July 30, 2009

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

Gentlepersons:

Re: Comments in Response to Advance Notice of Proposed Rulemaking Mortgage Acts and Practices, Rule No. R911004

The Mortgage Bankers Association[1] (MBA) appreciates the opportunity to comment on the Advance Notice of Proposed Rulemaking (ANPR) issued by the Federal Trade Commission (Commission) under Section 626 of the 2009 Omnibus Appropriations Act[2] (Act). The rulemaking would address activities that occur throughout the lifecycle of a mortgage loan, *i.e.*, practices with regard to mortgage loan advertising and marketing, origination, appraisals, and servicing.

While MBA appreciates the efforts of the Commission to begin the process of developing rules applicable to certain mortgage lenders, MBA strongly believes that the ANPR should not lead to a rulemaking at this time. The recent rules of the Board of Governors of the Federal Reserve System (the Board) under the Truth in Lending Act (TILA) as amended by the Home Ownership and Equity Protection Act (hereinafter HOEPA rules) cover the same areas which the ANPR addresses and were developed employing the FTC's criteria for unfair and deceptive acts or practices.

The mortgage financing system today is beset by a raft of regulatory changes which are necessitating very substantial costs in time, staffing and infrastructure changes. Ultimately these costs will be borne by consumers. While MBA believes carefully crafted, smart, uniform regulatory improvements can help restore investor and consumer confidence in the nation's lending and financial markets, it also strongly believes that if regulatory solutions are not well-conceived, they risk exacerbating a credit crisis that trillions of public dollars have still not fully resolved.

[1] The Mortgage Bankers Association (MBA) is the national association representing the real estate finance industry, an industry that employs more than 280,000 people in virtually every community in the country. Headquartered in Washington, D.C., the association works to ensure the continued strength of the nation's residential and commercial real estate markets; to expand homeownership and extend access to affordable housing to all Americans. MBA promotes fair and ethical lending practices and fosters professional excellence among real estate finance employees through a wide range of educational programs and a variety of publications. Its membership of over 2,400 companies includes all elements of real estate finance: mortgage companies, mortgage brokers, commercial banks, thrifts, Wall Street conduits, life insurance companies and others in the mortgage lending field. For additional information, visit MBA's Web site: www.mortgagebankers.org.

[2] Pub. L. No. 111-8, 123 Stat. 524 (Mar. 11, 2009).

Under these circumstances, MBA believes it would be both unnecessarily confusing and costly to consumers if the Commission were to make rules on the same subjects as the Board's, just as the Board's rules are being implemented. Moreover, since the Commission's rules will not cover all lenders, they will unnecessarily burden competition and increase costs. Finally, since the law calling on the Board to regulate was enacted, reform proposals have been introduced that would consolidate the Commission's authority in a new regulator. Therefore, there is a very strong possibility that any rules resulting from this rulemaking may be revisited and ultimately replaced, resulting in further unnecessary costs.

MBA believes the Commission should carefully gauge the legislative process before any rules supplementing the Board's are proposed. If the Commission determines to go forward, it should consult carefully with other regulators to examine any regulatory gaps and work in unison with them. Any coordinated rulemaking should be limited only to widespread abuses which are not covered by existing regulations. If the regulators, including the Commission, determine to go forward with rulemaking, it should conduct public hearings on such abuses and follow the Administrative Procedures Act in issuing final regulations.

In these comments, MBA explains this overarching comment and provides comments on mortgage advertising, mortgage origination, mortgage servicing and appraisals in response to the Commission's questions.

I. Background

Section 626 of the Act[3] requires the Commission to initiate a rulemaking proceeding with respect to mortgage loans. To implement the Act, the Commission commenced a rulemaking proceeding in two parts. This ANPR, the Mortgage Acts and Practices Rulemaking, has as its stated purpose to address activities that occur throughout the lifecycle of a mortgage loan, *i.e.*, practices with regard to mortgage loan advertising and marketing, origination, appraisals, and servicing.

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 (non-depositories)--other than banks, thrifts, federal credit unions, and nonprofits – that are engaged in such unfair and deceptive acts and practices. Non-bank affiliates of banks, such as parent companies or subsidiaries, are also subject to the Commission's jurisdiction. Likewise, the Commission has jurisdiction over entities that have contracted with banks to perform certain services on behalf of banks and as a result, nonbank 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. The Commission intends that any rules that it issues in this proceeding would apply only to these entities.

The types of conduct that the Commission proposes to cover include acts and practices that meet the Commission's standards for unfairness or deception under Section 5 of the Federal

[3] Id., § 626.

Trade Commission Act[4] (FTC Act). The Commission is seeking comment on whether proposed rules are needed regarding the acts and practices in these areas and whether any acts or practices are or may become unfair or deceptive throughout the life-cycle of a mortgage loan.

The Commission makes clear that the comments sought should not address statutes that have been enacted and rules that have been issued on these topics. Specifically, the Commission is not seeking comments on the Board's HOEPA rules that become effective October 1, 2009.

As indicated, MBA appreciates that in its ANPR the Commission noted that determining additional restrictions on mortgage loans does require consideration of the Board's HOEPA rules. 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.

Most importantly, TILA as amended by HOEPA gives the Board general authority to carry out TILA's purposes,[5] as well as 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.[6] The Board used these authorities to promulgate its HOEPA rules.

The federal banking agencies and the Commission enforce TILA (including HOEPA) and Regulation Z. TILA specifically provides enforcement authority to the Board, the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation, the Office of Thrift Supervision and the National Credit Union Administration for their respective regulated institutions. TILA also provides the Commission with enforcement authority as to all entities that are not specifically committed to another government agency.[7] The Board's HOEPA rules make changes to Regulation Z in what the Commission 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.

The Commission seeks comment in this ANPR on a number of acts and practices and has outlined a number of specific questions (attached at Appendix 1) dealing with: (1) mortgage advertising; (2) origination; (3) appraisals; and (4) servicing.

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[4] 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*).
[5] 15 U.S.C. 1604(a).
[6] 15 U.S.C. 1639(l)(2).
[7] This enforcement authority essentially covers all nondepository financial institutions.

II. Overarching Comment

MBA appreciates the Commission's recognition that restrictions on mortgage loans that are included in a Commission-proposed rule should consider the HOEPA rules recently promulgated by the Board.[8]

HOEPA does not set forth a standard for what is unfair or deceptive, but the Conference Report on HOEPA indicated that, in determining whether a practice in connection with mortgage loans is unfair or deceptive, the Board should look to the standards employed for interpreting state unfair and deceptive trade practices statutes and the FTC Act, Section 5(a), 15 U.S.C. 45(a).[9] Accordingly, in adopting the HOEPA rules under TILA Section 129(l)(2)(A), 15 U.S.C. 1639(l)(2)(A), the Board considered the standards currently applied to the FTC Act's prohibition against unfair or deceptive acts or practices, as well as the standards applied to similar state statutes.

In light of the subjects covered by the HOEPA rules and the fact that they were arrived at considering the Commission's own standards, MBA believes it would be unnecessarily confusing and costly for consumers if the Commission were to make rules on these same subjects just as the Board's rules are being implemented. In order to avoid these possibilities, MBA believes before any rules supplementing the Board's are promulgated, the Commission should consult carefully with other regulators and work in unison with them.

MBA believes that while this is true in all areas of this ANPR, it is particularly so considering mortgage servicing. Mortgage servicers today face a record number of troubled borrowers and are being asked by the administration and the Congress to move forward at break neck speed to assist them with modifications and workouts so they can keep their homes. An unprecedented number of federal programs and funds are dedicated to this effort. MBA believes that additional rules beyond those already promulgated by the Board, would distract from this effort.

Moreover, since the law calling on the Board to regulate was enacted, reform proposals have been introduced that would consolidate the Commission's authority into a new regulator. There is a very strong possibility, therefore, that any rules resulting from this rulemaking may be revisited and ultimately replaced, resulting in further unnecessary costs.

MBA believes the Commission should carefully gauge the legislative process before any rules supplementing the Board's are proposed. If the Commission determines to go forward in the context of a rulemaking with other regulators, MBA believes any coordinated rulemaking should be limited only to widespread abuses which are not covered by existing regulations. If the regulators, including FTC, determine to go forward with rulemaking, it should conduct public hearings on such abuses and follow the Administrative Procedures Act for issuing final regulations.

The mortgage industry and mortgage consumers today face a patchwork of federal and state laws. Recently, lenders have been faced with implementing the Board's HOEPA rules, rules implementing the Mortgage Disclosure Improvement Act (MDIA), the Board's extensive new

[8] Truth in Lending, 73 FR 44522 (July 30, 2008)
[9] H.R. Rep. 103–652, at 162 (1994) (Conf. Rep.).

TILA disclosure rules, the Department of Housing and Urban Development's (HUD) rules implementing the Real Estate Settlement Procedures Act (RESPA), new government sponsored enterprise appraisal requirements and new Fair Credit Reporting Act rules to name a few. At the same time, lenders (and in some cases servicers) must comply with new licensing and registration requirements under the S.A.F.E. Act, which is spawning a new wave of state legislation.

MBA strongly believes that the patchwork of divergent rules at the federal and state levels, while well intentioned, has unduly burdened competition and increased costs to consumers.

Moreover, considering that the HOEPA rules apply to all lenders -- depository and nondepository -- and that the FTC Act, which the Commission is using to establish the parameters of this ANPR, apply only to entities other than banks, thrifts, federal credit unions, and non-profits, MBA is also concerned that the rules will worsen the regulatory imbalance, undermining competition and ultimately harming the very consumers that the rules seek to serve. MBA believes consumers would be far better served by rigorous, uniform standards.

For these reasons, MBA urges the Commission to work in concert with other regulators, as suggested, in developing rules. Moreover, MBA would also emphasize that enforcement of the rules should be similarly consistent among all regulating entities to avoid divergent opinions on the very same requirements. The mortgage industry and consumers alike should have a clear understanding of what practices are required and prohibited so both enforcement and compliance occur uniformly.

III. MBA's Comments Relative to Specific Areas and Questions in the Proposed Rule

A. Mortgage Advertising

Since the HOEPA rules address unfair and deceptive acts or practices in mortgage advertising, it is unnecessary for the Commission's rules to establish new restrictions at this time while these provisions are being implemented and considering that the rules will only apply to certain participants in the market.

Specifically, as noted in the ANPR, the Board's HOEPA rules established new advertising rules for both open-end home equity plans and closed-end mortgages including applying a "clear and conspicuous" standard. They require that whenever a rate or payment is included in an advertisement for closed-end or open-end credit secured by a dwelling, all rates or payments that will apply over the loan must be disclosed with equal prominence and in close proximity to the advertised rate or payment.

The rules also prohibit advertising any interest rate lower than the rate at which interest is accruing on an annual basis. Additionally, the rules prohibit: (a) advertising fixed-rate loans when payments are fixed only for a limited period of time rather than the full loan term; (b) comparing an actual or hypothetical consumer's current rate or payment to an advertised loan unless the advertisement states the rate or payments over the full term of the advertised loan; (c) falsely advertising loan products as "government" or "government sponsored" or otherwise government endorsed loans programs; (d) prominently displaying the name of a consumer's current lender unless the advertisement also discloses that the advertising lender is not affiliated

with the current lender; (e) advertising claims of debt elimination if the product advertised merely replaces one debt obligation with that of another; (f) advertising that creates a false impression that a mortgage broker or lender has a fiduciary relationship with the consumer; and (g) foreign language advertisements in which certain information such as the teaser rate is provided in a foreign language and other disclosures are only in English.

Considering the breadth of the HOEPA rules on advertising and the fact that the industry is in the process of implementing them, MBA strongly believes that if the Commission is to begin regulation in this area it should only go forward bearing in mind the foregoing comments.

While MBA has long supported much greater transparency in the mortgage process, there are extensive pending revisions to both RESPA and now TILA. Moreover, as part of the HOEPA rules, the Board promulgated changes to disclosures which Congress under the MDIA further supplemented just last year and which are now the subject of a new final rule effective today. MBA believes it would be burdensome and costly for consumers for the Commission to promulgate additional disclosure requirements at this time, again, considering that the rules will only apply only to certain participants in the market.

MBA shares the view expressed in a 2007 report from Commission staff, noted in this ANPR, that consumers would benefit substantially from a comprehensive reform of mortgage disclosures that would create a single comprehensive disclosure of all key costs and terms of a loan. However, MBA has advocated that the best avenue to achieve such reform would be for the Board and HUD to work together consulting with government agencies and members of the public. MBA does not believe that HUD, the Board or the Commission should proceed with reform in a piecemeal fashion. In this connection, we are heartened that in its recent TILA rule, the Board has indicated it will be working with HUD in this direction over the next four months.

It is unclear what if any unfair and deceptive practices exist regarding Internet services beyond those that are covered by the Board's advertising requirements. A fact finding inquiry could determine to what extent if any rulemaking is needed in this area. It is also unclear whether it is necessary for the Commission to incorporate the requirements or prohibitions related to advertising that the Board promulgated under its TILA Section 105(a) authority into the Board's rules, thereby allowing the Commission to obtain civil penalties for any violation of TILA, HOEPA, or Regulation Z, consistent with the authority conferred on federal banking regulatory agencies. The HOEPA rules include remedies for noncompliance and are enforceable by the Commission with respect to all entities that are not committed to another agency. If regulators in consultation believe that additional remedies are necessary, such an approach should be proposed for public comment.

MBA serves as an important repository and analyst of data concerning the mortgage industry and the economy. It will work with the Commission to provide relevant reports, studies, or research regarding mortgage advertising to inform the rulemaking process with respect to mortgage advertising or any other issue mentioned in the ANPR.

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

Since the HOEPA rules address unfair and deceptive acts or practices in mortgage origination, it is not necessary for the Commission's rules to establish new restrictions in this area at this

time. This is particularly so while the Board's rules are being implemented and considering that the Commission's rules would only apply only to certain participants in the market.

The HOEPA rules for the first time require a finding of ability to repay and verification of income and assets. Specifically, the rules prohibit creditors from extending a higher-priced loan or a HOEPA covered loan credit without considering a borrower's ability to repay the loan based on his or her income or assets. These provisions also apply to high-cost HOEPA loans. The rules do not require a showing of pattern or practice to prove a violation.

The rules establish a presumption of compliance where a creditor satisfies three requirements including that it: (1) verify and document repayment ability of a borrower (see below): (2) determine repayment ability using the fully indexed rate and fully amortizing payment, except in certain circumstances, considering taxes and insurance; and (3) assess the consumer's repayment ability using either a ratio of the consumer's total debt obligation to income or the income the consumer will have after paying debt obligations. For variable rate loans, the presumption of compliance generally requires that creditors underwrite to the fully indexed rate – the sum of the index value and margin as of consummation or the initial rate if greater. (The creditor may use a discounted initial rate if the rate is fixed for at least seven years.) The presumption of compliance is not conclusive and can be rebutted by evidence.

The rules generally prohibit creditors from extending credit, for a higher-priced loan or a HOEPA covered loan secured by a consumer's principal dwelling, relying on amounts of income (except for expected income) or assets to assess repayment ability, unless the creditors verify the income and assets with third-party documents that provide reasonably reliable evidence, such as W-2 forms, tax returns, payroll receipts, or financial records.

The rules also prohibit prepayment penalties for any higher priced mortgage or a HOEPA covered loan, where payments can change during the four year period following loan consummation. For all other higher priced loans, where payments do not change for four years, the rules prohibit prepayment penalties that exceed two years from loan consummation and apply to refinancing by the creditor or its affiliate.

The rule requires establishment of escrow accounts for taxes and insurance for at least the first year of a first lien higher-priced mortgage secured by a principal dwelling with the only exception applicable to loans secured by cooperative apartments and certain condominium loans. The rule also permits, but does not require, creditors to offer borrowers an option to cancel escrows once the first year has passed.

Although the original HOEPA rules dropped a proposed requirement that would have prohibited a creditor from paying a mortgage broker more than the amount agreed by the consumer in a prior written agreement with the broker, the new TILA rules would prohibit payments to loan originators including mortgage brokers and lender loan officers based on the rate or terms of loans. The new rules would also prohibit steering.

MBA's comments below address the specific questions raised in the ANPR and incorporated in the attached Appendix A.

MBA does not believe that as a general matter that features of any nontraditional, or alternative, mortgage loans are, by themselves, unfair or deceptive. These products, such as payment option and interest only loans, have provided many borrowers affordable options to purchase homes. Nonetheless, MBA believes it is crucial that the details of these transactions are transparent so borrowers understand the loan's risks and benefits. Recent rulemakings under TILA and RESPA as well as a series of actions by financial regulators address these concerns. As indicated, MBA supports comprehensive reform of the mortgage process including greater transparency for nontraditional loans.

MBA believes competition would be undermined considerably if the Commission were to prohibit or restrict non-bank financial companies with respect to origination, while banks, thrifts, and federal credit unions were outside the purview of such rules. Similarly, competition would be undermined if the Commission were to require only non-bank financial companies to be subject to additional disclosure requirements while banks, thrifts, and federal credit unions were excepted.

MBA does not believe it is necessary at this time for the Commission to 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 Commission to obtain civil penalties for any violation of TILA, HOEPA, or Regulation Z, consistent with the authority conferred on federal banking regulatory agencies.

As indicated above, the HOEPA rules include remedies for noncompliance and are enforceable by the Commission with respect to all entities that are not committed to another agency. If regulators in consultation believe that additional remedies are necessary, such an approach should be proposed for public comment.

C. Mortgage Appraisals

MBA does not believe reputable non-bank financial companies engage in unfair or deceptive acts or practices in relation to appraisals. It is simply not in their interest to incorrectly value the collateral for their loans which they hold in portfolio or which they sell with representations and warranties.

Since the HOEPA rules address unfair and deceptive acts or practices in mortgage appraisals, it is unnecessary for the Commission's rules to establish new restrictions in this area at this time. As the ANPR points out, for all loans, the HOEPA rules prohibit creditors, mortgage brokers and their affiliates from coercing, pressuring or otherwise encouraging appraisers to misstate or misrepresent a dwelling's value, for all closed-end residential loans. Further, the rules prohibit creditors from extending credit if the creditor knew or had reason to know that that an appraiser has been encouraged by the creditor, a mortgage broker or an affiliate of either (including any of their employees) to misstate or misrepresent a principal dwelling's value, unless the creditor acts with reasonable diligence to determine that the appraisal was accurate or extends the credit based on a separate appraisal untainted by coercion.

On December 23, 2008, Fannie Mae and Freddie Mac (the GSEs) finalized a consent agreement with the Federal Housing Finance Agency (FHFA), and the New York Attorney General (NY AG) regarding home appraisals. The result of the agreement is a Home Valuation

Code of Conduct (Code) establishing requirements governing appraisal selection, solicitation, compensation, and conflicts of interest applicable to loans sold to the GSEs. The Code became effective on May 1, 2009.

Any rules in addition to the HOEPA rules would be costly to comply with and offer no apparent benefit. The compliance costs borne by consumers would be substantial. Moreover, since the Commission's rules would prohibit or restrict non-bank financial companies but not banks, thrifts, and federal credit unions, the resultant imbalance would burden competition.

Additionally, there are several reasons why the Commission should not incorporate into a proposed rule any of the prohibitions or restrictions on acts or practices related to mortgage appraisals addressed in the Code. The Code is an imprecise document and real estate sales persons and mortgage brokers are working to modify the agreement and suspend its operation. The provisions already apply to all conventional conforming loans that might be purchased by the GSEs. Finally, rules in this area should be developed on a comprehensive basis in conjunction with other regulators and stakeholders in the appraisal process.

MBA does not believe there is any specific information that non-bank financial companies should be required to disclose to prevent unfairness or deception related to mortgage appraisals. Were the Commission to require non-bank financial companies to disclose this information, but banks, thrifts, and federal credit unions not to do so, such a requirement would also have a deleterious effect on competition.

D. Mortgage Servicing

In the ANPR, the Commission expresses its belief that there is a need for comprehensive rules with respect to mortgage servicing. The Commission bases its conclusion on 1) the need to provide borrowers with a list of fees and other account information; 2) failure by servicers to provide proof of ownership in foreclosure proceedings; and 3) false claims in bankruptcy. Few details, however, are given as to the specific practices that are of concern.

- Regarding fee disclosure, MBA addresses that issue below in the discussion of the Board's HOEPA rules.

- Regarding proof of ownership at foreclosure, MBA has found that some courts are unfamiliar with the uniform commercial code (UCC) and how to address servicers' foreclosing on behalf of equitable owners or holders of mortgage backed-securities. MBA, its members and other entities, such as MERS, have been working with the courts to educate on the concept of "nominees" – a long established UCC concept. Many courts are raising other issues including questioning MERS as mortgagee of record, lost affidavits and lost assignments. These are not new issues. Once courts are provided with sufficient background and information or these cases reach appellate courts, the issues are usually properly resolved. The courts are the appropriate place to handle these issues. MBA does not believe the Commission should address this matter involving the UCC, real estate law and equitable remedies.

- With regard to servicers making proper claims in bankruptcy, that issue is being properly addressed by the U.S. Trustees Program, as the ANPR notes. These issues are very

complex, highly technical and require a specific understanding of the federal bankruptcy code and state exemptions. As in the rest of the judicial system, bankruptcy judges differ in their interpretations of the law. The fact that one judge may deny or question a claim in bankruptcy does not mean that such a claim is "illegal" in all other cases. Given the ongoing work of the U.S. Trustees, we do not believe it is necessary or appropriate for the Commission to issue rules in this area.

Existing Rules and Regulations

In addition to these issues, the ANPR provides a list of other laws and regulations addressing servicers, including the Board's HOEPA rules and RESPA. The Commission also reiterates the causes of action in several previous enforcement settlements with mortgage servicers. In the vast majority of cases, the items listed in the ANPR are already addressed by federal or state law (or are under the jurisdiction of other courts, namely bankruptcy courts).

The Board's HOEPA rules address several servicing practices, rendering it unnecessary for the Commission to address these concerns. These include:

- Crediting payments when received: Under these rules, the Board recognized effective date crediting. Also, the rule does not require servicers to credit partial payments. Whether a payment is a full or partial payment is governed by the loan agreement or promissory note. The nature of an installment loan and amortizing mortgage instrument require full installment payments – a basic component of traditional first mortgage debt. In addition, the Board recognized there are many reasons why a servicer may not be able to credit payments when received, including insufficient information or non-compliant payments. Both are properly addressed in the final rule and balance the concerns of consumers and the realities of efficient servicing. As indicated, we do not believe the Commission needs to act in this area. However, if it chooses to propose rules in this area, its rules should mirror those of the Board to ensure consistent enforcement.

- Imposing a late fee when the only basis is a consumer's failure to include a late fee from a previous delinquency: This has been a long standing prohibition under the ''credit practices rule,'' under section 5 of the FTC Act, 15 U.S.C. 45. *See, e.g.*, 12 CFR 227.15. We are not aware of any servicers engaging in this activity, which is also known as "pyramiding" late fees. However, the HOEPA rules correctly permit servicers to charge late fees each month that the borrower fails to make a timely payment. Given the scope of existing laws and regulations, we do not believe there is any need for Commission action in this area.

- Providing accurate payoff statements within a reasonable time after being requested: Once again the Board balanced the needs of consumers and the industry. The HOEPA rules impose a specific timeline for issuing pay off statements, but also recognize the need for expedited pay-off practices and flexible rules in high volume times. If the Commission chooses to act on this issue, MBA strongly urges that its rules mirror those of the Board.

While the Board's final HOEPA rules lack the proposed rule's provision that would have required a current schedule of servicing fees and charges be given to consumers within a reasonable time after request, the Board points out, as MBA and others asserted, itemizing third-party fees is impracticable. Clearly, the servicer knows what fees it sets within its own company. The

problem is that most fees are generated by third parties, usually governmental entities. These fees are ever-changing and come from bankruptcy courts, recorders offices, city and county offices, taxing authorities and others. While it is true servicers do impose certain third party fees, such as property preservation fees, such fees accrue because of the borrower's failure to comply with building and safety codes. These fees vary with the market and the types of costs. They encompass the range of home repairs and securing functions servicers must perform. Such a list would be massive and would be outdated the moment it is published. The Board recognized this problem and postponed issuing rules on this matter. However, it also indicated plans to reconsider disclosure of fees at a later date.

MBA believes that this issue should remain in the hands of the Board, which has conducted numerous inquires and is continuing to research how best to address this issue. If the Commission determines to regulate in this area, it should coordinate with the Board and other federal banking agencies to ensure consistent rules and enforcement across the agencies.

RESPA

The Commission states that it lacks authority to enforce RESPA or its implementing regulations, which among other things concern the administration of escrow accounts, qualified written requests, servicing transfer notices and disclosures regarding the transfer of mortgage servicing. Given HUD's authority respecting RESPA, we urge the Commission not to publish separate rules that would effectively duplicate, create alternate or higher standards than those required by RESPA for some entities. This would pose significant problems for the industry as entities try to comply with two sets of rules and enforcement actions. The industry is finding it difficult enough to comply with the Board's HOEPA rules that impose mandatory escrows on higher priced loans. Having yet another regulator occupy this space would cause significant compliance burdens and impose additional costs on servicers.

Previous Commission Enforcement Actions

The ANPR restates several settlement agreements resulting from enforcement actions against several mortgage servicers. It appears the intent of this listing is to solicit comments from consumer groups and the public as to the prevalence of such practices today. Unfortunately, the listing also implies that the practices enumerated are illegitimate. Yet, many of the practices as stated in the settlement documents are not illegal, unfair, deceptive or abusive. In fact, when these settlements were reached, MBA and other industry groups pointed out in various communications to the Commission that many of the prohibited practices were supported by the legal instruments, endorsed by government or quasi-government agencies or were consistent with court rulings. The Commission also recognized this fact and responded that enforcement actions are only applicable to the companies subject to the legal action and often result in settlements that restrict legitimate activity as a means to penalize the company for other improper or questionable behavior. Accordingly, we urge the Commission to avoid depicting these agreements as restricting impermissible activities of servicers. The Commission must conduct additional investigation to determine which activities are truly unfair and deceptive.

For example, MBA is surprised that lender-placed insurance continues to be an area of focus. We are not aware of any legitimate complaints around servicers' policies or practices. Servicers notify borrowers in advance of imposing insurance. Borrowers are given a reasonable time to

provide evidence of current insurance and insurers reimburse the borrower for any duplicate insurance. What is not appropriate in any rulemaking is a requirement that servicers track down thousands of borrowers' to ascertain their insurance policies. That is an unfair and unreasonable burden on servicers that results in additional costs to all borrowers.

Borrowers should provide proof of alternate coverage when their policies lapse or cancel. This is done by faxing or mailing a copy of the insurance policy's declarations page to the servicer. This requires little effort for each borrower, but is a tremendous burden when ignored. Given the demands on servicers' resources, such a requirement would further strain existing staff and detract from borrower relief or loss mitigation functions. MBA believes that the Commission's action in this area would not be helpful and is unnecessary.

Also problematic is any determination that servicers must accept and apply partial payments. This was vigorously objected to as an industry practice in proceedings related to the Commission's settlement agreements with Fairbanks Capital Corp. on November 21, 2003 and August 3, 2007. As mentioned above, the settlement requiring the crediting of partial payments was inconsistent with efficient servicing of first lien amortizing loans. Requiring such a practice would simply ignore the entire structure of a home mortgage and the contractual obligations that have existed since the creation of the amortizing home loan. Commission staff from the time of the settlements appeared to agree that the specific requirements of the settlement did not apply to the entire industry.

It is difficult to address all of the remaining areas of concern regarding the Commission's individual settlements, given that some of the enumerated concerns appear to not be truly problematic to the Commission. Were the rulemaking to go forward, we would, therefore, appreciate the opportunity to offer additional and more specific comments. We again request that the Commission take special care in determining whether settlements reached with individual companies should dictate how other mortgage servicers should be regulated. The Commission should focus only on those activities that are truly problematic and that are non-compliant with laws and regulations under the Commission's jurisdiction.

IV. Conclusion

Again, MBA greatly appreciates the opportunity to provide comments to the Commission on the subject rules and would also greatly appreciate the opportunity to work with the Commission on this rulemaking going forward. For questions or further information on these comments, please do not hesitate to contact Ken Markison, MBA Associate Vice President and Regulatory Counsel at kmarkison@mortgagebankers.org or at (202) 557-2930 or Vicki Vidal, Associate Vice President at vvidal@mortgagebankers.org or at (202) 557-2861.

Sincerely,

John Courson
President and Chief Executive Officer
Mortgage Bankers Association

APPENDIX A

Questions Presented In the ANPR

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?**

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

7. **Are there features of any nontraditional, 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?**

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? 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 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 amendments114);
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/postpetition 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.