NASCUS

July 30, 2009

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

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

Submitted via: http://secure.commentworks.com/ftc-mortgageactsandpractices

Dear Commission Secretary:

The National Association of State Credit Union Supervisors (NASCUS)[1] is pleased to submit the following comments in response to the Federal Trade Commission (Commission) Advanced Notice of Proposed Rulemaking (ANPR), Mortgage Acts and Practices, 74 Federal Register 103 (June 1, 2009) pp. 26118-26130. State regulators have worked diligently to protect consumers and try, where possible, to curb the bad players in the mortgage industry. NASCUS supports the Commission's rulemaking with regard to mortgage lending. However, for the reasons expounded upon below, the Commission should exempt state-chartered credit unions from this rulemaking.

The Commission was directed to initiate rule making by §626 of the Omnibus Appropriations Act of 2009.[2] Section 626, while directing the Commission to address mortgage loans, specified neither the types of conduct **nor the types of entities** any proposed rule should address. See 74 Federal Register 103 (June 1, 2009) p. 26119. Given broad discretion, the Commission chose to look to its organic statute to define the parameters of both the conduct and the entities to be covered. In so doing, the Commission seeks to determine "whether certain acts and practices of non-bank financial companies related to mortgage loans are unfair and deceptive…and should be incorporated into a proposed rule." Id. p. 26119. Specifically, the Commission asked for comments regarding potential effects of the proposed rulemaking on competition and on consumers.

Because the Federal Trade Commission Act excludes banks, thrifts and federal credit unions from Commission rulemaking, the proposed rules would apply only to state-chartered credit unions alone among depository institutions.[3] This result is inequitable and does not further the Commission's goal of consumer protection. Given the Commission's discretion to determine to which of its regulated entities to cover under this proposed rule, state-chartered credit unions

[1] NASCUS is the professional association of the 48 state and territorial credit union regulatory agencies.
[2] Omnibus Appropriations Act of 2009, Pub. L. No. 111-8, § 626, 123 Stat. 524 (Mar. 11, 2009).
[3] 15 U.S.C. 45(a)(2).

should be excluded considering 1) they are highly regulated, including throughout the mortgage lending process; 2) extensions of Commission rules under this proposal would create unmanageable regulatory burden; 3) the extensions of these rules to one type of depository institution while excluding all other may be confusing to consumers; and 4) the "consumers" accessing mortgage services through a state-chartered credit union are members of the institution and therefore uniquely empowered to vindicate their rights.

State-Chartered Credit Unions are Thoroughly Regulated Entities

State-chartered credit unions are highly regulated, not for profit, depository institutions. In its proposed rulemaking, the Commission extensively cites Federal Reserve Board rules promulgated under Regulation Z as a benchmark for the Commission's proposed rule. State-chartered credit unions must already comply with Regulation Z.

In addition to extensive regulation at the state level, state-chartered credit unions are also substantially regulated by the National Credit Union Administration (NCUA) including with regard to advertising.

State-chartered credit unions comply with the Real Estate Settlement Procedures Act (RESPA) and the Home Mortgage Disclosure Act (HMDA). State-chartered credit unions and their mortgage originating personnel must also comply with the comprehensive licensing and registration rules implemented by the Secure and Fair Enforcement for Mortgage Licensing Act of 2008 (S.A.F.E. Act).

It is Inequitable to Single Out State-Chartered Credit Unions Among Depository Institutions for this Rulemaking

As discussed above, the Commission's rulemaking would apply uniquely to state-chartered credit unions among depository institutions. In the proposal, the Commission expressly states that its rulemaking is intended for "non-bank" financial companies. The term "bank" used in this sense is intended to mean depository institution rather that the narrow definition of an institution chartered specifically as a bank.[4]

Inclusion of state-chartered credit unions in this rulemaking as the sole depository institutions would be inequitable because there is less likelihood of similar regulations being promulgated by the federal banking agencies (FBAs). Normally, the Commission promulgates rules pursuant to §18 of the Federal Trade Commission Act which requires the FBAs to promulgate similar rules. However, this rulemaking is being promulgated pursuant to the Administrative Procedure Act and therefore no similar rulemaking by the FBAs is required.[5]

The end result would be state-chartered credit unions would be required to follow Commission rules while their depository institution counterparts would not. This would prove confusing and counter-productive. Given the thorough regulations, including regulation of mortgage practices,

[4] See footnote 3 of the proposed rule where the Commission refers to NCUA as one of the "federal banking agencies." 74 Federal Register 103 (June 1, 2009) p. 26118
[5] Id.

of state-chartered credit unions, the negative effect on competition resulting from the inequitable treatment of one kind of depository institution outweighs any de minimis benefit to consumers.

To Single-Out State-Chartered Credit Unions Among Depository Institutions Could Confuse Consumers

As noted above, the comprehensive regulatory framework already in place for state chartered credit unions mean it is dubious that inclusion of these depository institutions within the scope of this rulemaking will produce any substantive benefit to consumers. However, there is the potential that inclusion could confuse consumers.

Under the rule as proposed, consumers would be faced with rules applicable to non-bank entities and one depository entity. This could create confusion as to which rules apply to which entities and as to which regulatory body can vindicate a consumer's rights.

Consumers Accessing Mortgage Products from a State Chartered Credit Union are Uniquely and Effectively Empowered to Vindicate Their Rights and Ensure Fair Dealing as Members of the Institution

State-chartered credit unions may provide mortgage loans only to consumers who have joined the institution through its field of membership (FOM). These consumers, known as "members" in credit union parlance, cooperatively own the institution. The members elect from among their own the board of directors that oversee the management team of the credit union. Therefore, credit union customers are uniquely empowered to self-vindicate their rights.

For the above reasons, the Commission should exclude state-chartered credit unions from this rulemaking. Such an exclusion would not weaken consumer protection, and is well within the Commission's discretion under §626. NASCUS would be pleased to discuss these issues further. If you have any questions, you may contact NASCUS' President and CEO Mary Martha Fortney, or me, at your convenience.

Sincerely,

[*signature redacted for electronic publication*]

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