, 72 Fed. Reg. 37569 (July 10, 2007).
- OTS Guidance on Overdraft Protection Programs, 70 Fed. Reg. 8428 (February 18, 2005).
- OTS Guidance on Gift Card Programs, OTS CEO Memorandum 254 (February 28, 2007).

C. **Other Federal Agency Models**

OTS could consider issuing guidelines along the lines of the OCC's Guidelines Establishing Standards for Residential Mortgage Lending Practices.¹⁶ These Guidelines advise national banks against becoming involved, directly or indirectly, in residential mortgage lending activities involving abusive, predatory, unfair or deceptive lending practices. The Guidelines list as examples equity stripping, fee packing, loan flipping, refinancing special mortgages, and encouragement of default. Other sections of the guidelines discuss prudent consideration of certain loan terms, conditions and features that may, under particular circumstances, be susceptible to abusive, predatory, unfair or deceptive practices. Among the practices listed are financing single premium credit insurance, negative amortization, balloon payments in short-

¹⁵ OTS CEO Memorandum # 255 (April 17, 2007,) available at www.ots.treas.gov/docs/2/25255.pdf.

¹⁶ 12 CFR part 30, Appendix C.

term transactions, and prepayment penalties that are not limited to the early years of the loan, particularly in subprime loans.

OTS could also consider the approach the Department of Housing and Urban Development (HUD) has taken in connection with setting housing goals for secondary market mortgage purchases by Government Sponsored Enterprises (GSEs) Fannie Mae and Freddie Mac.¹⁷ HUD defines “HOEPA mortgages” to mean mortgage loans above the HOEPA thresholds but including loans to finance the acquisition or initial construction of a consumer’s principal dwelling and open-end credit plans, which are both otherwise excluded from HOEPA.¹⁸ HUD defines “mortgages with unacceptable terms and conditions” to include loans with excessive fees (generally total points and fees charged to a borrower exceeding the greater of five percent of the loan amount or \$1,000), prepayment penalties except in limited circumstances, prepaid single premium credit life insurance, or failure of the lender to adequately consider the borrower’s ability to make payments.¹⁹

HUD’s regulations provide that GSE purchases of mortgages in either category do not count toward meeting the GSEs’ goals for purchasing mortgages.²⁰ OTS could consider restricting OTS-regulated entities from originating (or purchasing) such loans as unfair or deceptive.

¹⁷ It is the duty of an independent office within HUD, the Office of Federal Housing Enterprise Oversight (OFHEO), to ensure that these GSEs are adequately capitalized and operating in a safe and sound manner. 12 U.S.C. 4511 and 4513; 12 CFR 1700.1. Except for that authority of OFHEO and other matters relating to safety and soundness, the Secretary of HUD has general regulatory power over these GSEs to ensure that the purposes of their chartering acts and the Federal Housing Enterprises Financial Safety and Soundness Act of 1992 (Pub. L. 102-550) are accomplished. 12 U.S.C. 4541; 24 CFR 81.1. *See also* HUD’s Regulation of Fannie Mae and Freddie Mac, *available at* www.hud.gov/offices/hsg/gse/gse.cfm.

¹⁸ 24 CFR 81.2(b).

¹⁹ 24 CFR 81.2(b).

²⁰ 24 CFR 81.16(c)(12).

D. State Law Models

OTS could prohibit specific unfair or deceptive acts or practices of the types listed in various state unfair or deceptive acts or practices statutes. For example, the Michigan Consumer Protection Act prohibits dozens of specific acts or practices such as causing a probability of confusion or misunderstanding as to the legal rights, obligations, or remedies of a party to a transaction or gross discrepancies between the oral representations of the seller and the written agreement covering the same transaction or failure of the other party to the transaction to provide the promised benefits.²¹

For mortgage lending, OTS could also prohibit specific unfair or deceptive acts or practices of the types listed in various state predatory lending laws. For example, North Carolina's predatory lending law²² covers all consumer home loans (first and second liens and manufactured housing). It limits prepayment penalties, financing credit insurance, flipping, and default incentives. It describes a class of high cost home loans with high points and fees or annual percentage rate (APR), and for those loans it requires consumer counseling and prohibits financing fees and points in the loans.²³ The North Carolina law expressly provides that making a loan in violation of the law constitutes an unfair or deceptive act or practice under North Carolina law.²⁴

²¹ MCLS § 445.902 (2007).

²² 1999 N.C. Sess. Laws 332 as amended by 2003 N.C. Sess. Laws 401, *available at* www.ncga.state.nc.us/EnactedLegislation/SessionLaws/PDF/1999-2000/SL1999-332.pdf and www.ncga.state.nc.us/EnactedLegislation/SessionLaws/PDF/2003-2004/SL2003-401.pdf.

²³ OTS notes, however, that the impact of the North Carolina law and other state predatory lending laws is a matter of some disagreement. Among many studies is one from the Government Accountability Office (GAO), which reported in 2004 that the impact of North Carolina's laws on high cost loans and licensing of brokers was uncertain. GAO, *Consumer Protection: Federal and State Agencies Face Challenges in Combating Predatory Lending*, GAO-04-280 (January 2004), *available at* www.gao.gov/new.items/d04280.pdf.

²⁴ N.C. Gen. Stat. § 24-10.2(e) (2007).

E. Targeted Practices Approach

Under this approach, OTS could simply list a number of specific practices that it would prohibit as unfair or deceptive, such as in the area of credit card lending, residential mortgage lending, gift cards, and deposit accounts. For example, OTS could consider listing the following under this approach:

1. Credit Card Lending

- a. Imposing an interest rate increase that is triggered by adverse information unrelated to the credit card account or card issuer. This practice is commonly referred to as “universal default” or, more recently as, adverse action pricing in contrast to long-established risk based pricing.
- b. Imposing an over-the-limit-fee that is triggered by the imposition of a penalty fee, such as a late fee.
- c. Charging penalty fees in consecutive months based on previous late or over the limit transactions, not on a new or additional transaction offense.
- d. Requiring as a condition of a credit card account, a consumer’s waiver of his or her right to a court trial and consent to binding mandatory arbitration.
- e. Applying payments first to balances subject to a lower rate of interest before applying to balances subject to higher rates of interest or applying payments first to fees, penalties, or other charges before applying them to principal and interest.

2. Residential Mortgage Lending

- a. Repetitive refinancing of the same mortgage loan by the same lender whereby the consumer’s equity is used to finance the refinancing and from which transaction fees are paid

and whereby the consumer does not financially benefit from the terms of the new loan over the terms of the old loan.

b. Encouraging a consumer to default on a loan as a prerequisite to refinancing the loan.

c. Imposing changes in loan terms upon default, such as imposing significant interest rate increases or a balloon payment.

d. Layering discretionary pricing on top of pricing that has already taken risk into account, for example, where a branch or loan officer charges more points than called for by the rate sheet provided by the institution's central office.

e. Force placing hazard insurance without first giving reasonable notice to borrowers to cure a deficiency.

f. Failing to employ reasonable loss mitigation measures prior to initiating foreclosure.

3. Gift Cards

a. Imposing fees that exceed a certain amount or percentage of the original gift amount.

b. Setting an expiration date less than one year from the date of issuance.

4. Deposit Accounts

Freezing accounts containing federal benefit payments upon receipt of attachment or garnishment orders and setting off of debts owed to the financial institution from federal benefit payments deposited in accounts.²⁵

²⁵ House Committee on Financial Services Chairman Frank has expressed concerns about these practices and certain interstate debt collection practices. See Letter from Chairman Frank to OTS *et al.*, June 21, 2007, available at www.house.gov/apps/list/press/financialsvcs_dem/press2062707.shtml.

F. Issues on Alternative Models and Approaches

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

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?

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.

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?

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?

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?

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?

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?

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?

IV. Advertising

As referenced in Part II.B.2 of this Supplementary Information, OTS’s Advertising Rule (12 CFR 563.27) prohibits savings associations from using advertising or making any representation that is inaccurate in any particular manner or that in any way misrepresents a savings association’s services, contracts, investments, or financial condition. The rule encompasses all forms of advertising, including print or broadcast media, displays or signs, stationery, and all other promotional materials. OTS has previously articulated two principles in interpreting its Advertising rule:

1. The rule prohibits both misstatements of material facts and omissions of material facts.²⁶ For example, it prohibits false representations to the public about a savings association’s deposit accounts, including misrepresentations regarding the extent of FDIC insurance coverage.²⁷

²⁶ FHLBB Memorandum R-51a (September 9, 1981), *available at* 1981 FHLBB LEXIS 33.

²⁷ OTS Op. Acting Chief Counsel (September 3, 1993), *available at* 1993 OTS LEXIS 34.

2. The rule prohibits statements that, while technically accurate, would mislead a consumer. For example, it prohibits stating that money can be withdrawn from a passbook account at any time without also indicating that such withdrawals will result in a loss of interest.²⁸

OTS is considering whether to expand its advertising rule by providing more comprehensive guidance. One approach OTS is considering would be to incorporate materials from FTC advertising guides. FTC has issued advertising guides related to bait advertising (16 CFR part 238), the use of the word “free” and similar representations (16 CFR part 251), deceptive pricing (16 CFR part 233), advertising warranties and guarantees (16 CFR part 239), and endorsements and testimonials (16 CFR part 255).²⁹ OTS recognizes, however, that parts of these guides may not directly relate to the provision of financial products and services or be appropriate for a rule.

Issues

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?

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?

²⁸ FHLBB Inter-Office Communication (January 18, 1977), *available at* 1977 FHLBB LEXIS 219. For more information about this rule *see* OTS Examination Handbook section 1355 (December 1999), *available at* www.ots.treas.gov/docs/4/422261.pdf.

²⁹ These FTC guides and other FTC guidance on unfair or deceptive advertising are summarized in a useful FTC publication entitled Advertising Practices, Frequently Asked Questions: Answers for Small Business (April 2001), *available at* www.ftc.gov/bcp/online/pubs/buspubs/ad-faqs.pdf.

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

V. Process for Resolving Questions Concerning Unfair Acts or Practices

OTS recognizes that: (1) no set of principles or standards, no matter how effectively crafted, will lend themselves to an easy determination in every case as to whether a practice would violate a regulation on unfair or deceptive acts or practices; and (2) no established list of acts or practices deemed unfair or deceptive *per se* will ever be complete or current. OTS also recognizes that the overwhelming majority of institutions and the individuals employed by those institutions wish and seek to operate fairly with respect to the products and services they offer to their customers and other consumers.

Furthermore, OTS is keenly aware of the subjectivity and burden involved in applying a set of principals or standards to a set of particular facts in any given case. For this reason, OTS has a longstanding practice whereby institutions (primarily through OTS regional offices) or consumers (primarily through OTS's Consumer Affairs or External Affairs functions) confer with OTS about a particular practice or a program about which they have questions. We expect this process to continue with respect to unfair or deceptive acts and practices questions or concerns.

Executive Order 12866

OTS does not know now whether it will propose changes to its regulations and, if so, whether these changes will constitute a significant regulatory action under Executive Order 12866. This ANPR neither establishes nor proposes any regulatory requirements. OTS has submitted a notice of planned regulatory action to OMB for review. Because this ANPR does not contain a specific proposal, information is not available with which to prepare a regulatory

analysis. OTS will prepare a preliminary regulatory analysis if it proceeds with a proposed rule that constitutes a significant regulatory action.

Accordingly, OTS solicits comment, information, and data on the potential effects on the economy of changes to its regulations that commenters may recommend. OTS will carefully consider the costs and benefits associated with this rulemaking.

Dated:

By the Office of Thrift Supervision,

John M. Reich,
Director.