

HOUSING POLICY COUNCIL

THE FINANCIAL SERVICES ROUNDTABLE



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

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

Dear Sir or Madam:

The Housing Policy Council (“HPC”) appreciates the opportunity to comment on the Federal Trade Commission’s (“FTC” or “Commission”) Advance Notice of Proposed Rulemaking (ANPR) on mortgage acts and practices.

HPC is part of the Financial Services Roundtable (the Roundtable), a trade association for 100 of the nation’s largest banking, securities and insurance companies. The members of the Roundtable and HPC are directly involved in providing mortgage credit to Americans seeking to achieve the dream of homeownership. HPC companies originate, service, and insure mortgages for Americans across the nation every day.

Current Environment is Very Difficult

We share the Commission’s desire to strengthen mortgage lending and servicing practices, but our member companies and others involved in the mortgage finance field are facing a variety of pressing challenges regarding loan modifications, servicing, production, and a variety of other matters all generated by the current very difficult economic environment. We would urge caution in adding additional requirements at this time. The staffs of our member companies are stretched very thin as they try to keep abreast of the new regulations, programs, and guidelines, and to train line and servicing staff to comply with the new rules of the new environment.

For example, our members are currently working to implement the Secure and Fair Enforcement for Mortgage Licensing Act of 2008 (“Safe” Act) and staying abreast of the 50 or so new state or local servicing laws enacted with the last six months has been extremely challenging. In the RESPA/TILA area alone we are faced with: 1) a massive work load to incorporate HUD’s new RESPA rules; (2) the Federal Reserve’s just published new Truth in Lending (TILA) rules; (3) a potential third change in a number of months on new combined TILA and RESPA rules based recent announcements by representatives of the Federal Reserve and HUD that they will create a joint rule that will change the rules that each separately have just approved.

The requirements of these new regulations, including the training, education, preparation of new consumer documents, etc., is in addition to the massive efforts underway by mortgage servicers to implement the Administration’s Making Home Affordable loan modification and refinance programs. Our member companies are working hard to respond to the heavy demand from delinquent and current borrowers for

modifications in their loans or refinancing under the government sponsored programs, as well as individual company efforts to assist at-risk borrowers.

Our member companies' efforts in all of these areas will be made that much more difficult if the FTC issues new and potentially inconsistent rules on subjects already addressed by other laws or programs. For that reason we ask that the Commission proceed carefully in establishing new requirements on issues that are also addressed by other agencies and regulations.

This is perhaps one of the most difficult times for the industry to respond to yet another new series of rules with additional training, forms, documentation, compliance programs and the operational challenges they would create. We urge the Commission take these factors into consideration when deciding whether or not to propose new rules in this area.

Comments on the proposal

Coordination with bank regulatory agencies

We appreciate that the Commission will consult with the federal banking agencies before proposing new rules. Close consultation and coordination is essential. Notwithstanding that those agencies are not required to promulgate substantially similar regulations, if the Commission and the agencies agree that certain acts or practices are unfair or deceptive, the Commission and the agencies should determine whether or not those acts or practices are adequately addressed by current regulations of all agencies involved. If not, the agencies and the FTC should promulgate regulations that are consistent and complementary of those of other agencies.

It is unclear that the FTC has jurisdiction to require operating subsidiaries of banks and thrifts to adhere to their regulations. Before promulgating regulations that purport to apply to them, the Commission and the agencies should reach an accord on their respective jurisdiction over such entities.

Many laws and regulations cited by the FTC in the rulemaking (such as Regulation Z) are either explicitly limited to creditors, or as a practical matter their enforcement is limited to creditors. Extending the requirements of these laws and regulations to non-creditors, such as mortgage brokers, may be helpful and should be considered by the Commission.

Regulations should apply to entities, not individuals

The proposal indicates that this rulemaking shall apply to non-bank entities that banks or thrift contract with to perform services. It should clarify that it does not generally apply to individuals, except in those specific cases that the Commission concludes that it should.

Regulations should be proposed for comment on specific acts or practices before becoming final

It is likely that comments filed will suggest that many acts and practices not specifically identified in this rulemaking should be regulated, including some addressed in the Commission's previous settlements with servicers. It is imperative that the Commission identify the specific acts and practices it is considering

addressing and provide an opportunity for comment on those specific acts and practices before issuing a final rule.

Advertising and marketing rules should be adopted for non-creditors

While Regulation Z adequately addresses the advertising and marketing of mortgage loans by creditors, the advertising rules adopted by the Federal Reserve under its TILA Section 129(1)(2) authority, Regulation Z Section 226.24(i) should be adopted by the Commission for non-creditors, such as mortgage brokers and mortgage rate aggregators. These advertising practices were found by the Federal Reserve to be unfair and deceptive.

Regulation of underwriting and loan terms for non-traditional or alternative mortgage loans have been effectively addressed

Concerns about consumers being qualified for nontraditional or alternative mortgage loans based upon low initial payments has been effectively addressed by both state and federal regulators through the Nontraditional Mortgage Guidance and Subprime Statement, by the new Regulation Z rules and by the marketplace. There is no need for the FTC to take further action in this area.

Advertising and marketing should be the subject of separate coordinated activity by the Commission and the banking agencies

We agree with the Commission's statement that "consumers in both the prime and subprime markets would benefit substantially from comprehensive reform of mortgage disclosure that would create a single, comprehensive disclosure of all key costs and terms of a loan, presented in language consumers can easily understand and in a form that they can easily use, provided early in the transaction to aid consumers shopping for the best loan."

To reach that goal concerted effort among the Commission and the banking agencies will be required, and addressing it in these rules is probably premature. For example, there is yet no consensus on what costs and terms are those "key" costs and terms to which disclosure should be directed. That should be the subject of the initial meetings among the agencies and the Commission on this subject. Only after consensus has been reached can consumer and industry groups suggest alternative disclosure methods and regulators conduct meaningful testing of those alternative disclosure methods.

The mortgage disclosures required under present law are now in place and as such represent a consensus on those issues, and additional regulations are unnecessary on those disclosures.

Some changes in appraisal regulations are desirable

Although mortgage brokers are prohibited from coercing an appraiser under Section 226.36(b)(1) of Regulation Z, it is not clear that the broker who is not a creditor will have any liability if it does so, and therefore the Commission should provide regulations that prohibit mortgage brokers from coercing appraiser, using the same standards as established in Regulation Z.

The commission should require the appraiser to report any attempted coercion of the appraiser to the primary regulator of the creditor or mortgage broker, or utilize expanded powers of the Appraisal Subcommittee of the Federal Financial Institutions Examination Council to monitor appraisal independence at a national level, including establishment of a national hot line designed to accept complaints concerning appraisal independence and subsequent referral of such complaints to the appropriate governing body..

The practices outlined in the Home Valuation Code of Conduct are reasonable and represent good practices, but violations do not rise to the level of unfair or deceptive acts or practices. Between FIRREA, HVCC, USPAP and state appraiser licensing laws, the appraisal field has been the subject of increased regulation and scrutiny during the past few years. We believe that there are few consumer issues in the field that remain unaddressed or that would require FTC involvement to protect consumers from unfair or deceptive practices.

Comments on specific questions and issues

Question 17.

In most cases, the mortgage loan documents incorporate information regarding fees, and consumers can refer to such documents to more fully understand certain fees, such as prepayment penalties and late fees. Further, information regarding assessment of fees may appear in the monthly statement provided to the consumer. Specific disclosures to inform consumers of the other possible fees that servicer may assess for optional services that may be requested by the customer are provided in response to the customer's request for such expedited services and may include the payment of the fee prior to or at the time such optional services are provided. If customers have questions about certain fees and charges, assistance is available to them by contacting the servicer's customer service area. As described, requirements with respect to adequate disclosure of fees and charges that may be assessed by a servicer are already in place and no further regulation is necessary.

Question 18.

There should be no prohibition against the servicer and the borrower mutually agreeing to a fee for optional services rendered (even if not expressly contemplated by the loan documents), if the fee is clearly disclosed to the borrower and the borrower agrees to the fee.

A rule that restricts servicers from charging customers only those fees expressly authorized in the mortgage contract would be unfair to servicers and their customers and could have the effect of potentially denying services to a consumer. While the mortgage contract represents the transaction at the loan closing and addresses some subsequent events, it does not anticipate all possible transactions or servicing activities during the term of the mortgage loan that may result in customers requesting optional services and servicers providing those optional services for a fee.

Many state laws are silent. Many state laws cover only certain fees. In those situations, where customers want additional services, the servicer should be permitted to provide it and to charge a reasonable fee for doing so. If it is not permitted to offer a fee, it may not be able to provide the service the customer wants.

With respect to charging for estimated attorney's fees or other fees for service not rendered, HPC believes that fees charged must be for services rendered and in a reasonable amount. However, fees are estimated in connection with reinstatement and payoff demands issued during foreclosure and bankruptcy proceedings where there is a good through date into the future. Having the good through date is customer-friendly and servicers simply anticipate the attorneys' and other fees that are likely to be incurred during that period. Servicers should have a reconciliation process and issue refunds if the borrower overpaid. However, other restrictions on estimated fees are unnecessary.

Similarly, a servicer cannot alter the mortgage contract with the mortgage loan customer to allow a mortgage servicer to charge late fees that are not authorized, disclosed, or contracted for at the time of loan origination. There is no need for an FTC rule, or if one is crafted it should take into account the dozens of state laws on both of these issues.

Mortgage contracts disclose authorized fees, and monthly customer statements illustrate how payments received from mortgage loan customers are applied to satisfy those fees. In addition customer service representatives are available to customers to provide any detailed explanation.

Question 19.

Servicers are obliged by present law (12 CFR 226.36) to post payments on mortgage loan accounts in a timely manner and they have incentive to do so because of penalties available if they do not comply. A recent change in Regulation Z includes payment processing requirements on certain mortgage loan accounts, and servicers will review existing policies and procedures to ensure compliance. At this point, adding additional requirements is unnecessary and would be confusing in light of the new regulations already promulgated.

With respect to sub questions c, d, and e, servicers have in place methods and procedures to capture any mistakes that might be made, and imposing regulations will not contribute to better customer service in these areas.

It would be very difficult to promulgate an adequate rule under sub question f. Adequate customer service will depend upon the circumstances and cannot be defined in an objective rule that is applied to all incidents or inquiries. Customer service questions differ from one customer to the next, and answering them may require vastly different amounts of time. While many questions can be answered within minutes, others may require substantial research and preparation time. RESPA already sufficiently addresses customer inquiries. Accordingly this does not appear to be an area that needs new regulations.

Question 20.

Servicers proactively engage in loss mitigation efforts to assist consumers in securing affordable payments through various loss mitigation options, to include a loan modification. These efforts are designed to keep a borrower in his or her home and to avoid foreclosure, where possible. As part of the overall loss mitigation efforts, servicers will review certain account information, engage in conversations with the borrower and request documentation supporting the hardship. A rule which seeks to further define or restrict loss mitigation practices is not only not needed, but would be confusing in light of the existing guidelines and

regulations already existing in both state and federal law, and in light of the efforts of the industry to comply with the many rules and guidelines of the Administration's loan modification programs.

Generally, HPC would support a rule that limits the release by consumers of all claims in connection with loan modification or other workout agreements or repayment plans. However, an outright prohibition would be too broad and would not allow servicers to enter into agreements with customers in circumstances in which releases would be a significant part of the resolution of pending litigation. Defining those circumstances as unfair and deceptive would be a mistake.

Question 21.

Bankruptcy proceedings are surrounded by a variety of laws and oversight by the United States Trustee which together adequately address all issues in bankruptcy, including the accuracy of bankruptcy filings by servicers, and the application of payments to pre- and post-petition categories of the consumer's debts. Additionally, there has been a wave of new local bankruptcy court rules that address such issues as itemization of fees, accurate proofs of claim, and proper payment processing. HPC believes that additional rules would be confusing to all parties in this area.

Again, we appreciate the Commission's efforts in this area, but would urge that it proceed cautiously and consult and coordinate with other appropriate agencies to the greatest extent possible to avoid duplicative and burdensome requirements for mortgage lenders and servicers at a time when they are attempting to implement many new requirements in a challenging economic environment. Thank you for consideration of our views. If you have any questions about our comment letter, please contact Paul Leonard at (202) 589-1921.

With best wishes,


John H. Dalton
President
Housing Policy Council
The Financial Services Roundtable