

November 15, 2010

Federal Trade Commission,
Office of the Secretary,
Room H-135 (Annex W),
600 Pennsylvania Avenue, NW,
Washington, DC 20580.

Re: [RIN 3084-AB18] Notice of Proposed Rulemaking: Mortgage Acts and Practices – Advertising Rule

Dear Sir/Madam:

Advocates for Basic Legal Equality wishes to comment on the proposed Rulemaking: Mortgage Acts and Practices – Advertising Rule

Advocates for Basic Legal Equality is a not-for-profit law firm that provides free legal services in civil matters to the low income and elderly who can not afford to pay for a lawyer. We serve 32 counties in Northwestern Ohio, roughly from Dayton to Toledo to Mansfield, from offices in Dayton and Toledo. We work closely with Legal Aid of Western Ohio which serves the same area. We provide assistance in matters of housing, consumer, civil rights and economic opportunity. In particular ABLE is a participant in Ohio's "Save the Dream" program, where we provide legal assistance in order to save the homes of borrowers in foreclosure. We and our predecessor legal services programs have years of experience helping clients who received predatory mortgage loans. We also have long served migrant farmworkers, Hispanics and other immigrants and are familiar with the vulnerabilities of people who have limited proficiency in English.

OHIO'S FORECLOSURE CRISIS

Ohio has been in a foreclosure crisis for years.¹ Bad mortgage loans began in the subprime market and have spread through the economy and eventually plunged the country and the world into an economic downturn, with factories closed and jobs lost, resulting in still more foreclosures. Lost homes destroy families and communities. Vacant houses result in crime, fires,² deteriorating property values and unpaid real estate taxes.³

¹ Since 1995, the number of foreclosure filings has at least quadrupled in all but a few of Ohio's counties and has quintupled statewide. Z. Schiller and A. Hirsh, *Policy Matters Ohio, Foreclosure Growth in Ohio 2009*, available online at <http://www.policymattersohio.org/pdf/ForeclosureGrowthInOhio2009.pdf>. In 2009, there were 89,053 foreclosures filed in Ohio. Of these 21,125 were in our service area, including 4703 foreclosures filed in Montgomery County (Dayton), 4,491 in Lucas County (Toledo), and 1,104 in Clark County (Springfield). 2010 figures have been as high or higher. Dayton's Santa Clara neighborhood is the 9th most vacant in the country at 40.5% vacancies, as reported by the Associated Press <http://www.daytondailynews.com/news/ohio-news/ohio-has-3ohio-has-3-most-vacant-neighborhoods-in-u-s--107025.html>. Several other similar neighborhoods are found in Ohio.

² "5-house fire shows risk posed by vacant homes." Dayton Daily News, August 9, 2010.

³ W. Apgar, M. Duda and R. Gorey, *The Municipal Cost of Foreclosures: A Chicago Case Study*, at <http://www.nw.org/network/neighborworksProgs/foreclosuresolutionsOLD/documents/2005Apgar->

Local communities must therefore cope with higher costs while being less able to adequately fund services such as police, fire and schools.⁴ All levels of government lose revenues and can not fund their necessary activities.

While it is too late for better regulation of mortgages to prevent the current crisis, we hope the FTC's action and other ones by other agencies will prevent future crises from happening.

WE SUPPORT REGULATION OF STATEMENTS MADE IN MORTGAGE ADVERTISING

ABLE supports the mortgage advertising rules. Over the years we have seen numerous clients taken advantage of by dangerous and unsuitable mortgage products. Many, particularly the elderly, had expectations based on the old time locally-based mortgage market that they had grown up with. They had little understanding about the possible effects of adjustable rates, payment option arms and other sophisticated products where small changes in numbers that had historically had small effects on their lives suddenly put them in a position to lose their homes, which were also the center of family and neighborhood lives and their sole wealth-building investment.

Many clients were also subject to sophisticated marketing techniques, often based on purchased mailing lists screening for people who might be in need of refinancing, or personal contact from telemarketers or door to door home repair salespersons. The structure of the mortgage market was such that many in minority communities had few positive experiences borrowing from banks, and had credit histories typical of those with unstable or low wage employment, and were thus particularly vulnerable to the subprime mortgage lenders. These lenders looted low income communities of their present and future home equity and then disappeared when the abuses overcame the market.

These market problems were caused by perverse incentives in a segmented deregulated marketplace, where loan originators such as mortgage brokers, original lenders, ultimate loan holders, ultimate loan servicers, investors in securitization pools and the secondary market players who made this all work, were separate entities, joined together by the ability to make a quick up front profit whether the loan was good or bad, and the lack of meaningful accountability if the loan was bad. These incentives were

[DudaStudy-FullVersion.pdf](#) (2005). Community Research Partners and Rebuild Ohio, *\$60 Million and Counting: The Cost of Vacant and Abandoned Properties to Eight Ohio Cities*, at http://greaterohio.org/rebuildohio/FullReport_Nonembargoed.pdf.

⁴ A study of eight Ohio cities identified nearly \$64 million in costs to local jurisdictions related to vacant and abandoned properties. This included nearly \$15 million in city service costs such as code enforcement, boarding, demolition, maintenance, and police and fire services, and over \$49 million in lost tax revenues from demolitions and tax delinquencies. Community Research Partners and Rebuild Ohio, *\$60 Million and Counting: The Cost of Vacant and Abandoned Properties to Eight Ohio Cities*, at http://greaterohio.org/files/policy-research/FullReport_Nonembargoed.pdf. See also Alan Mallach , Addressing Ohio's Foreclosure Crisis: Taking the next steps, at http://www.brookings.edu/%7E/media/Files/rc/papers/2009/0605_ohio_foreclosure_mallach/0605_ohio_foreclosure_report.pdf

facilitated by devices like yield spread premiums where brokers and lenders split the profits from selling unsuitable loans to unsuspecting and trusting borrowers. While new rules have cut back on this particular device for the time being, industry players are expected to be innovative in thinking of new ways to accomplish the same thing.

The incentives of the marketplace made deception a common practice in order to sell unsuitable loans to people who would not have bought them had they appreciated the dangers to their keeping their homes. The industry took advantage of a vast knowledge gap between sophisticated mortgage insiders and ordinary people. Even business professionals were often taken advantage of in their mortgages.

The abusive mortgage marketplace was facilitated by the lack of meaningful regulation of mortgage sales activities. This allowed dangerous contract terms to be hidden in the piles of paperwork that borrowers had to sign, usually under conditions that were rushed and discouraged review and contemplation. Expert marketers devised ways to push the loan's attractive features such as a lower monthly payment, overcome sales resistance and divert attention from potential disadvantages of the loan.⁵ Expert attorneys took advantage of legal loopholes, "buyer beware" principals and waivers of legal remedies.

We do not believe that as a practical matter it is possible to educate or prepare vast numbers of homeowners to cope with the complex mortgage marketplace in the absence of meaning regulation of deceptive conduct. The public needs to be protected against misrepresentations by all parties to loan transactions at all times. Thus we welcome the FTC's action.

SPECIFIC FEATURES OF THE REGULATION

We welcome the breadth of the regulation. We welcome that all material misrepresentations regarding any term of a credit product are prohibited, and that the list of particular representations is included but not limited to these alone. We welcome the fact that all material misrepresentations, either express or by implication, are covered. It is clear that those intent on deceiving are inventive, and will come up with new ways to take advantage of people as the law catches up with the old ones.

We note that the dynamic of the mortgage market shifted from paying the mortgage over its term (often 30 years) to frequent refinancing which presumed a constant future increase in home values that could be tapped repeatedly for various ongoing living expenses of the borrower, but also a great profit in fees to the finance industry. This shift provided opportunities for deception. Underlying assumptions were

⁵ Psychological research into consumer behavior shows that people process large amount of information by selecting only a few key issues, that they are often overly optimistic about future risks, and that they often rely on personal trust rather than studying difficult legal texts. White Alan M., Behavior and Contract, 27 Minn. J.L. Inequality 135 (Winter 2009); White, Alan M., Risk-Based Mortgage Pricing: Present and Future Research. Housing Policy Debate, Vol. 15, No. 3, 2004. Available at SSRN: <http://ssrn.com/abstract=1012445>

part of “conventional financial wisdom,” such as that people could afford these mortgages or would be “worked with” in troubled times, that mortgage financing resulted in favorable interest and tax treatment, and that home values would always increase and support future refinances. These assumptions turned out to be inaccurate in part due to industry abuse. However many representations expressly or implicitly assumed there would be future refinancing to benefit the borrower. In fact this benevolent refinancing would not necessarily happen in the future. For example, reluctant borrowers were frequently told at closing that if they paid a high cost mortgage for 6 months or a year, they could then refinance it to a more favorable rate.

We are particularly concerned with the use of “bait and switch” tactics. This is a concept pioneered by the FTC decades ago, and was commonly abused in mortgage marketing. People who asked for low fixed rates were told at the last minute that a higher cost adjustable rate loan, perhaps paying off less of their other debt than expected, was the best they could get. We request that you add a provision that the use of bait and switch tactics can be deceptive.

Many of the prohibited representations of §321.3 are things we have seen used against borrowers to their detriment. We commend the FTC for including them. Misstatements and deception we have seen includes:

- Misstatements about the interest rate.
- Misstatements about the total of payments.
- Misstatements about the amount of “cashout” that the borrower will receive;
- Misstatements about what is done with loan proceeds;
- Use of a “teaser rate” that understates the expected effects of rate changes.
- Use of balloon payments that understate the cost of the loan and the possibility of losing one’s home due to inability to finance the balloon payment;
- Understating the effects of adjustable rates;
- Understating the effects of “payment option ARMS” and loans with interest only features;
- Understating loan terms making it likely that the borrower will be unable to pay the loan and lose their home.
- Misstatements about the effects of not escrowing for taxes and insurance, inducing borrowers to believe the loan is cheaper if they do not escrow, when in fact the costs are the same and the borrower is more likely to be unable to pay a lump sum payment for taxes and insurance;
- Misstatements about the benefits of lengthening loan terms and their effects on monthly payments which go down but also the total of payments which goes way up;
- Use of prepayment penalties that increase the cost of refinance in ways not understood by the borrower.
- Misrepresenting the value of the borrower’s home, as by inducing appraisers who wish their employment continued to appraise the home at an amount sufficient to fund the loan.

Misstatements about closing costs and what is done with the money the borrower is paying;

Misrepresenting the effects of multiple or “combo” loans, particularly when one or both contains dangerous features;

Understating the effect of mortgage terms on the borrower’s ability to ever pay off the loan;

Concealing the loss of rights attendant to predispute arbitration agreements

Concealing the possibility that the borrower could get a less expensive loan, when the borrower is presented with a more expensive loan and a yield spread premium results in lender and broker splitting the difference in higher cost;

Behavior at closing to conceal facts about the loan, such as concealing changes in loan terms, or by physically covering over items during signing and/or rushing the borrower to sign.

Misrepresentations concerning the cost and benefits of credit insurance and biweekly payment plans that are sold as add-ons to the loan.

Misrepresentations concerning the effects of reverse mortgages, particularly their use to fund home repairs;

Concealing reasons why the loan is unsuitable to the borrower’s individual situation (adjustable rate mortgage to person on fixed income);

Borrowers being told not to pay their mortgage while a refinance is in process;

Borrowers being told to spend their mortgage payments on home improvements in order to secure a refinance;

Lenders or brokers calling themselves a “bank” or “banc” when they aren’t a bank.

Lenders associating themselves by wording or logo with government programs, HUD, “stimulus” programs, and foreclosure prevention programs.

Representations to the effect that the borrower will be able to fix unwanted loan terms by refinancing later.

Concealment of loan terms by use of English language documents to people known to have limited ability to speak English.

Misrepresentations about loan workouts and loan modifications;

OTHER QUESTIONS

It is most important that no waivers be permitted. §321.3. Mortgage lending is filled with form documents created by industry and anything that can be waived, will be waived. There is never justification for waivers of misrepresentations. Industry should just tell the truth and they won’t have a problem.

We note that many of the entities that had contact with the borrowers were “small businesses” such as local mortgage brokers, who then plugged the borrowers into a system dominated by national or multinational financial institutions and investment banks. It is important that there be no special privilege to deceive and misrepresent because the entity doing so is a “small business.”

We have seen several cases where borrowers with limited English proficiency were told one thing in their native language, but the written contract said something different. In one case this resulted in a near tripling of the mortgage payment. This has happened in mortgages and land contracts, so we do not believe it is limited to any particular type of mortgage or transaction. Given the potential for abuse here and the lack of other legal protections in this situation, we believe the FTC should make it clear that anything that is deceptive when either or both languages or a “mix” of languages is considered should be prohibited by rule.

Thank you for your attention.

Truly yours

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