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By electronic delivery to:

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Federal Trade Commission
Office of the Secretary
Room H-135 (Annex W)
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580
https://secure.commentworks.com/ftc-mortgageactsandpractices

Re: Mortgage Acts and Practices Rulemaking, Rule No. R911004; 74 Federal Register 26118 (June 1, 2009).

Ladies and Gentlemen:

The American Bankers Association (ABA)[1] welcomes the opportunity to respond to the Advanced Notice of Proposed Rulemaking issued by the Federal Trade Commission (FTC) regarding whether certain acts and practices of non-bank financial companies are unfair and deceptive under Section 5 of the Federal Trade Commission Act (the FTC Act) and should be incorporated into a proposed rule.

Summary of Comment

ABA supports the FTC's efforts to protect consumers from unfair or deceptive acts committed by non-bank mortgage market participants. ABA and the banking industry are fully supportive of effective consumer protection and believe that abuses in the mortgage lending process will only be solved if gaps in the existing supervisory structure are closed, and unsupervised or minimally supervised participants are subject to an enforcement regime that parallels that of the federally regulated banking system. ABA, however, cautions the FTC to ensure that any rules it promulgates are clearly focused on the identified abuses and their sources and do

[1] The American Bankers Association brings together banks of all sizes and charters into one association. ABA works to enhance the competitiveness of the nation's banking industry and strengthen America's economy and communities. Its members – the majority of which are banks with less than $125 million in assets – represent over 95 percent of the industry's $13.6 trillion in assets and employ over 2 million men and women.

not result in duplicative and potentially conflicting rules applicable to bank-affiliated mortgage lenders, brokers, and servicers already subject to Regulation Z's sweeping proscriptions.

Background

Section 626 of the Omnibus Appropriations Act of 2009 (the Act), which was signed by President Obama on March 11, 2009, directs the FTC to initiate, within 90 days of enactment, "a rulemaking proceeding with respect to mortgage loans" in accordance with section 553 of the Administrative Procedure Act.[2] Following this open-ended legislative directive, the FTC has initiated a rulemaking in two parts by simultaneously issuing two Advance Notices of Proposed Rulemakings (ANPR). This ANPR, the Mortgage Acts and Practices Rulemaking, addresses acts and practices that occur throughout the life cycle of a mortgage loan, practices involving advertising and marketing, origination, appraisals, and servicing.[3] ABA filed comments to the companion ANPR on mortgage assistance relief services on July 15, 2009.

In the absence of direction from the Act as to the type of conduct to address or the entities to cover, the FTC has chosen to rely on the Federal Trade Commission Act (the FTC Act) to establish the parameters for the rulemaking. Thus, the conduct the FTC proposes to cover in the rulemaking includes acts and practices that meet the FTC's standards for unfairness or deception under Section 5 of the FTC Act,[4] and the entities the FTC intends to cover are those over which the FTC has jurisdiction under the FTC Act, entities other than banks, thrifts, federal credit unions, or non-profits.[5] However, because the FTC asserts jurisdiction over the non-bank affiliates of banks, ABA urges the FTC to consult with the federal banking agencies throughout the rulemaking in order to promote effective comparability of the rules and standards.[6]

ABA Supports FTC Efforts to Close Regulatory Gaps.

ABA welcomes the FTC's efforts to protect consumers from unfair or deceptive acts committed by non-bank mortgage market participants. It is well established that the majority of abuses in the mortgage market were not committed by federally supervised banks but by state-licensed mortgage lenders and brokers. As reported by an October 2007 report of the Senate's Joint Economic Committee:

> The expansion of subprime mortgages during the years 2001 through 2006 came, for the most part through a well-defined channel of financial intermediaries. The intermediaries in this channel—brokers, mortgage companies, and the firms that securitize these mortgages and sell them on to the capital markets—had strong incentives to increase the supply of these loans…
>
> The mortgages underwritten by subprime lenders come from many sources, but the overwhelming majority was originated through mortgage

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[2] Omnibus Appropriations Act of 2009, Pub. L. No. 111-8, § 626, 123 Stat. 524 (Mar. 11, 2009).
[3] 74 Fed. Reg. 26118 (June 1, 2009).
[4] 15 U.S.C. §45(a)(1).
[5] 15 U.S.C. §§ 44, 45(a)(2).
[6] *See* 74 Fed.Reg., *supra* at 26119(ABA notes the FTC's statement that it "plans to consult with the federal banking agencies in this proceeding.").

> brokers. For 2006, Inside Mortgage Finance estimates that 63.3 percent of all subprime mortgages came through brokers, with the 19.4 percent coming through retail channels, and the remaining 17.4 percent through correspondent lenders.[7]

Moreover, it is equally clear that regulatory and supervisory gaps led to this concentration. Indeed, Michael Barr, Assistant Secretary for Financial Institutions of the Department of the Treasury, underscored this fact in his July 8, 2009 testimony before the Subcommittee on Commerce, Trade and Consumer Protection of the House Committee on Energy and Commerce, stating:

> Bank and non-bank financial service providers often compete vigorously in the same consumer markets but are subject to two different and uncoordinated federal regimes – one based on examinations and supervision, the other based on after-the-fact investigations and enforcement actions. The lack of federal supervision of non-bank providers is an open invitation to the less responsible actors that seek darker corners to ply their dubious practices. These actors are willing to gamble that the FTC and state agencies lack the resources to detect and investigate them.[8]

ABA has been a consistent supporter of efforts to protect consumers from predatory lending practices and to establish national mortgage lending standards. ABA members recognize that their success or failure, individually and as an industry, depends on prudent underwriting and responsible and efficient service to consumers. Last year, ABA supported the Board of Governors of the Federal Reserve System's (the Board) use of its authority under Sections 105(a) and 129(I)(2) of the Truth-in-Lending Act (TILA) and the Home Ownership and Equity Protection Act (HOEPA) to promulgate new rules to protect borrowers from unfair or deceptive mortgage lending practices as well as to prohibit abusive practices or practices not in the interest of the borrower in connection with mortgage refinancing.[9] Currently, ABA members are engaged in extensive modifications of their mortgage marketing, origination, appraisal, and servicing programs and systems to comply with the Board's amendments to Regulation Z by the October 1, 2009, compliance deadline. Finally, banks, thrifts, and their affiliated mortgage subsidiaries will be regularly examined for their compliance with the amendments to TILA, and the penalties for non-compliance will be severe—including the possibility of bank specific penalties and class action litigation.[10]

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[7] Joint Economic Committee Report and Recommendations "The Subprime Lending Crisis: The Economic Impact on Wealth, Property Values and Tax Revenues, and How We Got Here," 17, (October 25, 2007)(emphasis in original), *available at* http://jec.senate.gov/index.cfm?FuseAction=Reports.Reports&ContentRecord_id=c6627bb2-7e9c-9af9-7ac7-32b94d398d27&Region_id=&Issue_id. *See also* U.S. Department of the Treasury "Financial Regulatory Reform: A New Foundation," 69, (June 2009), *available at* http://www.financialstability.gov/docs/regs/FinalReport_web.pdf ("[T]he Federal Reserve has reported that only six percent of all the higher-priced loans were extended by the CRA-covered lenders to lower income borrowers or neighborhoods in the local areas that are the focus of CRA evaluations.").

[8] Testimony of Assistant Secretary Michael Barr on Consumer Financial Protection Agency Act of 2009 Before the H. Comm. On Energy and Commerce, Subcommittee on Commerce, Trade and Consumer Protection, 111th Cong, 3, (July 8, 2009), *available at* http://energycommerce.house.gov/Press_111/20090708/testimony_barr.pdf

[9] 15 U.S.C. §§ 1604(a), 1639(I)(2).

[10] *See* Testimony of Governor Elizabeth A. Duke on Consumer Protection Before the H. Comm. On Financial Services, Subcommittee on Domestic Monetary Policy and Technology, 111th Cong. (July 16, 2009), *available at* http://www.federalreserve.gov/newsevents/testimony/duke20090716a.htm (describing the Board's 2007 pilot program for on-site reviews of targeted non-bank mortgage lenders).

In contrast, a supervisory system does not exist to examine non-bank mortgage brokers, lenders, and servicers for compliance with the consumer protection laws and regulations. Moreover, non-bank mortgage brokers, lenders, and servicers generally have little or no continuing interest in the loans they originate or the individuals to whom they lend.

Therefore, ABA welcomes the FTC's consideration of rulemaking as a way to close the gaps in mortgage market regulation. We also support granting the FTC enhanced enforcement and supervisory authority to ensure that there are robust consumer protections in place across all mortgage lending and servicing. ABA believes that abuses in the mortgage lending process will only be solved if gaps in the existing supervisory structure are closed, and unsupervised or minimally supervised participants are subject to an enforcement regime that parallels that of the federally regulated banking system.[11]

To Avoid Inconsistencies and Duplication, the FTC Should Consult with the Board throughout this Rulemaking.

ABA, however, has concerns about the breadth and jurisdictional reach of the proposed rulemaking. As previously explained, in 2008 the Board, the federal banking regulator charged with rule writing authority under TILA and HOEPA, engaged in an extensive review of the mortgage lending process, applying its authority under Sections 129(I)(2) and 105(a) of TILA to prohibit unfair or deceptive practices in connection with mortgage lending as well as to prohibit abusive practices or practices not in the interest of the borrower in connection with mortgage refinancing. The resulting amendments to Regulation Z represent a comprehensive effort to protect consumers in the mortgage market from unfair, abusive, or deceptive practices related to what the FTC identifies as the four stages of the mortgage "life-cycle:" advertising and marketing, origination (including underwriting, loan terms and disclosures), appraisals, and servicing.[12] In addition, the new rules apply to "creditors", which term has been defined to encompass insured depository institutions as well as non-federally regulated banks and other lenders.[13]

Despite these sweeping new regulations, in March of 2009, Congress directed to the FTC to initiate "a rulemaking proceeding with respect to mortgage loans." In Section 511 of the Credit Card Accountability Responsibility and Disclosure Act of 2009 (the CARD Act),[14] which amended Section 626(a), Congress clarified that the rulemaking authority "shall not be construed to authorize the Federal Trade Commission to promulgate a rule with respect to an entity that is not subject to enforcement of the Federal Trade Commission."[15] Therefore, any new rules will not apply to banks, thrifts, federal credit unions, or *bona fide* non-profit organizations. However, the FTC asserts

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[11] *See* Testimony of Edward L. Yingling on Behalf of the American Bankers Association Before the Senate Committee on Banking, Housing and Urban Affairs, 111th Cong., 9-10, (July 14, 2009), *available at* http://banking.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=4fc68607-d571-435d-b1a3-6cee97f23713.

[12] 73 Fed. Reg. 44538 (July 30, 2008).

[13] 12 C.F.R. §226.35(b) (Mortgage brokers, however, are not "creditors" under Regulation Z, and therefore, are not directly subject to most of the new regulations. ABA members, however, report that as insured depository institutions subject to regular compliance examinations, they will require their affiliated mortgage brokers to comply with the new disclosure, underwriting, documentation of eligibility, and appraisal regulations.)

[14] Pub. L. 111-24, 123 Stat. 1734, 1763-64.

[15] *Id.*, 123 Stat. at 1764.

jurisdiction "over the non-bank affiliates of banks, such as parent companies or subsidiaries" as well as "entities that have contracted with banks to perform certain services on behalf of banks."[16] Thus, ABA urges the FTC to remain focused in this rulemaking on the gaps in regulatory coverage and to avoid the unintentional imposition of duplicative and potentially inconsistent rules on affiliates of federally regulated institutions and other individuals or entities that contract with depository institutions to provide mortgage-related services.

As recognized by former FTC Chairman Timothy J. Muris, "We are in the midst of a period of unusual government activism,"[17] and care must be taken not to over-react. Muris' general observation on the impact of rulemaking bears repetition here—

> By their nature, however, rules also must apply to legitimate actors, who actually deliver the goods and services they promise. Remedies and approaches that are entirely appropriate for bad actors can be extremely burdensome when applied to legitimate businesses, and there is usually no easy or straightforward way to limit a rule to fraudulent activities. Rather than enhancing consumer welfare, overly burdensome rules can harm the very market processes that serve consumers' interests.[18]

We underscore the need for the FTC to consult with the banking agencies throughout this rulemaking and to focus its efforts on filling *specific* regulatory gaps necessary to ensure that non-bank mortgage market participants are subject to regulation and supervision that parallels in its effectiveness that of the federally supervised financial institutions.

In this same vein, the FTC should give deference to, and engage in discussions with, the Board's most recent proposal for regulating closed-end mortgages and its prescriptions for mortgage brokers and other loan originators.[19]

Specific Comments Related to the Four Stages of the Mortgage Life Cycle.

1. Advertising and Marketing:

The Board's recent amendments to Regulation Z establish two sets of rules, one for closed-end credit secured by a dwelling and the other for open-end home equity plans. With respect to closed-end credit, the Board made three significant changes. Using its Section 105(a) authority[20] to promulgate rules necessary or proper to carry out TILA's authority, the Board strengthened the "clear and conspicuous" standard for disclosure and addressed a variety of practices regarding the

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[16] 74 Fed. Reg. at 26132.

[17] Testimony of Timothy J. Muris before the Senate Committee on Commerce, Science and Transportation, Subcommittee on Consumer Protection, Product Safety, and Insurance, 111th Cong., 16, (July 14, 2009) *available at* http://commerce.senate.gov/public/_files/MurisJuly14Testimony.pdf.

[18] *Id* at 12.

[19] *See* Federal Reserve Board Press Release announcing draft Federal Register Notice of Regulation Z proposal (July 23, 2009), *available at* http://www.federalreserve.gov/boarddocs/meetings/2009/20090723/FR%20Notice%20HELOC.pdf.

[20] 15 U.S.C.§ 1604(a) (Section 105(a) authorizes the Board to adopt regulations to ensure meaningful disclosure of credit terms so that consumers will be able to compare credit terms and avoid the uninformed use of credit. The FTC does not have authority to obtain civil penalties for violations of rules promulgated by the Board pursuant to its Section 105(a) authority).

advertising of mortgage rates and practices.[21] Then, using its Section 129(I)(2) authority,[22] the Board prohibited the use of seven specific mortgage advertising claims based on its conclusion that the claims are *per se* misleading or deceptive.[23]

With respect to open-end home equity plans, the Board made two significant changes—modifying the "clear and conspicuous" standard and adding new disclosure requirements for the advertising of promotional rates and payments. The standards vary significantly depending on the media used for the advertisement. In both instances, the Board acted pursuant to its Section 105(a) authority.

As ABA acknowledged in its written comments submitted in response to the Regulation Z rulemaking, the Board faced a daunting task of ensuring fairness and transparency without turning advertisements into quasi-legal notices. ABA believes that the balance the Board struck—after extensive consumer testing and consideration of more than 4700 comments—was appropriate. Thus, we urge the FTC to resist the temptation to promulgate additional rules in this area, allowing time to determine whether the Board's actions were sufficient to prevent future deceptive mortgage advertising practices.

ABA recommends that the FTC concentrate its efforts on enforcement of the new advertising restrictions and prohibitions with respect to non-bank mortgage originators. To that end, the FTC should limit its action here to incorporating into a proposed rule the restrictions or prohibitions on mortgage advertising acts and practices that the Board promulgated pursuant to its Section 105(a) authority, thereby allowing the FTC to obtain civil penalties for any violations committed by those entities over which it has jurisdiction.

2. Mortgage Origination: Disclosures, Underwriting, and Loan Terms:

ABA agrees with the FTC's statement that

> [C]onsumers 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 a language consumers can understand and in a form they can easily use, and provided early in the transaction to aid consumers shopping for the best loans.[24]

The need for a single mortgage loan disclosure is clear. Unfortunately, the Department of Housing and Urban Development (HUD) acting pursuant to its authority under RESPA has promulgated one set of disclosure requirements and the Board acting under TILA another. ABA, members of Congress, and other mortgage industry trade groups have repeatedly called upon HUD to withdraw its proposed RESPA rule and to commence a joint rulemaking with the Board to produce a single, integrated mortgage loan and settlement cost disclosure form. On July 23, 2009, the Board issued a

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[21] *See* 12 C.F.R. §226.24.

[22] 15 U.S.C. §1639(I)(2)(Section 129(I)(2) authorizes the Board to prohibit acts or practices in connection with mortgage loans or refinancing that the Board finds to be unfair, deceptive, or abusive or that are otherwise not in the interest of the borrower. The FTC has authority to obtain civil penalties for violations of the rules that the Board promulgates under its Section 129(I)(2) authority.)

[23] 12 C.F.R.§226.24

[24] 74 Fed. Reg., *supra*, at 26125.

comprehensive proposal to amend Regulation Z to improve consumer disclosures on closed-end mortgages and home equity lines of credit and simultaneously announced its intention to work with HUD to reconcile the disclosures mandated by TILA and RESPA. ABA is encouraged by these recent positive developments toward the simplification, clarification, and integration of mortgage disclosures. However, we urge the FTC not to proceed with a separate mortgage disclosure rulemaking, but rather to consult with the Board during its TILA rulemaking and with both the Board and HUD during their joint effort to integrate the TILA and RESPA disclosures. We encourage the FTC to share its expertise conducting empirical tests of consumer disclosures as well as the information gained from its 2007 quantitative study of customer understanding of a mortgage transaction.

With respect to underwriting, ABA notes the Board's recent amendments to Regulation Z which establish a new category of "higher-priced loans" and require a creditor to determine and document a borrower's ability to repay the loan. Evaluating a borrower's repayment ability is essential both to consumer protection and safe and sound banking. As discussed previously, the vast majority of federally regulated banks did not engage in subprime lending and considered a borrower's repayment ability an integral component of their underwriting. Too many non-bank mortgage market participants, in contrast, engaged in significantly less cautious—and in many cases fraudulent—underwriting, including underwriting stated income loans in cases where compensating factors were not present and where little or no effort was made to verify income or otherwise address ability to pay issues. Thus, ABA supports the amendments to Regulation Z that will require *all* creditors to evaluate and verify a borrower's ability to repay the loan, and ABA encourages the FTC to enforce rigorously the underwriting rules with respect to non-bank mortgage lenders and brokers. However, we do not believe that additional rules governing underwriting are necessary where enforcement of adequate existing rules will meet the need, and we caution the FTC not to promulgate potentially unnecessary or conflicting regulations. Instead, agency resources should be focused on active enforcement of these uniform standards against creditors within its jurisdiction and outside of the banking agencies' authority.

Finally, in order to maintain consistency with the Board's recent amendments to Regulation Z, ABA encourages the FTC to follow the Board's example of using price to identify a subprime loan rather than the presence of specific loan terms that can be difficult to verify or which can misidentify loans. ABA commends the Board's measured approach to rulemaking—its recognition that by identifying a subprime loan on the basis of price, a rule is more likely to remain relevant over time as creditors introduce new products into the marketplace and as lending practices change. Thus, ABA encourages the FTC to concentrate on enforcement of Regulation Z's restrictions for higher-priced loans, a much more nimble means of addressing unfair and deceptive practices.

3. Appraisals:

ABA also believes that the Board's new appraisal regulations adequately address unfair and deceptive practices arising with respect to appraisal practices. Acting pursuant to its Section 129(I)(2) authority—which expressly provides the FTC with enforcement authority against non-banks—the Board amended Regulation Z to prohibit a creditor or mortgage broker from directly or indirectly coercing, influencing or "otherwise encouraging" an appraiser to misstate or misrepresent the value of a dwelling. In addition, the new amendments impose liability on a creditor if it knows, at or

before settlement, that an appraiser has overstated the value of the property due to coercion, influence, or other encouragement.[25]

Insured depository institutions are subject to these new amendments as well as federal banking agency guidance on appraisal practices, and the Home Valuation Code of Conduct (HVCC) for loans sold to the Federal Home Loan Mortgage Corporation (Freddie Mac) or the Federal National Mortgage Corporation (Fannie Mae). In addition, bank-affiliated appraisal management companies are increasingly subject to state appraisal laws. Non-bank mortgage lenders and brokers, in contrast, are not subject to equivalent federal guidance. ABA urges the FTC to consider whether additional rules are necessary to govern the practices of non-bank mortgage market participants to fill *specific* regulatory gaps.

In response to the FTC's inquiry about whether the Commission should incorporate into a proposed rule any of the prohibitions or restrictions on acts or practices related to mortgage appraisals included in the HVCC, ABA does not believe that the practices addressed in that code (other than appraiser coercion) rise to the level of "unfair and deceptive acts and practices" as those terms are understood within the relevant statutes.

4. Mortgage Servicing:

ABA disagrees with the FTC's characterization of the relationship between mortgage loan servicers and consumers, at least insofar as bank-affiliated mortgage servicers are concerned. The FTC asserts, "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 loan's owners."[26]

As ABA has explained on many occasions and in many forums, banks are in the relationship business. They know that their success and longevity depends on treating customers well and encouraging their customers to continue to see the bank as a source of valuable financial services. Statistics prove that banks are involved in the long term customer business – 73 percent of banks (6,013) have been in existence for more than a quarter century, 62 percent (5,090) have been in business more than a half century, and 31 percent (2,557) for more than a century. Moreover, this responsibility extends to the many affiliated entities that provide particular bank's products and services and are branded with the bank's name and reputation. Bank affiliated mortgage servicers, for example, recognize the importance of their relationships with customers and their responsibility for complying with the consumer protection laws and regulations that apply to them. They take great pains to make their work appear seamless for their customers, because the bank with which they are affiliated wants its borrowers to view the servicing of their loan as an extension of their banking relationship. Consequently, banks place a premium on their servicers acting fairly toward their customers.

ABA supported the Board's recent amendments to Regulation Z because the standards for prompt crediting of payments, prohibiting late fee pyramiding, and providing timely payoff statements are consistent with the business practices of bank-affiliated servicers. ABA counsels the FTC to consider servicing best practices consistently applied by bank-affiliated mortgage servicers before it

[25] 12 C.F.R.§226.36.
[26] 74 Fed. Reg., *supra* at 26126.

considers formulating rules in this area. We urge the FTC to recognize the adage "bad facts make bad law" and resist the temptation to build from the FTC's mortgage servicing enforcement cases UDAP standards that will apply to all mortgage servicers. As appropriate as the Fairbanks order[27] may have been as a remedy for the facts of that particular case, its components should not be imposed as a general industry standard without regard for the differing circumstances that can exist to protect consumer choice and avoid unfair or deceptive practices.

ABA believes that the Board's recent amendments to Regulation Z represent a comprehensive effort to protect consumers in the mortgage market from unfair, abusive, or deceptive practices related to servicing. We believe that the FTC should concentrate on using its enforcement tools to require non-bank servicers to *adhere* to the new regulations. This is a surer path to effective consumer protection than potentially inconsistent and burdensome rulemaking.

Conclusion

ABA appreciates the opportunity to comment on the FTC's advance notice of proposed rulemaking on mortgage acts and practices. If you have any questions about these comments, please contact the undersigned at (202) 663-5073 or via e-mail at voneill@aba.com.

Sincerely,

Virginia O'Neill
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[27] *U.S. v. Fairbanks Capital Corp.,* No. 03-12219 (D. Mass. 2003).