Proposed Rules

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This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

FEDERAL TRADE COMMISSION

16 CFR Parts 321 and 322

[RIN 3084-AB18]

Advance Notice of Proposed Rulemaking: Mortgage Acts and Practices

AGENCY: Federal Trade Commission (FTC or Commission).

ACTION: Advance Notice of Proposed Rulemaking; request for comment.

SUMMARY: President Obama signed the 2009 Omnibus Appropriations Act on March 11, 2009. Section 626 of the Act directed the Commission to initiate, within 90 days of the date of enactment, a rulemaking proceeding with respect to mortgage loans. To implement the Act, the Commission has commenced a rulemaking proceeding in two parts. This Advance Notice of Proposed Rulemaking (ANPR), the Mortgage Acts and Practices Rulemaking, addresses activities that occur throughout the life-cycle of a mortgage loan, *i.e.*, practices with regard to mortgage loan advertising and marketing, origination, appraisals, and servicing. Another ANPR, the Mortgage Assistance Relief Services Rulemaking, addresses the practices of entities (other than mortgage servicers) who offer assistance to consumers in dealing with owners or servicers of their loans to modify them or avoid foreclosure. The Commission is seeking public comment with regard to the unfair and deceptive acts and practices that should be prohibited or restricted pursuant to any rules adopted in these proceedings. Any rules adopted will apply to entities, other than banks, thrifts, federal credit unions, and non-profits, that are engaged in such unfair and deceptive acts and practices.

DATES: Comments must be received by July 30, 2009.

ADDRESSES: Interested parties are invited to submit written comments electronically or in paper form. Comments should refer to ''Mortgage Acts and Practices Rulemaking, Rule No. R911004'' to facilitate the organization of comments. Please note that comments will be placed on the public record of this proceeding—including on the publicly accessible FTC website, at (*http://www.ftc.gov/os/publiccomments.shtm*)—and therefore should not include any sensitive or confidential information. In particular, comments should not include any sensitive personal information, such as an individual's Social Security Number; date of birth; driver's license number or other state identification number, or foreign country equivalent; passport number; financial account number; or credit or debit card number. Comments also should not include any sensitive health information, such as medical records or other individually identifiable health information. In addition, comments should not include any ''[t]rade secrets and commercial or financial information obtained from a person and privileged or confidential . . .,'' as provided in Section 6(f) of the FTC Act, 15 U.S.C. 46(f), and Commission Rule 4.10(a)(2), 16 CFR 4.10(a)(2). Comments containing material for which confidential treatment is requested must be filed in paper form, must be clearly labeled ''Confidential,'' and must comply with FTC Rule 4.9(c), 16 CFR 4.9(c).[1]

Because paper mail addressed to the FTC is subject to delay due to heightened security screening, please consider submitting your comments in electronic form. Comments filed in electronic form should be submitted by using the following weblink: (*https://secure.commentworks.com/ftc-mortgageactsandpractices*) (and following the instructions on the web-based form). To ensure that the Commission considers an electronic comment, you must file it on the web-based form at the weblink (*https://secure.commentworks.com/ftc-mortgageactsandpractices*). If this Notice appears at (*http://www.regulations.gov/search/index.jsp*), you may also file an electronic comment through that website. The Commission will consider all comments forwarded to it by regulations.gov. You may also visit the FTC website at *http://www.ftc.gov* to read the Notice and the news release describing it.

A comment filed in paper form should include the reference ''Mortgage Acts and Practices Rulemaking, Rule No. R911004'' both in the text of the comment and on the envelope, and should be mailed or delivered to the following address: Federal Trade Commission, Office of the Secretary, Room H-135 (Annex T), 600 Pennsylvania Avenue, NW, Washington, DC 20580. The FTC requests that any comment filed in paper form be sent by courier or overnight service, if possible, because U.S. postal mail in the Washington area and at the Commission is subject to delay due to heightened security precautions.

The FTC Act and other laws administered by the Commission permit the collection of public comments to consider and use in this proceeding as appropriate. The Commission will consider all timely and responsive public comments received, whether filed in paper or electronic form. Comments received will be available to the public on the FTC website, to the extent practicable, at (*http://www.ftc.gov/os/publiccomments.shtm*). As a matter of discretion, the Commission makes every effort to remove home contact information from comments filed by individuals before placing those comments on the FTC website. More information, including routine uses permitted by the Privacy Act, may be found in the FTC's privacy policy, at (*http://www.ftc.gov/ftc/privacy.shtm*).

FOR FURTHER INFORMATION CONTACT: Laura Johnson, Attorney, 202-326-3224, Division of Financial Practices, Federal Trade Commission, 600 Pennsylvania Avenue, NW, Washington, DC 20580.

SUPPLEMENTARY INFORMATION:

I. Background

A. FTC Rulemaking Authority Pursuant to the Omnibus Appropriations Act of 2009

Section 626 of the Omnibus Appropriations Act of 2009[2] requires that, within 90 days of enactment, the FTC initiate a rulemaking proceeding

[1] The comment must be accompanied by an explicit request for confidential treatment, including the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. The request will be granted or denied by the Commission's General Counsel, consistent with applicable law and the public interest. *See* FTC Rule 4.9(c), 16 CFR 4.9(c).

[2] Omnibus Appropriations Act of 2009, Pub. L. No. 111-8, § 626, 123 Stat. 524 (Mar. 11, 2009).

with respect to mortgage loans. Pursuant to the Act, the rulemaking proceeding will be conducted in accordance with the requirements of Section 553 of the Administrative Procedure Act.[3] To implement the Omnibus Appropriations Act of 2009, the Commission has commenced a rulemaking proceeding in two parts.

This ANPR, the Mortgage Acts and Practices (MAP) Rulemaking, addresses activities that occur throughout the life-cycle of a mortgage loan, *i.e.*, practices with regard to mortgage loan advertising and marketing, origination, appraisals, and servicing. Another ANPR, the Mortgage Assistance Relief Services (MARS) Rulemaking, addresses the practices of entities (other than mortgage servicers) who offer assistance to consumers in dealing with owners or servicers of their loans to modify them or avoid foreclosure. Although the Omnibus Appropriations Act of 2009 specifies neither the types of conduct nor the types of entities any proposed rules should address, the Commission has used its organic statute, the FTC Act, in establishing the parameters for this rulemaking.[4] In particular, the types of conduct that the FTC proposes to cover include acts and practices that meet the FTC's standards for unfairness or deception under Section 5 of the FTC Act.[5] In addition, the entities that the FTC intends to cover are those over which the FTC has jurisdiction under the FTC Act—specifically, entities other than banks, thrifts, federal credit unions,[6] and non-profits[7] that engage in the conduct the rules would cover.

Based on its law enforcement experience and the limited scope of current federal regulation, the Commission believes that the servicing of mortgage loans is a topic on which proposed rules may be needed. The FTC, however, also recognizes that proposed rules also may be needed to address acts and practices related to mortgage loan advertising and marketing, origination, and appraisals. The Commission therefore is seeking public comment on whether proposed rules are needed concerning acts and practices throughout the life-cycle of mortgage loans.

The Commission is seeking comments to determine whether certain acts and practices of non-bank financial companies related to mortgage loans are unfair or deceptive under Section 5 of the FTC Act and should be incorporated into a proposed rule. These acts and practices include conduct that the FTC currently could challenge in a law enforcement action as violating Section 5 of the FTC Act. However, the Commission is not seeking comments on statutes that have been enacted and rules that have been issued on these topics. The FTC also specifically is not seeking comments on the Federal Reserve Board's (Board) new rules concerning mortgage loans.[8]

Pursuant to Section 626 of the Omnibus Appropriations Act of 2009, any violation of a rule adopted under that section will be treated as a violation of a rule promulgated pursuant to Section 18 of the FTC Act.[9] Therefore, pursuant to Section 5(m)(1)(A) of the FTC Act,[10] the Commission may seek civil penalties as a remedy for such rule violations. In addition, pursuant to Section 626(b) of the Omnibus Appropriations Act of 2009, a state may bring a civil action, in either state or federal court, to enforce the FTC mortgage loan rules and obtain civil penalties and other relief for violations. Before initiating an enforcement action, the state must notify the FTC, at least 60 days in advance, and the Commission may intervene in the action.

B. FTC Authority Over Mortgage Loans and Other Financial Services

The Commission protects consumers from harmful acts and practices at every stage of the mortgage life-cycle—from the advertisement of mortgages to the collection of mortgage debts. At the early stages of the cycle, the FTC protects consumers from unfair, deceptive, or otherwise unlawful acts and practices of brokers, lenders, and others that advertise or offer mortgages, including entities that market loans on behalf of lenders. At the middle and later stages of the cycle, the agency protects consumers from the unlawful conduct of creditors, mortgage servicing agents, and debt collectors that collect payments from consumers. The Commission also protects consumers from the unlawful acts and practices of those that market credit repair or debt relief services, including entities (other than mortgage servicers) who offer assistance to consumers struggling with mortgage debt in dealing with the owners or servicers of their loans to modify their loans or avoid foreclosure.

The Commission has law enforcement authority over a wide range of acts and practices throughout the consumer credit life-cycle. The agency enforces Section 5 of the Federal Trade Commission Act, which prohibits ''unfair or deceptive acts or practices in or affecting commerce.''[11] The Commission also enforces other consumer protection statutes that govern financial services providers. These include the Truth in Lending Act (TILA),[12] the Home Ownership and Equity Protection Act (HOEPA),[13] the Consumer Leasing Act,[14] the Fair Debt Collection Practices Act (FDCPA),[15] the Fair Credit Reporting Act (FCRA),[16] the Equal Credit Opportunity Act (ECOA),[17] the Credit Repair Organizations Act,[18] the Electronic Funds Transfer Act,[19] the Telemarketing and Consumer Fraud and Abuse Prevention Act,[20] and the privacy

[3] 5 U.S.C. 553. Section 626 of the Omnibus Appropriations Act of 2009 authorizes use of these procedures in lieu of the procedures set forth in Section 18 of the FTC Act, 15 U.S.C. 57a. Note that, because this rulemaking is not undertaken pursuant to Section 18, 15 U.S.C. 57a(f), federal banking agencies are not required to promulgate substantially similar regulations for entities within their jurisdiction. Nonetheless, the Commission plans to consult with the federal banking agencies in this proceeding.

[4] The available legislative history is consistent with the Commission's determination as to the scope of the FTC's rulemaking. *See* 155 Cong. Rec. S2816-S2817 (2009).

[5] 15 U.S.C. 45(a)(1). For a comprehensive description of the FTC's application of its unfairness and deception authority in the context of financial services, see Letter from the FTC staff to John E. Bowman, Chief Counsel of the Office of Thrift Supervision (Dec. 12, 2007), available at (*http://www.ftc.gov/os/2007/12/P084800anpr.pdf*).

[6] 15 U.S.C. 45(a)(2).

[7] 15 U.S.C. 44. Bona fide non-profit entities are exempt from the jurisdiction of the FTC Act. Sections 4 and 5 of the FTC Act confer on the Commission jurisdiction only over persons, partnerships, or corporations organized to carry on business for their profit or that of their members. *See* 15 U.S.C. 44, 45(a)(2).

[8] *See infra* Part I.D.

[9] 15 U.S.C. 57a.

[10] 15 U.S.C. 45(m)(1)(A).

[11] 15 U.S.C. 45(a)(1).

[12] 15 U.S.C. 1601-1666j (mandates disclosures and other requirements in connection with consumer credit transactions).

[13] 15 U.S.C. 1639 (provides protections for consumers entering into certain high-cost mortgage refinance loans).

[14] 15 U.S.C. 1667-1667f (requires disclosures, limits balloon payments, and regulates advertising in connection with consumer lease transactions).

[15] 15 U.S.C. 1692-1692p (prohibits abusive, deceptive, and unfair debt collection practices by third-party debt collectors).

[16] 15 U.S.C. 1681-1681x (imposes standards for consumer reporting agencies and information furnishers; places restrictions on the use of consumer report information). The Fair and Accurate Credit Transactions Act of 2003 amended the FCRA. Pub. L. No. 108-159, 117 Stat. 1952 (2003).

[17] 15 U.S.C. 1691-1691f (prohibits creditor practices that discriminate on the basis of race, religion, national origin, sex, marital status, age, receipt of public assistance, or the exercise of certain legal rights).

[18] 15 U.S.C. 1679-1679j (mandates disclosures and other requirements in connection with credit repair organizations, including a prohibition against charging fees until services are completed).

[19] 15 U.S.C. 1693-1693r (establishes rights and responsibilities of institutions and consumers in connection with electronic fund transfer services).

[20] 15 U.S.C. 6101-6108 (provides consumer protection from telemarketing deception and abuse

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provisions of the Gramm-Leach-Bliley (GLB) Act.[21]

Notwithstanding the Commission's broad authority over acts and practices related to financial services, the FTC does not have jurisdiction over all providers of these services. The FTC Act specifically excludes banks, thrifts, and federal credit unions from the agency's jurisdiction.[22] However, non-bank affiliates of banks, such as parent companies or subsidiaries, are subject to the Commission's jurisdiction.[23] Likewise, the FTC has jurisdiction over entities that have contracted with banks to perform certain services on behalf of banks, such as credit card marketing and other services, but which are not themselves banks.[24] As a result, non-bank entities that provide financial services to consumers are subject to Commission jurisdiction, even if they are affiliated with, or are contracted to perform services for, banking entities.

As discussed above, the Commission intends that any rules that it issues in this proceeding would apply only to the same types of entities over which the Commission has jurisdiction under the FTC Act.

C. Deceptive and Unfair Acts and Practices

1. Deceptive Acts and Practices

Section 5 of the FTC Act broadly proscribes deceptive or unfair acts or practices in or affecting commerce. An act or practice is deceptive if there is a representation, omission of information, or practice that is likely to mislead consumers, who are acting reasonably under the circumstances, and the representation, omission, or practice is one that is material.[25] Injury is likely if the misleading or omitted information is material to consumers, *i.e.*, likely to affect a decision to purchase or use a product or service.

To determine that an act or practice is deceptive, the Commission first must conclude that there is a representation, omission of information, or a practice that is likely to mislead consumers. A claim about a product or service may be either express or implied. An express claim generally is established by the representation itself. An implied claim, on the other hand, is an indirect representation, which must be examined within the context of other information that is either presented or omitted. Deception may occur based on what is stated or because of the omission of information that would be important to the consumer. In determining that an advertisement is deceptive, for example, the Commission considers whether the overall net impression of the ad (including language and graphics) is likely to mislead consumers.[26]

Second, the Commission considers the act or practice from the perspective of a consumer acting reasonably under the circumstances.[27] Reasonableness is evaluated based on the sophistication and understanding of consumers in the group to whom the representation or sales practice is directed. If a specific audience is targeted, the Commission will consider the effect on a reasonable member of that target group. A representation may be susceptible to more than one reasonable interpretation, and if one such interpretation is misleading, the advertisement is deceptive, even if other non-deceptive interpretations are possible.[28]

Third, to conclude that deception has occurred, the Commission must determine that the representation, omission, or practice is material, *i.e.*, one that is likely to affect a consumer's decision to purchase or use a product or service. A deceptive representation, omission, or practice that is material is likely to cause consumer injury—that is, but for the deception, the consumer may have made a different choice.[29] Express claims about a product or service, such as statements about cost, are presumed to be material. Claims about purpose and efficacy of a product or service are also presumed to be material.[30]

2. Unfair Acts and Practices

Section 5(n) of the FTC Act also sets forth a three-part test to determine whether an act or practice is unfair.[31] First, the practice must be one that causes or is likely to cause substantial injury to consumers. Second, the injury must not be outweighed by countervailing benefits to consumers or to competition. Third, the injury must be one that consumers could not reasonably have avoided.

In analyzing whether injury is substantial, the Commission is not concerned with trivial, speculative, or more subjective types of harm. The substantial injury test may be met by small harm to a large number of consumers. In most cases, substantial injury involves monetary harm. Once it determines that there is substantial consumer injury, the Commission considers whether the harm is offset by any countervailing benefits to consumers or to competition. Thus, the Commission considers both the costs of imposing a remedy and any benefits that consumers enjoy as a result of the practice at issue. Finally, the injury must be one that consumers cannot reasonably avoid. If consumers reasonably could have made a different choice that would have avoided the injury, but did not do so, the practice is not deemed to be unfair under the FTC Act.

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and requires the Commission to promulgate implementing rules).

[21] 15 U.S.C. 6801-6809 (requires financial institutions to provide annual privacy notices; provides consumers the means to opt out from having certain information shared with non-affiliated third parties; and safeguards customers' personally identifiable information).

[22] 15 U.S.C. 45(a)(2). The FTC Act defines ''banks'' by reference to a listing of certain distinct types of legal entities. *See* 15 U.S.C. 44, 57a(f)(2). That list includes: national banks, federal branches of foreign banks, member banks of the Federal Reserve System, branches and agencies of foreign banks, commercial lending companies owned or controlled by foreign banks, banks insured by the Federal Deposit Insurance Corporation, and insured state branches of foreign banks.

[23] Congress clarified FTC jurisdiction when it enacted the GLB Act. Section 133(a) of the GLB Act states that an entity that is affiliated with a bank, but which is not itself a bank, is not a bank for purposes of the FTC Act. Section 133(a) of the GLB Act specifically provides:

> CLARIFICATION OF FEDERAL TRADE COMMISSION JURISDICTION. Any person that directly or indirectly controls, is controlled directly or indirectly by, or is directly or indirectly under common control with, any bank or savings association . . . and is not itself a bank or savings association shall not be deemed to be a bank or savings association for purposes of any provisions applied by the Federal Trade Commission under the Federal Trade Commission Act.

Pub. L. No. 106-102, § 133(a), 113 Stat. 1383; 15 U.S.C. 41 note (a). This section has been interpreted to apply to subsidiaries of banks that are not themselves banks. *Minnesota v. Fleet Mortgage Corp.*, 181 F. Supp. 2d 995 (D. Minn. 2001).

[24] *See, e.g.*, *FTC v. CompuCredit Corp.*, Civil Action No. 1:08-CV-01976-BBM-RGV (N.D. Ga. 2008) (approving stipulated final order involving FTC action against entity that contracted to perform credit card marketing services for a bank); *FTC v. Am. Standard Credit Sys.*, 874 F. Supp. 1080, 1086 (C.D. Cal. 1994) (dismissing argument that entity that contracted to perform credit card marketing and other services for a bank is not subject to FTC Act).

[25] Federal Trade Commission Policy Statement on Deception, *appended to In re Cliffdale Assocs.*, 103 F.T.C. 110, 174-84 (1984) (Deception Policy Statement).

[26] Disclaimers or qualifying statements are important to consider for deception analysis. Such disclaimers must be sufficiently clear, prominent, and understandable to convey the qualifying information effectively to consumers. The Commission recognizes that often ''reasonable consumers do not read the entirety of an ad or are directed away from the importance of the qualifying phrase by the acts or statements of the seller.'' Deception Policy Statement at 181. Thus, fine print disclosures at the bottom of a print ad or television screen are unlikely to cure an otherwise deceptive representation.

[27] Deception Policy Statement at 177-81.

[28] *Id.* at 178.

[29] *Id.* at 182-83.

[30] *Novartis Corp. v. FTC*, 223 F.3d 783, 786-87 (D.C. Cir. 2000).

[31] 15 U.S.C. 45(n). Section 5(n) of the FTC Act also provides that ''[i]n determining whether an act or practice is unfair, the Commission may consider established public policies as evidence to be considered with all other evidence.''

In applying its unfairness standard, the Commission takes the approach that well-informed consumers are capable of making choices for themselves. The agency therefore may prohibit or restrict acts and practices if they unreasonably create, or take advantage of, an obstacle to the ability of consumers to make informed choices, thus causing, or being likely to cause, consumer injury.[32]

D. Federal Reserve Board's Rules Concerning Mortgage Loans

In determining the restrictions on mortgage loans that should be included in an FTC proposed rule, it is important to consider the rules related to mortgage loans that the Board issued last year. On July 14, 2008, the Board announced new rules amending several aspects of Regulation Z, which implements TILA and HOEPA.[33] TILA generally requires that creditors and certain advertisers make disclosures to consumers so that they can make better informed credit decisions, including decisions related to mortgages. HOEPA, which amended TILA, imposes substantive restrictions on certain high-priced loans, all of which are subprime loans.[34] Section 105(a) of TILA gives the Board the authority to promulgate rules necessary or proper to carry out TILA's purposes.[35] Section 129(l)(2) of TILA gives the Board the authority to promulgate rules to prohibit ''unfair'' or ''deceptive'' acts and practices in connection with mortgage loans generally. It also gives the Board the authority to promulgate rules to prohibit practices that are ''abusive'' or ''not in the interest of the borrower'' in connection with the refinancing of mortgage loans.[36] The Board used its general authority under Section 105(a) to promulgate some of its new rules and its HOEPA authority under Section 129(l)(2) to promulgate other new rules.[37]

The federal banking agencies and the FTC enforce TILA (including HOEPA) and Regulation Z. TILA specifically provides enforcement authority to the Board (for state member banks of the Federal Reserve System), the Office of the Comptroller of the Currency (OCC) (for national banks), the Federal Deposit Insurance Corporation (FDIC) (for other insured banks), the Office of Thrift Supervision (OTS) (for savings associations), and the National Credit Union Administration (NCUA) (for federal credit unions).[38] TILA provides the FTC with enforcement authority as to all entities that are not specifically committed to another government agency.[39] Thus, the FTC enforces TILA (including HOEPA) and Regulation Z for non-bank financial companies, such as non-bank mortgage companies, mortgage brokers, and finance companies.[40]

The Board's final rules make changes to Regulation Z in what the FTC describes as essentially four parts of the mortgage life-cycle. The rules address acts and practices related to: (1) advertising and marketing; (2) origination (including underwriting, loan terms, and disclosures); (3) appraisals; and (4) servicing. Most of the new rules will take effect on October 1, 2009, although the rules related to escrows do not take effect until 2010.

II. Mortgage Advertising and Marketing

A. Overview

The mortgage life-cycle begins when a consumer initially shops for a mortgage. The consumer may seek out mortgage loan information on his or her own, whether on the Internet or through oral or written contacts with a real estate broker, mortgage lender, mortgage broker, or other source. The consumer also may see or hear more widely disseminated mortgage advertisements through various sources, whether in print (including billboards, direct mailings, emails, and faxes), or through television, radio, the Internet, or other electronic media. The advertiser or marketer may be the creditor itself, or a mortgage broker, real estate broker, lead generator, rate aggregator, or another person or entity.

B. Mortgage Advertising and Marketing Laws the FTC Enforces

The FTC Act requires that claims in advertising and marketing, including claims about mortgage loans, be truthful and non-misleading.[41] Mortgage advertisers are also subject to TILA (including HOEPA) and its implementing Regulation Z, among other laws.[42] In general, TILA and Regulation Z contain four basic requirements for mortgage advertisements.[43] First, an advertisement must reflect terms actually available to the consumer. Second, required disclosures must be made clearly and conspicuously in the advertisement. Third, any advertisement that includes any credit rate must state the annual percentage rate, or ''APR.'' The APR must be stated at least as conspicuously as any other stated rates. Fourth, if any major triggering loan term (*e.g.*, a monthly payment amount) is advertised, other major terms, including the APR, must also be advertised.

In July 2008, the Board issued rules under Regulation Z addressing mortgage advertising issues.[44] Some of these rules apply to closed-end credit, and others apply to open-end home equity plans. The Board's rules take effect on October 1, 2009.

[32] *See* Letter from the FTC to Hon. Wendell Ford and Hon. John Danforth, Committee on Commerce, Science and Transportation, United States Senate, Commission Statement of Policy on the Scope of Consumer Unfairness Jurisdiction (December 17, 1980), *reprinted in In re Int'l Harvester Co.*, 104 F.T.C. 949, 1070, 1073 (1984) (Unfairness Policy Statement). *See also* Trade Regulation Rule Concerning Cooling-Off Period for Sales Made at Homes or at Certain Other Locations, 16 CFR 429 (making it an unfair and deceptive practice for anyone engaged in ''door-to-door'' sales of consumer goods or services with a purchase price of $25 or more to fail to provide buyer with certain oral and written disclosures regarding buyer's right to cancel within three business days); *Holland Furnace Co. v. FTC*, 295 F.2d 302 (7th Cir. 1961) (seller's servicemen dismantled home furnaces then refused to reassemble them until consumers agreed to buy services or replacement parts).

[33] Truth in Lending, 73 FR 44522 (July 30, 2008). This ANPR summarizes the Board's rules, *infra*, but does not provide a full analysis because they are explained in detail in the supplementary information portion of the July 2008 final rule. *See id.*

[34] HOEPA applies to loans that are closed-end, non-purchase money mortgages (such as refinancings or home equity loans) secured by a consumer's principal dwelling (other than a reverse mortgage) where either: (a) the APR at consummation will exceed the yield on Treasury securities of comparable maturity by more than 8 percentage points for first-lien loans, or 10 percentage points for subordinate-lien loans; or (b) the total points and fees payable by the consumer at or before closing exceed the greater of 8 percent of the total loan amount, or $583. *See* 12 CFR 226.32; FRB Regulation Z Official Staff Commentary, 12 CFR 226.32(a), Supp. I (2008); *see also* definition of ''closed-end credit,'' *infra* note 45.

[35] 15 U.S.C. 1604(a).

[36] 15 U.S.C. 1639(l)(2).

[37] The FTC has the authority to obtain civil penalties for violations of the rules that the Board promulgates under its Section 129(l)(2) authority. *See infra* notes 53, 70, 97, and 101 and accompanying text; Omnibus Appropriations Act of 2009 § 626(c); 15 U.S.C. 45(l), 45(m), 1607(c). The FTC does not have the authority to obtain civil penalties for violations of rules the Board promulgates under its Section 105(a) authority. *See infra* notes 46, 48, 55, 57, 81, and 84 and accompanying text. In contrast, the federal banking regulatory agencies may obtain civil penalties from entities under their jurisdiction for any violation of TILA, HOEPA, or Regulation Z. *See* 15 U.S.C. 1607(a); 12 U.S.C. 1786(k), 1818(I).

[38] 15 U.S.C. 1607(a).

[39] 15 U.S.C. 1607(c).

[40] *See* Part I.B, *supra*, for discussion of FTC jurisdiction.

[41] *See* 15 U.S.C. 45; *see also* Part I.C.1, *supra*.

[42] This discussion is not intended as a comprehensive list of all potentially applicable mortgage advertising and marketing laws. Marketers of credit products also may be subject to requirements under laws such as the FCRA—for example, regarding firm offers of credit. The Commission is not seeking comment on FCRA issues in response to this ANPR.

[43] *See, e.g.*, 15 U.S.C. 1661-1665b; 12 CFR 226.16, 226.24.

[44] *See* 73 FR at 44599-602 (to be codified at 12 CFR 226.16, 226.24).

1. Closed-End Credit

Closed-end credit includes a standard mortgage loan in which the proceeds are paid out in full at loan closing.[45] Regarding closed-end credit, the Board made three significant changes to the advertising provisions in Regulation Z. First, the Board strengthened the ''clear and conspicuous'' Regulation Z standards for disclosures of information.[46] The standards vary greatly depending on the type of media used for the advertisement, but generally disclosures about promotional rates and payments must be prominent and appear close to triggering terms.[47]

Second, the Board addressed a variety of practices regarding advertising mortgage rates and payments.[48] For example, mortgage advertisements must not state any rate other than the APR, except that the simple annual rate applied to an unpaid balance may be stated in conjunction with, but not more conspicuous than, the APR.[49] If mortgage advertisements contain limited duration ''teaser'' rates or payment amounts, then the advertisements must also clearly and conspicuously disclose the duration of these rates or payment amounts.[50] The rules prohibit advertisement of rates that are lower than the rate at which interest is accruing (referred to as ''payment rates,'' ''effective rates,'' or ''qualifying rates'') because consumers may not understand these rates.[51] The rules also revise the requirements regarding the disclosures that must be made when any one of certain triggering terms is advertised by clarifying the meaning of the ''terms of repayment'' and adding a new disclosure requirement if a mortgage advertisement states the amount of any payment.[52]

Third, the Board prohibited the following seven specific mortgage advertising claims based on its conclusion that the claims are per se ''misleading or deceptive:''[53]

1. advertising as ''fixed'' a rate or payment that will change after a period of time unless the advertisement meets certain criteria, such as having an equally prominent and closely proximate disclosure that the rate or payment is ''fixed'' for only a limited period of time;
2. comparing actual or hypothetical rates or payments to the rates or payments on an advertised loan unless the advertisement discloses the rates or payments that will apply over the full term of the advertised loan;
3. misrepresenting an advertised loan as being part of a ''government loan program'' or otherwise endorsed or sponsored by a government entity;
4. using the name of the consumer's current lender unless the advertisement has an equally prominent disclosure of the person actually making the advertisement and includes a clear and conspicuous statement that the advertiser is not associated with the consumer's current lender;
5. making any misleading claim that an advertised loan will eliminate debt or result in a waiver or forgiveness of a consumer's existing loan terms with, or obligations to, another creditor;
6. using the term ''counselor'' in an advertisement to refer to a for-profit mortgage broker or mortgage lender; and
7. advertising mortgages in a language other than English while giving critical disclosures only in English.

2. Open-End Home Equity Plans

The Board's new mortgage rules also addressed the advertising of open-end home equity plans,[54] such as home equity lines of credit (HELOCs). Regarding open-end home equity plans, the Board made two significant changes. First, the rules modify Regulation Z's ''clear and conspicuous'' standard.[55] The standards vary greatly depending on the type of media used for the advertisement, but generally disclosures about promotional rates and payments must be prominent and appear close to triggering terms.[56] Second, the rules address a variety of practices regarding advertising rates and payments.[57] Most significantly, the rules add new disclosure requirements for the advertisement of promotional rates and payments.[58] The standards vary greatly depending on the type of media used for the advertisement.[59]

C. FTC Mortgage Advertising and Marketing Law Enforcement

The FTC has brought numerous enforcement actions challenging the conduct of lenders, brokers, and other advertisers of mortgage loans in violation of the FTC Act or the TILA.[60] In most of its mortgage lending cases, the Commission has challenged alleged deception in the advertising or marketing of mortgage loans, with a focus on subprime and non-traditional loans. For example, the Commission has brought actions against mortgage lenders or brokers for alleged deceptive marketing of loan costs[61] or other key loan terms, such as misrepresenting the absence of or failing to adequately disclose the existence of a prepayment penalty[62] or a large balloon payment due at the end of the loan.[63] Most

[45] TILA Section 144 and Regulation Z Section 226.24 govern advertising of ''closed-end credit,'' which is defined as consumer credit other than open-end credit. 15 U.S.C. 144; 12 CFR 226.2(10), 226.24. Open-end credit is credit extended to a consumer under a plan in which: (1) the creditor reasonably contemplates repeated transactions; (2) the creditor may impose a finance charge from time to time on the outstanding unpaid balance; and (3) the amount of credit that may be extended to the consumer during the plan's term is generally made available to the extent that any unpaid balance is repaid. 12 CFR 226.2(20).

[46] *See* 73 FR at 44579-85, 44601-602, 44608-610. The Board promulgated these rules using its authority under TILA Section 105(a).

[47] For example, disclosures in the context of visual text advertisements on the Internet must not be obscured by graphic displays, shading, or coloring. *See id.* at 44581, 44608.

[48] *See id.* at 44581-585, 44601-602, 44608-610. The Board promulgated these rules using its authority under TILA Section 105(a).

[49] *See id.* at 44581, 44601, 44608. The rules prohibit advertisement of a periodic rate, other than the simple annual rate of interest, for credit secured by a dwelling. *Id.*

[50] *See id.* at 44583, 44601-602, 44609-610.

[51] *See id.* at 44581. Payment rates are often featured in option adjustable rate mortgages and various other non-traditional mortgages. A payment rate is used to calculate the consumer's monthly payment amount and is not necessarily the same as the interest rate. If the payment rate is less than the interest rate, the consumer's monthly payment amount does not include the full interest owed each month; the difference between the amount the consumer pays and the amount the consumer owes is added to the total amount due from the consumer. After a specified number of years, or if the loan reaches a negative amortization cap, the required monthly payment amount is recast to require payments that will fully amortize the balance over the remaining loan term, leading to sharply increased payments by the consumer.

[52] *See, e.g., id.* at 44582-585, 44601-602, 44608-610.

[53] *See id.* at 44586-590, 44602, 44610. The Board promulgated these rules using its authority under TILA Section 129(l)(2).

[54] Open-end home equity plans are open-end credit secured by a consumer's dwelling. *See* 12 CFR 226.5b; *see also* definition of ''open-end credit,'' *supra* note 45.

[55] *See* 73 FR at 44574-79, 44599-600, 44605-606. The Board promulgated these rules using its authority under TILA Section 105(a).

[56] For example, disclosures in the context of visual text advertisements on the Internet must not be obscured by graphic displays, shading, or coloring. *See id.* at 44575, 44605.

[57] *See id.* at 44575-579, 44599-600, 44606. The Board promulgated these rules using its authority under TILA Section 105(a).

[58] *See id.* at 44576-579, 44600, 44606.

[59] *See id.*

[60] *See, e.g., FTC v. Mortgages Para Hispanos.Com Corp.*, No. 06-00019 (E.D. Tex. 2006); *FTC v. Ranney*, No. 04-1065 (D. Colo. 2004); *FTC v. Chase Fin. Funding*, No. 04-549 (C.D. Cal. 2004); *FTC v. OSI Fin. Svcs., Inc.*, No. 02-C-5078 (N.D. Ill. 2002); *United States v. Mercantile Mortgage Co.*, No. 02-5079 (N.D. Ill. 2002); *FTC v. Associates First Capital Corp.*, No. 01-00606 (N.D. Ga. 2001); *FTC v. First Alliance Mortgage Co.*, No. 00-964 (C.D. Cal. 2000).

[61] *See, e.g., FTC v. Associates First Capital Corp.*, No. 01-00606 (N.D. Ga. 2001); *FTC v. First Alliance Mortgage Co.*, No. 00-964 (C.D. Cal. 2000).

[62] *FTC v. Chase Fin. Funding*, No. 04-549 (C.D. Cal. 2004); *FTC v. OSI Fin. Svcs., Inc.*, No. 02-C-5078 (N.D. Ill. 2002).

[63] *E.g., FTC v. OSI Fin. Svcs., Inc.*, No. 02-C-5078 (N.D. Ill. 2002); *FTC v. Associates First Capital Corp.*, No. 1:01-CV-00606 (N.D. Ga. 2001).

recently, in February 2009, the Commission announced settlements with three mortgage companies charged with advertising low interest rates and low monthly payments, but allegedly failing to disclose adequately that the low rates and payment amounts would increase substantially after a limited period of time.[64]

III. Mortgage Origination—Underwriting, Loan Terms, and Disclosure Issues

A. Underwriting and Loan Terms

1. Overview

For many years, consumers purchased homes with traditional, fully documented, 30-year, amortizing, fixed-rate or adjustable rate mortgages (ARMs), under which the borrower pays principal and interest each month for the life of the loan. However, over the past decade, there has been an increase in the use of increasingly complex non-traditional, or alternative, mortgage products.[65] Several of these products offer consumers the option of making lower initial monthly payments in the early years of the loan, which makes it easier for some consumers to purchase homes, or to purchase more expensive homes than they might otherwise buy at the time. After the introductory period ends, however, the monthly payments can increase significantly, and some consumers can no longer afford their loans. For example, payment option ARMs do not require that the consumer's initial payments cover the accruing interest. The remaining interest is added to the loan balance, resulting in negative amortization and larger subsequent payments. Interest-only loans require the borrower to pay only the monthly interest due during an initial period, causing the principal balance to remain unchanged. When the initial period expires, the consumer's payments increase to include both principal and interest. In addition, some consumers who use these products are subject to prohibitive prepayment penalties if they refinance their loans.

The growth of these products coincided with the rise of independent brokers originating loans and the ''originate-to-distribute'' model under which lenders immediately sell loans to the secondary market instead of holding them in their portfolios. Because these brokers and lenders are compensated early on in the loan transaction, the incentives do not facilitate diligent underwriting or interest in the long-term performance of loans.[66]

2. Mortgage Origination Laws the FTC Enforces

Mortgage loan originators are subject to numerous federal laws that the FTC enforces.[67] Section 5 of the FTC Act prohibits unfair or deceptive acts or practices in or affecting commerce, including unfair or deceptive mortgage loan origination activities. In addition, mortgage loan originators are subject to disclosure, and other requirements under the TILA (including HOEPA) and its implementing Regulation Z. In July 2008, the Board issued rules under Regulation Z addressing certain mortgage origination issues, including substantive restrictions on underwriting and loan terms.[68] Most of the Board's rules take effect on October 1, 2009, although the rules concerning escrows do not take effect until 2010.

The Board's rules establish a new category of ''higher-priced mortgage loans,'' which effectively includes HOEPA loans and virtually all subprime loans.[69] The Board added four new provisions to Regulation Z that apply to these higher-priced loans, three of which also specifically apply to HOEPA loans.[70] First, creditors are prohibited from making higher-priced loans or HOEPA loans without regard to the borrower's ability to repay the loans.[71] Second, for higher-priced loans or HOEPA loans, creditors must verify the income and assets of borrowers using reliable third-party documents.[72] Third, prepayment penalties are restricted on higher-priced loans and HOEPA loans. If mortgage payments can change during the first four years of the loan, creditors cannot impose a prepayment penalty. If mortgage payments will not change during the first four years of the loan, creditors can charge a prepayment penalty only if borrowers prepay during the first two years of the loan.[73] Finally, creditors must establish an escrow account for property taxes and homeowner's insurance for first-lien higher-priced mortgage loans.[74]

3. FTC Mortgage Origination Law Enforcement

The FTC's law enforcement program protects consumers in connection with various aspects of their mortgage origination, including those related to mortgage underwriting requirements and loan terms that are restricted or prohibited for HOEPA loans. Some lenders against whom the FTC has taken action [75] allegedly violated HOEPA by engaging in one or more of the following prohibited acts and practices: extending

[64] *See, e.g.*, *In the Matter of American Nationwide Mortgage Company, Inc.*, FTC Dkt. No. C-4249 (Feb.17, 2009); *In the Matter of Shiva Venture Group, Inc.*, FTC Dkt. No. C-4250 (Feb. 17, 2009); *In the Matter of Michael Gendrolis*, FTC Dkt. No. C-4248 (Feb. 17, 2009).

[65] These products include 2/28 and 2/27 ARMs, fixed- and adjustable-rate interest-only loans, payment option ARMs, 40-year fixed-rate mortgages, and 50-year hybrid ARMs. In May 2006, to explore the financial benefits and risks of several alternative mortgage products, the Commission sponsored a day-long public workshop, ''Protecting Consumers in the New Mortgage Marketplace.'' *See* 71 FR 15417 (Mar. 28, 2006) and (*http://www.ftc.gov/bcp/workshops/mortgage/index.html*).

[66] *See* Ben Bernanke, Chairman, Board of Governors of the Federal Reserve System, ''Housing, Housing Finance, and Monetary Policy,'' Remarks at Federal Reserve Bank of Kansas City's Economic Symposium, Jackson Hole, Wyo. (Aug. 31, 2007) *available at* (*http://www.federalreserve.gov/newsevents/speech/bernanke20070831a.htm*).

[67] This discussion is not intended as a comprehensive list of all potentially applicable mortgage origination laws. Mortgage originators also are subject to requirements under laws such as ECOA. *See, e.g.*, *FTC v. Gateway Funding Diversified Mortgage Servs. L.P.*, No. 08-5805 (E.D. Pa. 2008). The Commission is not seeking comments on discrimination and fair lending issues in response to this ANPR.

[68] 73 FR at 44602-604 (to be codified at 12 CFR 226.32, 226.34, 226.35). *See* note 34, *supra*, for definition of HOEPA loans.

[69] ''Higher-priced mortgage loans'' are consumer-purpose, closed-end loans secured by a consumer's principal dwelling and having an APR that exceeds the average prime offer rates for a comparable transaction published by the Federal Reserve Board by at least 1.5 percentage points for first-lien loans, or 3.5 percentage points for subordinate-lien loans. The term excludes initial construction loans, bridge loans for 12 months or less, reverse mortgages, and home equity lines of credit. *See* 73 FR at 44603.

[70] The Board promulgated these rules using its authority under TILA Section 129(l)(2).

[71] The final rules provide that creditors are presumed to have adequately considered ability to pay if they have: (1) verified repayment ability based on reliable third-party documents; (2) determined repayment ability using the ''largest scheduled payment'' of principal and interest in the first seven years of the loan (in the case of variable-rate loans, the applicable rate is the fully-indexed rate as of the date of consummation, not the maximum note rate); and (3) assessed the borrower's repayment ability using a ratio of the borrower's total debt obligations to income, and/or a borrower's residual income (income after paying debt obligations). *See* 73 FR at 44539-551, 44603, 44611-613.

[72] *See id.* at 44546-548, 44603, 44611-612.

[73] *See id.* at 44551-557, 44603-604, 44610-611, 44613.

[74] Borrowers may cancel their escrow accounts 12 months after loan consummation. The requirement for a creditor to establish an escrow account for loans secured by site-built homes becomes effective April 1, 2010; for loans secured by manufactured housing, it becomes effective October 1, 2010. *See id.* at 44557-562, 44604, 44613.

[75] *See, e.g.*, *FTC v. Safe Harbour Found. of Fl., Inc.*, No. 08-1185 (N.D. Ill. 2008); *United States v. Delta Funding Corp.*, No. 00-1872 (E.D.N.Y. 2000) (brought in conjunction with Department of Justice and Department of Housing and Urban Development); *FTC v. NuWest, Inc.*, No. 00-1197 (W.D. Wash. 2000); *FTC v. Capitol Mortgage Corp.*, No. 2-99-CV580G (D. Utah 1999); *FTC v. Cooper*, No. CV 99-07782 WDK (C.D.Cal. 1999); *FTC v. CLS Fin. Servs., Inc.*, No. C99-1215 Z (W.D. Wash. 1999); *FTC v. Granite Mortgage, LLC*, No. 99-289 (E.D. Ky. 1999); *FTC Interstate Resource Corp.*, No. 99 Civ. 5988 (S.D. N.Y. 1999); *FTC v. LAP Fin. Servs., Inc.*, No. 3:99 CV-496-H (W.D. Ky. 1999); *FTC v. Wasatch Credit Corp.*, No. 2-99CV579G (D. Utah 1999).

credit based on the value of consumers' collateral without regard to their repayment ability, charging prepayment penalties, requiring balloon payments, providing negatively amortized loans (causing the loan balance to increase), including provisions to increase the interest rate after default, making direct payments to home improvement contractors, or failing to make required HOEPA disclosures.

B. Mortgage Disclosures

1. Overview, Relevant Federal Laws, and FTC Law Enforcement

Consumers are faced with numerous factors to take into consideration when comparing the terms of various mortgage loans, such as the duration of the loan, the interest rate, whether that rate is fixed or adjustable, the amount of closing costs, and other characteristics such as prepayment penalties and balloon payments. As consumers shop for a mortgage, it is important that they receive timely and understandable information about the terms and costs of the particular products they are trying to analyze and compare. Moreover, for many alternative mortgage products—where the payment schedule may increase substantially in future years, or prepayment penalties may apply—it is important that consumers receive information about their payments and other important loan terms at a time when they can use that material in selecting their preferred loan and terms.

Federal agencies other than the Commission currently have the specific authority to promulgate rules specifying mortgage disclosure requirements. These disclosures are intended to provide consumers with the opportunity to review, understand, and agree to the offered loan terms. The Department of Housing and Urban Development (HUD) has responsibility for disclosure of settlement costs under the Real Estate Settlement Procedures Act (RESPA).[76] The Board also has responsibility for disclosure of certain loan costs under TILA.[77]

Under RESPA, a lender or broker must provide consumers of ''federally related mortgage loans'' [78] with a Good Faith Estimate of Settlement Costs (GFE) within three days of receiving a written application and with a HUD-1 Settlement Statement at closing. The GFE currently is not a standardized form, but it must include an itemization of the estimated costs and services the borrower is likely to incur in connection with the settlement. The HUD-1 shows the actual costs of settlement services for the loan. HUD recently amended RESPA's implementing rules to require new standardized GFE and HUD-1 forms. These new rules take effect on January 1, 2010.[79] The FTC does not have authority to enforce RESPA or its implementing regulations.

In general, under TILA and the Board's implementing Regulation Z, creditors currently must provide disclosures within three days of receiving a consumer's written application for a purchase-money mortgage loan. For non-purchase (*e.g.*, refinance) mortgage loans, the creditor must provide the disclosures prior to loan consummation. The FTC has the authority to enforce TILA's mortgage disclosure requirements for non-bank financial companies. Many of the FTC's law enforcement cases regarding mortgage loans allege that companies have failed to provide, or to provide timely, specific TILA disclosures,[80] including one or more of the following: the amount financed, the finance charge, the APR, the payment schedule, the total of payments, and the fact that the creditor has or will acquire a security interest in the consumer's principal dwelling.

In July 2008, the Board issued new rules under Regulation Z that require transaction-specific, earlier mortgage loan disclosures for closed-end loans secured by a consumer's principal dwelling (including non-purchase money mortgages, such as refinancings, but excluding HELOCs).[81] On the same day, Congress enacted the Mortgage Disclosure Improvement Act of 2008 (MDIA), which amended TILA.[82] The MDIA broadened and added to the Board's new disclosure requirements. The MDIA requirements apply to any closed-end, dwelling-secured loan (including refinancings and loans secured by a dwelling other than the consumer's principal dwelling).[83] Among other things, they require that disclosures include new language, which varies depending on the type of loan (*e.g.*, fixed- or variable-rate). The TILA disclosures must be given to the consumer no later than three business days after the creditor receives the written application and at least seven business days before closing and before the consumer pays a fee to any person (other than for obtaining the consumer's credit history). In addition, if the originally disclosed APR is incorrect, the creditor must provide a corrected disclosure at least three business days before closing. The consumer can waive this waiting period for a ''bona fide personal financial emergency.'' Nevertheless, final disclosures are still required no later than the time of the waiver. Certain aspects of the MDIA's requirements, including the early disclosure changes, take effect on July 30, 2009; other MDIA requirements for variable-rate transactions become effective contingent on the Board's actions. The Board has issued final rules implementing those aspects of the MDIA that become effective on July 30, 2009 and conforming the Board's July 2008 rules regarding disclosures to the requirements of the MDIA.[84]

2. FTC Empirical Testing Regarding Mortgage Disclosures

The Commission has a long history of conducting empirical tests of the efficacy of disclosures relating to financial services.[85] Most recently, in 2007, the FTC's Bureau of Economics published a research report concluding that the current mortgage disclosure requirements do not work and that alternative disclosures should be

[76] 12 U.S.C. 2603-04.

[77] 15 U.S.C. 1604.

[78] This term includes the vast majority of residential purchase money, refinance, and home equity mortgage transactions. *See* 12 U.S.C. 2601 *et seq.*

[79] *See* Real Estate Settlement Procedures Act (RESPA): Rule to Simplify and Improve the Process of Obtaining Mortgages and Reduce Settlement Costs, 73 FR 68204 (Nov. 17, 2008) (to be codified at 24 CFR parts 203 and 3500).

[80] *See, e.g.*, *FTC v. Safe Harbour Found. of Fl., Inc.*, No. 08-1185 (N.D. Ill. 2008); *United States v. Mercantile Mortgage Co.*, No. 02-5079 (N.D. Ill. 2002); *FTC v. Associates First Capital Corp.*, No. 1:01-CV-00606 (N.D. Ga. 2001); *FTC v. First Alliance Mortgage Co.*, No. SA CV 00-694 (C.D. Cal. 2000); *FTC v. NuWest, Inc.*, No. 00-1197 (W.D. Wash. 2000); *FTC v. Capitol Mortgage Corp.*, No. 2-99-CV580G (D. Utah 1999); *FTC v. Granite Mortgage, LLC*, No. 99-289 (E.D. Ky. 1999); *FTC v. LAP Fin. Servs., Inc.*, No. 3:99 CV-496-H (W.D. Ky. 1999); *FTC v. Wasatch Credit Corp.*, No. 2-99CV579G (D. Utah 1999).

[81] *See* 73 FR at 44600-601 (to be codified at 12 CFR 226.17, 226.19). The Board promulgated these rules using its authority under TILA Section 105(a).

[82] Mortgage Disclosure Improvement Act of 2008, Pub. L. 110-289, 122 Stat. 2654 §§ 2501-2503 (July 30, 2008) (enacted in Housing and Economic Recovery Act of 2008); *amended by* Emergency Economic Stabilization Act of 2008, Pub. L. 110-343, 122 Stat. 3765 § 130 (Oct. 3, 2008).

[83] Timeshare plans are subject to some, but not all, of these requirements. *See* MDIA § 2502 (to be codified at 15 U.S.C. 1638(b)(2)(E)); *see also* 11 U.S.C. 101(53D).

[84] *See* Federal Reserve Board, Press Release, Board Approves Final Rules Revising Disclosure Requirements for Mortgage Loans Under Regulation Z (May 8, 2009), (*http://www.federalreserve.gov/newsevents/press/bcreg/20090508a.htm*). For example, the disclosure rules will become effective on July 30, 2009, instead of October 1, 2009. The Board promulgated these rules using its authority under TILA Section 105(a).

[85] *See, e.g.*, Federal Trade Commission, Bureau of Economics Staff Report, ''The Effect of Mortgage Broker Compensation Disclosures on Consumers and Competition: A Controlled Experiment'' (February 2004); Federal Trade Commission, Bureau of Economics Staff Report, ''Survey of Rent-to-Own Customers'' (April 2000).

considered and tested.[86] The study, based on in-depth interviews with several dozen recent mortgage customers and quantitative testing with over 800 mortgage customers, found that: (1) the current federally required disclosures fail to convey key mortgage costs to many consumers, even for relatively simple, fixed-rate, fully-amortizing loans; (2) better disclosures can significantly improve consumer recognition of mortgage costs; (3) both prime and subprime borrowers failed to understand key loan terms when viewing the current disclosures, and both benefitted from improved disclosures; and (4) improved disclosures provided the greatest benefit for more complex loans, for which both prime and subprime borrowers had the most difficulty understanding loan terms.

The results of the FTC staff study indicate that consumers in both the prime and subprime markets would benefit substantially from comprehensive reform of mortgage disclosures that would create a single, comprehensive disclosure of all key costs and terms of a loan, presented in language consumers can easily understand and in a form they can easily use, and provided early in the transaction to aid consumers shopping for the best loans.

IV. Mortgage Appraisals

A. The Role of Appraisals in Mortgage Loans

Mortgage lenders and brokers compete with each other to offer loan products to consumers. Regardless of which entity the consumer initially contacts, during the purchase money or refinance mortgage loan shopping process one of the parties seeks an appraisal [87] to obtain an estimate of the market value of a specific property.[88] Lenders rely on the appraisal to evaluate the collateral that will secure the loan. Brokers obtain an appraisal to shop a complete loan package (including the appraisal) to multiple lenders. Accurate appraisals therefore are important to the integrity of the mortgage lending process.

Several parties to the loan transaction may have an incentive to influence the appraisal valuation process. Borrowers want an appraisal valuation high enough that they can obtain a loan to purchase the property at the sales price. Mortgage brokers want an appraisal valuation high enough for the transaction to occur because they get paid only if the loan is made, and their commissions usually are based on the loan amount. Individual loan officers also want an appraisal valuation high enough for the transaction to occur, particularly if their compensation is tied to overall loan volume or the amount of the loan. Although lenders may have some interest in obtaining an appraisal valuation high enough so that the loan is made (particularly if they immediately sell the loan),[89] they also have a very strong interest in the property being accurately valued to ensure that it provides adequate security for the loan (particularly if they hold the loan in their portfolio).

Appraisers are paid to value property for their customers, who primarily are lenders or mortgage brokers.[90] Some lenders and mortgage brokers may use coercion or pressure appraisers to obtain the valuations they want. To satisfy and retain customers, appraisers have some incentive to provide an appraisal at or above the amount sought. In the face of these incentives, industry self-regulatory and government restrictions have been imposed to protect the independence of appraisers and the integrity of the mortgage lending process.

B. Laws and Standards for Appraisals

Typically, the conduct of appraisers is governed through the Appraisal Foundation and its Uniform Standards of Professional Appraisal Practice (USPAP) guidelines,[91] as well as through various state appraiser licensing and certification laws. These laws primarily address the conduct of appraisers and preparation of appraisals, not the entities that order appraisals, such as mortgage lenders and brokers. The federal bank regulatory agencies have issued appraisal guidance that applies to the entities under their jurisdiction,[92] but there is no equivalent federal guidance for non-bank entities under the FTC's jurisdiction. Nevertheless, the FTC Act prohibits unfair or deceptive acts or practices in or affecting commerce, including unfair or deceptive appraisal activities, whether by non-bank financial companies that order appraisals, or by appraisers under the FTC's jurisdiction. In addition, the FTC enforces TILA, HOEPA, and Regulation Z, among other laws, with regard to non-bank mortgage lenders and brokers that order appraisals.[93]

1. Home Valuation Code of Conduct

On March 3, 2008, the New York Attorney General (NYAG) announced settlement agreements with the Federal Home Loan Mortgage Corporation (Freddie Mac), Federal National Mortgage Association (Fannie Mae), and the Office of Federal Housing Enterprise Oversight (OFHEO).[94] The settlement agreements and corresponding Home

[86] *See* Federal Trade Commission, Bureau of Economics Staff Report, ''Improving Consumer Mortgage Disclosures: An Empirical Assessment of Current and Prototype Disclosure Forms'' (June 2007), *available at* (*http://www2.ftc.gov/os/2007/06/P025505MortgageDisclosureReport.pdf*). Following up on this research, in 2008 the FTC's Bureau of Economics convened a conference to evaluate how mortgage disclosures could be improved. *See* Federal Trade Commission, ''May 15, 2008 Mortgage Disclosure Conference,'' *available at* (*http://www2.ftc.gov/opa/2008/05/mortgage.shtm*).

[87] This summary does not address automated valuation models, in which computers generate the estimated property value by performing a data analysis using an automated process.

[88] *See* 12 CFR 34.42(a), 225.62(a), 323.2(a), 564.2(a), 722.2(a); Uniform Standards of Professional Appraisal Practice, Definitions, *available at* (*http://commerce.appraisalfoundation.org/html/USPAP2008/USPAP_folder/uspap_foreword/DEFINITIONS.htm*).

[89] *See, e.g.*, Prepared Statement of the Appraisal Institute, American Society of Appraisers, American Society of Farm Managers and Rural Appraisers, and National Association of Independent Fee Appraisers on H.R. 1728 The Mortgage Reform and Anti-Predatory Lending Act Before the H. Comm. on Financial Services, 111th Cong. 5-6 (Apr. 23, 2009), *available at* (*http://www.appraisalinstitute.org/newsadvocacy/downloads/ltrs_tstmny/2009/AI-ASA-ASFMRA-NAIFATestimonyonMortgageReform042309final.pdf*); Joe Eaton, ''The Appraisal Bubble: In Run Up to Real Estate Bust, Lenders Pushed Appraisers to Inflate Values,'' The Center for Public Integrity, Apr. 14, 2009, *available at* (*http://www.publicintegrity.org/investigations/luap/articles/entry/1264*).

[90] Appraisers also are paid to value property for appraisal management companies (AMCs). Typically, AMCs are hired by lenders to provide appraisal and, in some cases, other settlement services. AMCs, in turn, typically develop, and purchase appraisals from, a network of independently contracted appraisers.

[91] The Financial Institutions Reform, Recovery, and Enforcement Act, Pub. L. 101-73, 103 Stat. 183 (1989), requires that real estate appraisals used in conjunction with federally-related transactions be performed in accordance with USPAP.

[92] *See, e.g.*, Proposed Interagency Appraisal and Evaluation Guidelines, 73 FR 69647 (Nov. 19, 2008) (issued jointly by OCC, Board, FDIC, OTS, and NCUA, proposing revisions to Interagency Appraisal and Evaluation Guidelines issued jointly on Oct. 27, 1994); Independent Appraisal and Evaluation Functions (Oct. 28, 2003) (issued jointly by OCC, Board, FDIC, OTS, and NCUA).

[93] This discussion is not intended as a comprehensive list of all potentially applicable mortgage appraisal laws.

[94] *See* New York Attorney General Cuomo Announces Agreement with Fannie Mae, Freddie Mac, and OFHEO (Mar. 3, 2008), (*http://www.oag.state.ny.us/media_center/2008/mar/mar3a_08.html*) (last visited May 18, 2009). At the time of the settlement, OFHEO was the agency within HUD with oversight of Freddie Mac and Fannie Mae. On July 30, 2008, OFHEO staff and other federal agency staff combined to become the Federal Housing Finance Agency (FHFA), a new agency that is no longer part of HUD. *See* About FHFA, (*http://www.fhfa.gov/Default.aspx?Page=4*) (last visited May 18, 2009).

Valuation Code of Conduct (Code) impose various restrictions, prohibitions, and requirements to promote independent appraisals.[95] The primary provisions of the Code address: (1) general appraiser independence safeguards, such as prohibiting specific parties from influencing the appraisal process;[96] (2) timing and cost for the borrower to receive a copy of the appraisal; (3) hiring of appraisers, such as prohibiting third parties (*e.g.*, mortgage brokers) from selecting, retaining, or compensating appraisers; (4) prevention of improper influences on appraisers, such as prohibiting lenders from using an appraisal prepared by an employee of the lender (with certain exceptions) or by an entity that is an affiliate of another entity the lender retained to provide other settlement services in the same transaction (with certain exceptions); (5) establishment of the Independent Valuation Protection Institute to take and review complaints about non-compliance with the Code; and (6) other compliance issues, such as required quality control testing, referrals of appraiser misconduct, and certification that appraisals are obtained in compliance with the Code. As of May 1, 2009, Freddie Mac and Fannie Mae do not purchase single-family home mortgage loans (except government-insured loans) from lenders that do not adopt the Code. Because Freddie Mac and Fannie Mae purchase a significant number of single-family home mortgage loans in the United States, the Code may have a substantial impact on the conduct of appraisers in the mortgage market. The FTC cannot enforce the settlement agreements or Code provisions.

[95] The parties to the settlement requested public comment on the original Code that was proposed in March 2008. The FTC staff submitted a comment to Freddie Mac to convey its concerns about aspects of the proposed Code. Letter from FTC Staff to Senior Vice President, Credit Risk Oversight, Freddie Mac (Apr. 30, 2008), *available at* (*http://www.ftc.gov/opa/2008/05/freddiemac.shtm*) (prepared by the staff of the Office of Policy Planning and the Bureau of Economics). On December 23, 2008, the FHFA (*see supra* note 94) announced that Freddie Mac and Fannie Mae would implement a revised Code, which includes modifications reflecting many comments received, including those of the FTC staff.

[96] Specifically, the Code prohibits any employee, director, officer, or agent of the lender, or other party affiliated in any way with the lender from influencing or attempting to influence the development, reporting, result or review of an appraisal through coercion, extortion, collusion, compensation, inducement, intimidation, bribery, or in any other manner, including but not limited to the several examples provided in the Code.

2. Board's Regulation Z Amendments

As discussed above, in July 2008, the Board issued rules under Regulation Z addressing appraisal issues.[97] In connection with any covered closed-end loan secured by a consumer's principal dwelling, creditors and mortgage brokers, and their affiliates, cannot directly or indirectly coerce, influence, or otherwise encourage an appraiser[98] to misstate or misrepresent the home's value.[99] If a creditor knows or has reason to know, at or before loan consummation, of a violation of the above requirement, the creditor must not extend credit based on that appraisal unless the creditor documents that it acted with reasonable diligence to determine that the appraisal does not materially misstate or misrepresent the home's value. The Board's rules take effect on October 1, 2009.

V. Mortgage Servicing

A. The Role of Mortgage Loan Servicers

Mortgage servicers handle day-to-day duties for those who own mortgage loans. They collect mortgage payments, provide customer service, handle delinquencies (including bankruptcies and foreclosures), and otherwise protect the interests of the loans' owners. The loans' owners may be the original lenders or other investors in the future proceeds of the loans (and can include servicers themselves).

The relationship between mortgage servicers and consumers is vulnerable to abuse. Mortgage servicers typically do not have a customer relationship with homeowners; rather, they work for the loans' owners. Moreover, borrowers cannot shop for a loan based on the quality of servicing, and they have virtually no ability to change servicers if they are dissatisfied. Mortgage servicing rights can be transferred frequently, causing consumers confusion about who owns their loan and where to send their payments.

In addition, servicers have financial incentives to impose fees on consumers. Servicers are compensated in three main ways. First, they receive a fixed fee for each loan, such as a fee based on the unpaid principal balance of the loan. Second, servicers earn ''float'' income from accrued interest between when consumers pay and when those funds are sent to investors. Third, servicers derive ancillary income from charges imposed on consumers, such as late fees or other delinquency-related fees. Thus, a borrower's default can increase a servicer's revenues.

[97] *See* 73 FR at 44604 (to be codified at 12 CFR 226.36). The Board promulgated its appraisal rules using its authority under TILA Section 129(l)(2).

[98] Under the Board's rules, an ''appraiser'' refers to a person who engages in the business of providing assessments of the value of dwellings. It includes persons that employ, refer, or manage appraisers, and affiliates of such persons. *See* 73 FR at 44604. Thus, it includes appraisal management companies.

[99] *See id.* at 44565-568, 44604, 44614. Note that this language used in the Board's rules is similar in concept to, but not the same as, the appraiser independence safeguard language in the NYAG settlement's Code. *See* note 96, *supra* for the Code's language.

For these reasons, it is important that servicers take appropriate care in acquiring and handling consumers' mortgages, including providing consumers with complete and accurate information about fees and other account information. However, the process of acquiring, securitizing, and transferring large volumes of loans on the secondary market has raised concerns about the integrity of consumers' loan information and the mistakes that can occur due to mishandling or lack of documentation. For example, courts have dismissed foreclosure cases against borrowers because the companies failed to show proof of ownership, and the United States Trustee Program has announced an effort to move against mortgage servicers that file false and inaccurate claims in consumer bankruptcy cases. The FTC is also concerned about the servicing of consumers' loans in bankruptcy.

Because of these concerns and because mortgage servicers are the day-to-day contact for many homeowners, the FTC has been active in monitoring the servicing industry for potential abuses. The FTC's experience in this area suggests that there is a need for comprehensive rules with respect to mortgage servicing.

B. Federal Mortgage Servicing Laws

The FTC Act prohibits unfair or deceptive acts or practices in or affecting commerce, including unfair or deceptive mortgage servicing activities. In addition, servicers may be subject to a patchwork of other laws.[100] In July 2008, the Board issued rules under Regulation Z addressing certain mortgage servicing issues.[101] These rules apply to all consumer-purpose, closed-end loans secured by a consumer's principal dwelling. They prohibit mortgage servicers from the

[100] This discussion is not intended as a comprehensive list of all potentially applicable mortgage servicing laws. Mortgage servicers also may be subject to requirements under other laws the FTC enforces, such as the FDCPA and FCRA. The Commission is not seeking comment on FDCPA or FCRA issues in response to this ANPR.

[101] *See* 73 FR at 44604 (to be codified at 12 CFR 226.36). The Board promulgated its servicing rules using its authority under TILA Section 129(l)(2).

following abusive servicing practices: (1) failing to credit a consumer's payment as of the date received (except under specified circumstances); (2) imposing a late fee or delinquency charge when the delinquency is due only to the consumer's failure to include in the current payment a late fee or delinquency charge that was imposed on an earlier payment;[102] and (3) failing to provide an accurate payoff statement to borrowers within a reasonable period of time after it is requested.[103] The Board's rules take effect on October 1, 2009.

In addition, HUD imposes disclosure and other requirements related to servicing under RESPA and its implementing Regulation X.[104] The person who makes the mortgage loan must provide consumers with a servicing disclosure statement, which discloses whether the person intends to transfer the servicing of the loan to another entity at any time and also includes complaint resolution information. Both the transferor servicer and the transferee servicer have disclosure obligations to the consumer about the transfer. Servicers have a duty to respond in a timely manner to qualified written consumer inquiries with a written explanation or clarification that includes specified information. RESPA and Regulation X also regulate servicers regarding escrow accounts, such as requiring annual escrow statements and prohibiting fees for the preparation of escrow account statements. The FTC does not have authority to enforce RESPA or its implementing regulations.

C. FTC Mortgage Servicing Law Enforcement

The FTC has challenged deceptive and unfair practices in the servicing of mortgage loans, addressing core issues such as failing to post payments upon receipt, charging unauthorized fees, and engaging in deceptive or abusive debt collection tactics.[105] For example, in November 2003, the Commission, along with HUD, announced settlements with one of the country's largest third-party subprime loan servicers at that time, its parent company, and its founder and former chief executive officer.[106] The Commission alleged that the defendants violated several federal laws, including the FTC Act, FDCPA, and FCRA, by: (1) failing to post consumers' payments upon receipt; (2) charging consumers for unnecessary casualty insurance; (3) assessing illegal late fees and other unauthorized fees in connection with alleged defaults; (4) using dishonest or abusive tactics to collect debts; and (5) reporting consumer payment information that the defendants knew to be inaccurate to credit bureaus.

In addition to requiring the defendants to pay over $40 million to redress consumer injury, the settlements enjoin the defendants from future law violations and impose new restrictions on their business practices. Among other things, the settlements:

1. require the defendants to accept partial payments from most consumers and to apply most consumers' mortgage payments first to interest and principal;
2. prohibit the defendants from forcing consumers to buy insurance when they know the consumer has insurance or fail to take reasonable actions to determine whether the consumer has insurance;
3. enjoin the defendants from charging unauthorized fees, and place limits on specific fees;
4. require the defendants to acknowledge, investigate, and resolve consumer disputes in a timely manner;
5. require the defendants to provide timely billing information, including an itemization of fees charged;
6. prohibit the defendants from taking any action toward foreclosure unless they have reviewed the consumer's loan records to verify that the consumer failed to make three full monthly payments, confirmed that the consumer has not been the subject of any illegal practices, and investigated and resolved any consumer disputes;
7. prohibit the defendants from piling on late fees in certain situations;
8. prohibit the defendants from enforcing certain waiver provisions in forbearance agreements that consumers had to sign to prevent foreclosure; and
9. prohibit the defendants from violating the FDCPA, the FCRA, or the RESPA.

The FTC conducted a review of the defendants' compliance with certain aspects of the 2003 settlement.[107] The FTC and defendants negotiated and agreed to several modifications of the settlement.[108] HUD also agreed to these changes, which, among other things, include:

1. a five-year prohibition on marketing optional products, which are products or services that are not required by the consumer's loan (such as home warranties);
2. refunds of optional product fees paid by consumers in certain circumstances;
3. revised limitations on charging attorney fees in a foreclosure or bankruptcy to ensure that consumers receive full disclosures, including the actual amount due if consumers receive estimated attorney fees;[109]
4. refunds for consumers who may have paid foreclosure attorney fees for services that were not actually performed since November 2003;
5. a permanent requirement that consumers be provided with monthly mortgage statements containing important information about their loans; and
6. a requirement that the company revise its monthly mortgage statements based on consumer testing performed by a qualified, independent third party.

In September 2008, the FTC settled charges that another mortgage servicer and its parent violated Section 5 of the FTC Act, the FDCPA, and the FCRA in servicing mortgage loans.[110] Among other practices, the complaint alleged that the defendants: (1) misrepresented the amounts consumers owed; (2) assessed and collected unauthorized fees, such as late fees, property inspection fees, and loan modification fees; and (3) misrepresented that they had a reasonable basis to substantiate their representations about consumers' mortgage loan debts. The complaint further alleged the defendants made harassing collection calls; falsely represented the character, amount, or legal status of consumers' debts; and used false representations and deceptive means to collect on mortgage loans.

In addition to requiring the defendants to pay $28 million to redress consumer injury, the settlement bars the

[102] This practice is commonly referred to as fee ''pyramiding.'' *See* 73 FR 44568-574, 44614.

[103] *See* 73 FR 44568-574, 44604, 44613-44614.

[104] *See* 12 U.S.C. 2605, 2609, 2610; 24 CFR 3500.17, 3500.21.

[105] *See, e.g.*, *FTC v. Capital City Mortgage Corp.*, No. 98-00237 (D.D.C. 1998) (settled in 2005; FTC alleged that defendant mortgage lender and servicer deceptively induced consumers into taking mortgage loans, included false charges in monthly statements, added charges to loan balances, forced consumers to make monthly payments for the entire loan amount while withholding some loan proceeds, and failed to release liens on homes after loans were paid off).

[106] *U.S. v. Fairbanks Capital Corp.*, No. 03-12219 (D. Mass. 2003).

[107] In early 2004, the defendants changed their names to Select Portfolio Servicing, Inc. and SPS Holding Corp.

[108] *FTC v. Select Portfolio Servicing, Inc. (formerly Fairbanks Capital Corp.)*, Civ. No. 03-12219-DPW (D. Mass. 2007) (modified stipulated final order).

[109] The defendant servicer also agreed to conduct reconciliations after payoff or foreclosure and reimburse consumers who may have paid for services that were not actually performed.

[110] *See FTC v. EMC Mortgage Corp.*, No. 4:08-cv-338 (E.D. Tex. Sept. 9, 2008); *see also* Press Release, Federal Trade Commission, Bear Stearns and EMC Mortgage to Pay $28 Million to Settle FTC Charges of Unlawful Mortgage Servicing and Debt Collection Practices (Sept. 9, 2008), available at (*http://www2.ftc.gov/opa/2008/09/emc.shtm*).

defendants from future law violations and imposes new restrictions and requirements on their business practices. Among other things, the settlement:

1. bars the defendants from misrepresenting amounts due or any other loan terms;
2. requires them to possess and rely upon competent and reliable evidence to support claims made to consumers about their loans;
3. bars them from charging unauthorized fees, and places specific limits on property inspection fees even if they are authorized by the contract;
4. prohibits them from initiating a foreclosure action, or charging any foreclosure fees, unless they have reviewed all available records to verify that the consumer is in material default, confirmed that the defendants have not subjected the consumer to any illegal practices, and investigated and resolved any consumer disputes; and
5. prohibits the defendants from violating the FDCPA, FCRA, or TILA.

The settlement further requires defendants to establish and maintain a comprehensive data integrity program to ensure the accuracy and completeness of data and other information that they obtain about consumers' loan accounts, before servicing those accounts. The defendants also are required to obtain periodic assessments over an eight-year period from a qualified, independent, third-party professional, to assure that their data integrity program meets the standards of the order.

VI. Request for Comments

The Commission is seeking comments on a wide range of topics related to mortgage loans, but it is not soliciting views on the merits of current statutory and regulatory schemes applicable to these topics.

The Commission has broad authority over acts and practices related to financial services, but the FTC Act specifically excludes banks, thrifts, and federal credit unions from the agency's jurisdiction. However, non-bank subsidiaries or affiliates of banks are subject to the Commission's jurisdiction. Likewise, the FTC has jurisdiction over entities that perform services on behalf of banks, but which are not themselves banks. As discussed above, the Commission intends that any rules it issues in this proceeding would apply only to the same types of entities over which the Commission has jurisdiction under the FTC Act.

The Commission is seeking comments to determine whether certain acts and practices of non-bank financial companies (such as non-bank mortgage lenders, brokers, appraisers, or servicers) related to mortgage loans are unfair or deceptive under Section 5 of the FTC Act and should be incorporated into a proposed rule. These acts and practices include conduct that the FTC currently could challenge in a law enforcement action as violating Section 5 of the FTC Act. However, the Commission is not otherwise seeking comments on statutes that have been enacted and rules that have been issued. The FTC also specifically is not seeking comments on the Board's new rules.

The FTC invites interested persons to submit written comments on any issue of fact, law, or policy that may bear upon these issues. After examining the comments, the Commission will determine whether and how to incorporate them into a possible proposed rule. The Commission encourages commenters to respond to the specific questions asked. However, commenters do not need to respond to all questions. Please provide explanations for your answers and detailed, factual supporting evidence.

The Commission is particularly interested in receiving comments on the following questions and issues:

A. Mortgage Advertising

1. What types of unfair or deceptive acts and practices, if any, do non-bank financial companies engage in related to advertising and marketing mortgages? For any such act or practice, please answer the following questions:

a. Why is it unfair or deceptive under Section 5 of the FTC Act?

b. Should it be prohibited or restricted? If so, how? For all loans or only certain types of loans? What are the costs and benefits of such prohibitions or restrictions?

c. What would be the effect on competition and consumers if the Commission were to prohibit or restrict non-bank financial companies with respect to the act or practice, but banks, thrifts, and federal credit unions were not similarly prohibited or restricted?

2. Is there any specific information that non-bank financial companies should be required to disclose to prevent unfairness or deception in advertising and marketing mortgages? Identify any such type of information, and for each, please answer the following questions:

a. Why is the failure to disclose the information unfair or deceptive under Section 5 of the FTC Act?

b. Should disclosure be required for all loans or only certain types of loans? What are the costs and benefits of mandating its disclosure?

c. What would be the effect on competition and consumers if the Commission were to require non-bank financial companies to disclose this information, but banks, thrifts, and federal credit unions were not similarly required to do so?

3. What types of unfair or deceptive acts and practices, if any, do non-bank financial companies engage in regarding Internet financial services related to mortgage loans, including but not limited to acts and practices of mortgage rate aggregators that post rate and points charts? For any such act or practice, please answer the following questions:

a. Why is it unfair or deceptive under Section 5 of the FTC Act?

b. Should it be prohibited or restricted? If so, how? For all loans or only certain types of loans? What are the costs and benefits of such prohibitions or restrictions?

c. What would be the effect on competition and consumers if the Commission were to prohibit or restrict non-bank financial companies with respect to the act or practice, but banks, thrifts, and federal credit unions were not similarly prohibited or restricted?

4. Should the FTC incorporate into a proposed rule any of the requirements or prohibitions on acts or practices related to mortgage advertising that the Board promulgated under its TILA Section 105(a) authority, thereby allowing the FTC to obtain civil penalties for any violation of TILA, HOEPA, or Regulation Z, consistent with the authority conferred on federal banking regulatory agencies?[111]

5. Do any recent reports, studies, or research provide data relevant to mortgage advertising rulemaking? If so, please provide or identify such reports, studies, or research.

B. Mortgage Origination—Underwriting, Loan Terms, and Disclosure Issues

6. What types of unfair or deceptive acts and practices, if any, do non-bank financial companies engage in related to mortgage origination? For any such act or practice, please answer the following questions:

a. Why is it unfair or deceptive under Section 5 of the FTC Act?

b. Should it be prohibited or restricted? If so, how? For all loans or only certain types of loans? What are the costs and benefits of such prohibitions or restrictions?

c. What would be the effect on competition and consumers if the Commission were to prohibit or restrict non-bank financial companies with respect to the act or practice, but banks,

[111] *See* note 37, *supra*.

thrifts, and federal credit unions were not similarly prohibited or restricted?

7. Are there features of any non-traditional, or alternative, mortgage loans that are unfair or deceptive? Identify any such feature, and for each, please answer the following questions:

a. Why is it unfair or deceptive under Section 5 of the FTC Act?

b. Should it be prohibited or restricted? If so, how? For all loans or only certain types of loans? What are the costs and benefits of such prohibitions or restrictions?

c. What would be the effect on competition and consumers if the Commission were to prohibit or restrict non-bank financial companies with respect to the feature, but banks, thrifts, and federal credit unions were not similarly prohibited or restricted?

8. Is there any specific information that non-bank financial companies should be required to disclose to prevent unfairness or deception related to the origination of mortgage loans? Identify any such type of information, and for each, please answer the following questions:

a. Why is the failure to disclose the information unfair or deceptive under Section 5 of the FTC Act?

b. Should disclosure be required for all loans or only certain types of loans? What are the costs and benefits of mandating its disclosure?

c. What would be the effect on competition and consumers if the Commission were to require non-bank financial companies to disclose this information, but banks, thrifts, and federal credit unions were not similarly required to do so?

9. Should the FTC incorporate into a proposed rule any of the requirements or prohibitions on acts or practices related to mortgage disclosures that the Board promulgated under its TILA Section 105(a) authority, thereby allowing the FTC to obtain civil penalties for any violation of TILA, HOEPA, or Regulation Z, consistent with the authority conferred on federal banking regulatory agencies?[112]

10. Do any recent reports, studies, or research provide data relevant to mortgage origination rulemaking? If so, please provide or identify such reports, studies, or research.

C. Mortgage Appraisals

11. What types of unfair or deceptive acts and practices, if any, do non-bank financial companies engage in related to mortgage appraisals, including but not limited to engaging or selecting appraisers, ordering appraisals, or performing as appraisers? For any such act or practice, please answer the following questions:

a. Why is it unfair or deceptive under Section 5 of the FTC Act?

b. Should it be prohibited or restricted? If so, how? For all loans or only certain types of loans? What are the costs and benefits of such prohibitions or restrictions?

c. What would be the effect on competition and consumers if the Commission were to prohibit or restrict non-bank financial companies with respect to the act or practice, but banks, thrifts, and federal credit unions were not similarly prohibited or restricted?

12. Is there any specific information that non-bank financial companies should be required to disclose to prevent unfairness or deception related to mortgage appraisals? Identify any such type of information, and for each, please answer the following questions:

a. Why is the failure to disclose the information unfair or deceptive under Section 5 of the FTC Act?

b. Should disclosure be required for all loans or only certain types of loans? What are the costs and benefits of mandating its disclosure?

c. What would be the effect on competition and consumers if the Commission were to require non-bank financial companies to disclose this information, but banks, thrifts, and federal credit unions were not similarly required to do so?

13. Should the FTC incorporate into a proposed rule any of the prohibitions or restrictions on acts or practices related to mortgage appraisals addressed in the NYAG's settlement and Code? Identify any such prohibited or restricted act or practice, and for each, please answer the following questions:

a. Why is it unfair or deceptive under Section 5 of the FTC Act?

b. Should it be prohibited or restricted? If so, how? For all loans or only certain types of loans? What are the costs and benefits of such prohibitions or restrictions?

c. What would be the effect on competition and consumers if the Commission were to prohibit or restrict non-bank financial companies with respect to the act or practice, but banks, thrifts, and federal credit unions were not similarly prohibited or restricted?

14. Do any recent reports, studies, or research provide data relevant to mortgage appraisal rulemaking? If so, please provide or identify such reports, studies, or research.

D. Mortgage Servicing

15. What types of unfair or deceptive acts and practices, if any, do non-bank financial companies engage in related to mortgage servicing? For any such act or practice, please answer the following questions:

a. Why is it unfair or deceptive under Section 5 of the FTC Act?

b. Should it be prohibited or restricted? If so, how? For all loans or only certain types of loans? What are the costs and benefits of such prohibitions or restrictions?

c. What would be the effect on competition and consumers if the Commission were to prohibit or restrict non-bank financial companies with respect to the act or practice, but banks, thrifts, and federal credit unions were not similarly prohibited or restricted?

16. Should the FTC incorporate into a proposed rule any of the prohibitions or restrictions on acts and practices addressed in its settlement orders with mortgage servicers?[113] Identify any such prohibited or restricted act or practice, and for each, please answer the following questions:

a. Why is it unfair or deceptive under Section 5 of the FTC Act?

b. Should it be prohibited or restricted? If so, how? For all loans or only certain types of loans? What are the costs and benefits of such prohibitions or restrictions?

c. What would be the effect on competition and consumers if the Commission were to prohibit or restrict non-bank financial companies with respect to the act or practice, but banks, thrifts, and federal credit unions were not similarly prohibited or restricted?

17. Is there any specific information that non-bank financial companies should be required to disclose, or to disclose in a particular manner (for example, through uniform or model servicing disclosures), to prevent unfairness or deception related to mortgage servicing, such as:

a. information about fees the servicer is authorized to charge under the mortgage contract over the life of the loan; or

b. information about applicable fees the servicer has charged during a specific monthly statement period.

Identify any such type of information, and for each, please answer the following questions:

i. Why is the failure to disclose the information, or to disclose it in a particular manner, unfair or deceptive under Section 5 of the FTC Act?

ii. Should disclosure be required in a particular manner (for example, through uniform or model servicing disclosures)? Should disclosure be required for all loans or only certain

[112] *See id.*

[113] *See* text discussion in Part V.C, *supra.*

types of loans? What are the costs and benefits of mandating its disclosure?

iii. What would be the effect on competition and consumers if the Commission were to require non-bank financial companies to make these disclosures, but banks, thrifts, and federal credit unions were not similarly required to do so?

18. Should the FTC consider prohibiting or restricting as unfair or deceptive certain acts and practices related to mortgage servicing fees or related charges, such as:

a. charging fees not authorized under the mortgage contract;

b. charging fees not authorized by state law;

c. charging for ''estimated'' attorney fees or other fees for services not rendered;

d. charging late fees that are not permitted under the service agreement or that are otherwise improper (other than ''fee pyramiding,'' which is already prohibited under the Board's Regulation Z amendments[114]);

e. failing to disclose and itemize adequately fees in billing statements or other relevant communications with borrowers; or

f. forcing consumers to buy insurance on their homes when the servicer knows or should know that insurance is already in place?

Identify any such act or practice, and for each, please answer the following questions:

i. Why is it unfair or deceptive under Section 5 of the FTC Act?

ii. Should it be prohibited or restricted? If so, how? For all loans or only certain types of loans? What are the costs and benefits of such prohibitions or restrictions?

iii. What would be the effect on competition and consumers if the Commission were to prohibit or restrict non-bank financial companies with respect to the act or practice, but banks, thrifts, and federal credit unions were not similarly prohibited or restricted?

19. Should the FTC consider prohibiting or restricting as unfair or deceptive certain acts and practices related to how mortgage servicers handle payments, amounts owed, or consumer disputes, such as:

a. failing to post payments in a timely and proper manner (beyond the new prohibition under the Board's Regulation Z amendments);

b. mishandling of partial payments or suspense accounts;

c. misrepresentation of amounts owed or other account terms or the status of the account;

d. making claims to borrowers about their loan accounts without a reasonable basis (*i.e.*, lack of substantiation);

e. failing to have a adequate procedures to ensure accuracy of information used to service loans; or

f. failing to maintain and provide adequate customer service to handle disputes?

Identify any such act or practice, and for each, please answer the following questions:

i. Why is it unfair or deceptive under Section 5 of the FTC Act?

ii. Should it be prohibited or restricted? If so, how? For all loans or only certain types of loans? What are the costs and benefits of such prohibitions or restrictions?

iii. What would be the effect on competition and consumers if the Commission were to prohibit or restrict non-bank financial companies with respect to the act or practice, but banks, thrifts, and federal credit unions were not similarly prohibited or restricted?

20. Should the FTC consider prohibiting or restricting as unfair or deceptive certain acts and practices related to how mortgage servicers handle loan performance and loss mitigation issues, such as:

a. taking foreclosure action without first verifying loan information and investigating any disputes;

b. taking foreclosure action without first giving the consumer an opportunity to attend foreclosure counseling or mediation;

c. requiring consumers to release all claims (or other requirements, such as requiring binding arbitration agreements) in connection with loan modifications or other workout agreements/repayment plans; or

d. making loan modifications or other workout agreements/repayment plans without regard to the consumer's ability to repay?

Identify any such act or practice, and for each, please answer the following questions:

i. Why is it unfair or deceptive under Section 5 of the FTC Act?

ii. Should it be prohibited or restricted? If so, how? For all loans or only certain types of loans? What are the costs and benefits of such prohibitions or restrictions?

iii. What would be the effect on competition and consumers if the Commission were to prohibit or restrict non-bank financial companies with respect to the act or practice, but banks, thrifts, and federal credit unions were not similarly prohibited or restricted?

21. Should the FTC consider prohibiting or restricting as unfair or deceptive certain acts and practices related to servicing of mortgage loans in connection with bankruptcy proceedings, such as:

a. failing to disclose fees incurred during a Chapter 13 bankruptcy case and then seeking to collect them from the consumer after discharge/dismissal?

b. filing of proofs of claim or other bankruptcy filings without a reasonable basis (*i.e.*, impose a substantiation requirement beyond Rule 11 of the Federal Rules of Civil Procedure);

c. failing to apply properly payments in bankruptcy to pre-petition/post-petition categories of the consumer's debts; or

d. charging of specific unnecessary or excessive fees in bankruptcy cases (*e.g.*, duplicative attorneys' fees)?

Identify any such act or practice, and for each, please answer the following questions:

i. Why is it unfair or deceptive under Section 5 of the FTC Act?

ii. Should it be prohibited or restricted? If so, how? For all loans or only certain types of loans? What are the costs and benefits of such prohibitions or restrictions?

iii. What would be the effect on competition and consumers if the Commission were to prohibit or restrict non-bank financial companies with respect to the act or practice, but banks, thrifts, and federal credit unions were not similarly prohibited or restricted?

22. Do any recent reports, studies, or research provide data relevant to mortgage servicing rulemaking? If so, please provide or identify such reports, studies, or research.

By direction of the Commission.

Donald S. Clark

Secretary

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FEDERAL TRADE COMMISSION

16 CFR Parts 321 and 322

[RIN 3084-AB18]

Advance Notice of Proposed Rulemaking: Mortgage Assistance Relief Services

AGENCY: Federal Trade Commission (FTC or Commission)

ACTION: Advance Notice of Proposed Rulemaking; request for comment

SUMMARY: President Obama signed the 2009 Omnibus Appropriations Act on March 11, 2009. Section 626 of the Act directed the Commission to initiate, within 90 days of the date of enactment, a rulemaking proceeding with respect to

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[114] *See* note 102, *supra.*