



NATIONAL ASSOCIATION OF REALTORS®

The Voice For Real Estate®

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President

July 30, 2009

Donald S. Clark
Secretary of the Commission
Federal Trade Commission, Office of the Secretary, Room H-145 (Annex T)
600 Pennsylvania Avenue, NW
Washington, DC 20580

[transmitted electronically to: <https://secure.commentworks.com/ftc-mortgageactsandpractices>]

Attn: Mortgage Acts and Practices Rulemaking, Rule No. R911004

Dear Secretary Clark:

On behalf of the 1.2 million members of the National Association of REALTORS® (NAR), I am pleased to recommend that the Federal Trade Commission (FTC) promulgate a rule to prevent unfair or deceptive acts or practices (UDAP) with respect to mortgage lending activities engaged in by non-bank financial companies such as non-bank mortgage lenders, brokers, appraisers, and servicers.

The National Association of REALTORS®, “The Voice for Real Estate,” is America’s largest trade association, including NAR’s five commercial real estate institutes and its societies and councils. REALTORS® are involved in all aspects of the residential and commercial real estate industries and belong to one or more of some 1,400 local associations or boards, and 54 state and territory associations of REALTORS®.

REALTORS® have a strong stake in preventing abusive lending because:

- Abusive lending erodes confidence in the Nation’s housing system.
- In a credit-driven economy, the legislative and regulatory response to lending abuses can go too far and inadvertently limit the availability of reasonable credit for prime as well as subprime borrowers.
- Abusive lending strips equity from homeowners and harms citizens of communities, including REALTORS®, especially when the irresponsible lenders concentrate their activities on certain neighborhoods and create a downward cycle of economic deterioration that affects the entire community.

I. NAR Supports FTC Rulemaking

NAR believes that borrowers who have demonstrated the financial capacity to meet their mortgage obligations, whether prime or subprime, should continue to have access to mortgage loans made by responsible lenders. Consistent with this principle, NAR has strongly supported the efforts of the federal banking agencies and their state counterparts to address abusive lending practices by issuing the Interagency Guidance on Nontraditional Mortgage Product Risks¹ and the Statement on Subprime Mortgage Lending² (Guidelines). Codifying these principles for non-bank financial companies will provide a level playing field for the mortgage industry and protect consumers across the board.

NAR also believes it is important to apply regulations to non-bank financial companies engaged in mortgage lending activities. One thing we have all learned as abuses in the subprime mortgage market have drawn national attention is that the bad actors seek out the least regulated sectors, allowing them to strip equity from innocent home buyers and home owners.

Too many homeowners and home buyers today are the victims of failure of the free market, the full scope and impact of which remain unclear, even today. Some subprime mortgage originators premised their business plan on a housing market with ever-increasing home prices and repeated refinancings by borrowers seeking to escape unaffordable mortgage payments. Aside from the faulty premise of assuming that home prices only go up, making loans designed to be refinanced multiple times over a short time constitutes equity stripping by generating high fees that are often masked in a new, higher principal amount. Families who could have realized and retained significant home equity and sustainable homeownership if they had been offered a traditional 30-year, fixed rate subprime mortgage now struggle to retain their home and even face foreclosure due to the hybrid adjustable rate mortgage (ARM) product they were sold.

NAR urges the FTC to adopt regulations applicable to mortgage lending activities engaged in by non-bank financial companies such as non-bank mortgage lenders, brokers, appraisers, or servicers. NAR believes that a rule, as it applies to mortgage lending, should include general principles, with specific examples to guide those subject to the rule of the practices to apply and those to avoid. We believe that all who engage in activities related to mortgage origination should act in “good faith and with fair dealings” in a mortgage transaction and treat all parties honestly. NAR encourages the FTC to use such a standard of care as a guiding principle when drafting regulations. Such a standard should not be used to create a new, freestanding federal duty that would be too general and, therefore, too difficult to enforce. High standards are achievable without imposing undue burdens. For example, real estate professionals owe a fiduciary duty to their client or, in the case of dual agency, clients. NAR’s Code of Ethics requires REALTORS® to treat everyone in the transaction honestly.

We offer the following specific recommendations:

1. Affordability. NAR supports strong underwriting standards that require all mortgage originators to verify the borrower's ability to repay the loan based on all its terms, including taxes and insurance, without having to refinance or sell the home.³ Lenders should consider all relevant facts, including the borrower's income, credit history, future income potential, and other life circumstances. Lenders should not make loans to borrowers that make loss of the home through sale or foreclosure likely if the borrower is unable to refinance the mortgage or sell.

¹ 71 Fed. Reg. 58609 (Oct. 4, 2006)

² 72 Fed. Reg. 37569 (July 10, 2007)

³ The limited exceptions to this general principle would include prime borrowers with sufficient verifiable assets to handle a balloon mortgage or a significant jump in mortgage payment.

- **Underwriting Subprime Loans with "Teaser Rates."**
Some subprime loans are structured with a significant jump in monthly payments often resulting in "payment shock" for the borrower. While these mortgages may be a reasonable choice for subprime borrowers who can afford them, a majority of subprime borrowers do not understand the unique terms and conditions of these risky mortgage products that can result in a significant "payment shock." Therefore, lenders (including mortgage brokers) should exercise more caution when underwriting such loans to subprime borrowers to make sure the borrower is able to afford the mortgage. Examples of these risky mortgage products include loans with a short-term interest "teaser" rate for the first two or three years (known as 2/28s and 3/27s), loans with an initial interest-only period, and mortgages that negatively amortize.⁴
- **Reasonable Debt-to-Income Ratio.**
NAR supports requiring lenders to make subprime loans that have a reasonable debt-to-income ratio. Borrowers should have enough residual income after making their monthly mortgage payment, including taxes and insurance, to meet their needs for food, utilities, clothing, transportation, work-related expenses, and other essentials. Requiring underwriting at a fully amortizing, fully indexed rate is meaningless if the lender uses such high debt-to-income ratios that the family doesn't have enough income remaining to pay for other necessities.
- **Escrow/Reserve for Payment of Taxes and Insurance.**
Lenders that make subprime mortgage loans should generally require that the monthly payment include an amount to be held by the mortgage servicer in an escrow/reserve/impound account for the payment of the borrower's periodic payments, such as taxes and insurance. Similar to the exception for prime loans in some jurisdictions, borrowers that make at least a 20 percent downpayment should have the option to budget for these payments independently.

2. Limit Stated Income/Stated Assets Underwriting.

Because mortgages underwritten based on "stated income" and/or "stated assets" (also known as "no income verification" or "no doc" loans) typically have higher rates, lenders making subprime loans should, as a general rule, underwrite loans based on verified income and assets. The main exception should be for borrowers whose incomes derive from hard-to-verify sources (such as self-employed borrowers).

3. Flexibility for Life Circumstances.

NAR believes that a standard for determining a borrower's ability to repay must be flexible to accommodate borrowers with unique circumstances, such as:

- Borrowers who have demonstrated the ability to make monthly payments, over a long term, that are higher than underwriting standards would otherwise allow. Lenders should consider, for example, the borrower's history of making rent and student loan payments.
- Borrowers with high assets but low income who, for cash management or other financial planning reasons, elect a mortgage with a monthly payment that their current income is not sufficient to cover.

⁴ Negative amortization ordinarily results if the mortgage permits a borrower to pay less than the interest on the mortgage for a limited time, in which case the difference is added to the total amount of the loan the borrower must repay.

- Borrowers who anticipate a jump in income or assets due to life events such as graduation, completion of professional training, completion of payment obligations for student or car loans, another member of the household entering the work force when young children start school, or an inheritance.

4. Anti-Mortgage Flipping Policy.

NAR supports an anti-mortgage-flipping rule requiring mortgage originators making or arranging for a loan that refinances an existing residential mortgage to verify that the new loan provides a significant benefit to the borrower (one test often proposed is the loan must provide a "reasonable net tangible benefit" to the borrower). The lender should consider the circumstances of the borrower, as discussed above, all terms of the new loan including taxes and insurance, the fees and other costs of refinance, prepayment penalties, and the new interest rate compared to that of the refinanced loan.

5. Bar Prepayment Penalties.

NAR opposes prepayment penalties for all mortgages. Prepayment penalties often work to trap borrowers in loans they cannot afford by making it too expensive to refinance. If complete prohibition of prepayment penalties is not feasible, NAR supports permitting prepayment penalties for the shortest time and the lowest amount possible. For example, a borrower in a 2/28 mortgage should be able to refinance by the end of the initial two-year "teaser" rate period without having to pay a prepayment penalty.

6. Improvements for Assessing Creditworthiness.

Borrowers with little or no credit history, as traditionally measured, usually have lower credit scores and must pay more every month for their mortgage than those with higher scores. NAR supports ongoing efforts to take into account consumer payment history not typically considered, such as rent, utility, telephone, and other regular payments and urges HUD, the regulators, the GSEs, and lenders to work to strengthen these efforts. Use of alternative credit approaches will be especially beneficial for low- and moderate-income first-time homebuyers and borrowers with problematic loans that need to refinance their mortgage to avoid foreclosure. NAR recommends that FTC encourage the non-bank financial industry to expand use of alternative credit histories in connection with its rulemaking.

Another public policy issue associated with credit histories is the failure of furnishers to report good payment histories to the consumer reporting agencies. NAR has heard reports that many problematic subprime lenders purposefully withhold information on timely mortgage payments from the credit bureaus in order to prevent their customer from refinancing with another lender. The result is obvious-the borrowers with no positive payment histories for their subprime loan keep treading the waters of high-interest rates and expensive credit products. NAR supports requiring all institutional mortgage lenders, or the mortgage servicers acting on their behalf, to report payment history of all borrowers to at least the three national credit bureaus on a monthly basis.

7. Mortgage Choice for Borrowers.

NAR supports requiring mortgage originators to offer borrowers one or more mortgages with interest rates and other fees that appropriately reflect the borrower's credit risk. It remains the responsibility of borrowers to decide which is the best mortgage for their needs and circumstances, but they may only do so if they understand all the facts so they can make an informed decision. The following are suggested principles for your consideration:

- For originators who offer nontraditional mortgage products, the originator should:
 - offer all borrowers a choice of several significantly different mortgage options;

- include at least one traditional loan product as one of the options for the borrower to consider, if the borrower qualifies for such a product offered by the originator; and
 - before application acceptance, disclose information about the maximum potential payment over the life of the loan and the date the initial payment will increase to a fully amortizing, fully indexed payment amount.
- For subprime borrowers, originators that offer FHA-insured mortgages or VA home loan guaranty mortgages should consider whether these types of mortgages should be offered as an appropriate option.
 - If the originator does not offer mortgages with rates and fees appropriate for the borrower's credit risk, the originator should inform the borrower a lower interest rate may be available from another originator or that the borrower may wish to seek housing counseling, to allow the borrower an opportunity to shop elsewhere or receive counseling before proceeding. For example, a prime borrower that applies for a loan to a lender that only makes subprime loans should be advised that other options may be available.
 - For loans originated by a mortgage broker, the broker should offer mortgage options that are among the lowest-cost products appropriate for the borrower.

8. Improved Consumer Mortgage Disclosures.

Lenders have a responsibility to ensure that consumers understand the loans they receive, including their terms and all costs. Consistent with this principle, NAR recommends that HUD improve consumer disclosures under the Real Estate Settlement Procedures Act (RESPA). In particular, NAR believes that consumers should receive a Summary GFE, accompanied by a detailed GFE with explanations of each subcategory of fees to help consumers more fully understand the services they are receiving and the cost of each service. The revised GFE should closely parallel the HUD-1 settlement form so consumers can compare the GFE they receive when they apply for a loan to their closing documents at settlement.

9. Strengthen Appraiser Independence.

NAR believes that appraisals should be based on sound and fair appraisal principles and be accurate. There are reports that appraisers have been pressured to meet targeted values or risk losing business. Appraisal pressure undermines the integrity of the mortgage lending process if the result is a mortgage loan made based on an inaccurate property valuation. NAR recommends the following measures to strengthen the appraisal process:

- Require lenders to inform each borrower of the method used to value the property in connection with the mortgage application, and give the borrower the right to receive a copy of each appraisal.
- Establish enhanced penalties against those who improperly influence the appraisal process. Those with an interest in the outcome of an appraisal should only request the appraiser to:
 - consider additional information about the property;
 - provide further detail, substantiation, or explanation for the appraisal; and
 - correct errors.
- Provide federal assistance to states to strengthen regulatory and enforcement activities related to appraisals.
- Support enhanced education and qualifications for appraisers.

Thank you for the opportunity to make recommendations for how to address unfair, deceptive acts and practices in the mortgage markets. If you have any questions or concerns, or if I may be of service to you, please do not hesitate to contact me or our Senior Regulatory Policy Representative, Jerry Nagy, at 202.383.1233 or jnagy@realtors.org.

Sincerely,


Charles McMillan, CIPS, GRI
2009 President, National Association of REALTORS®