

Consumer Mortgage Coalition Mortgage Bankers Association

November 12, 2010

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

Re: Notice of Proposed Rulemaking: Mortgage Acts and Practices –
Advertising Rule

Dear Secretary:

The Consumer Mortgage Coalition (CMC) and the Mortgage Bankers Association (MBA) appreciate the opportunity to comment on the proposed rule on mortgage advertisements.¹ We fully support the Federal Trade Commission's (Commission) efforts to prevent unfair or deceptive advertisements. The proposal recites a number of unacceptable advertising practices, and it is important that such practices be impermissible. The industry has believed, for many years, that it is extremely important that consumers understand the terms and costs of their mortgage credit.

As the Commission also notes in the proposal, the Federal Trade Commission Act is not the only law relating to mortgage advertising. The Truth in Lending Act (TILA) and its implementing Regulation Z contain mortgage advertising rules. These include rules for closed-end credit secured by a dwelling and rules for home equity lines of credit (HELOCs). We note that familiar TILA rules are not the only rules that need to be coordinated with the Commission's rulemaking. The Dodd-Frank Act has several provisions that we believe the Commission and the other federal regulators should take into consideration, as well. And, finally, there are also many state laws on advertising.

The Commission solicits comment on the overlap of TILA rules and its rule. We believe the Commission, Federal Reserve Board (Board), and the Bureau of Consumer Financial Protection (Bureau) should work together to implement one set of rules. All of the rules have the same purpose – consumer protection – so there is no benefit to rules that duplicate or, worse, contradict each other. We request that the Commission postpone its rulemaking on mortgage advertising and, instead, engage in a coordinated rulemaking on this subject with the Bureau of Consumer Financial Protection.

¹ The proposed rule arises from a law that Congress enacted in 2009.

The Dodd-Frank Act Has Many Provisions Relating to Unfair and Deceptive Acts and Practices

The Dodd-Frank Act will broadly affect consumer protection laws in this country. It created an entirely new regulator, the new Bureau, whose authority will intertwine with that of the Commission. The Bureau is charged with implementing and enforcing the federal consumer financial laws,² which include a number of laws but which exclude the Federal Trade Commission Act.³ Congress assigned a number of objectives to the Bureau, not the least of which is ensuring that consumers are protected from unfair, deceptive, or abusive acts and practices.⁴

The Bureau has broad rulewriting authority,⁵ and this includes authority to write rules against unfair or deceptive acts or practices. The Bureau's § 1022 rulewriting authority became effective on enactment,⁶ so the Bureau can write rules even before the designated transfer date. The Bureau is also specifically authorized to prescribe rules defining unfair, deceptive, or abusive acts or practices.⁷

The Bureau is specifically required to write rules relating to unfair or deceptive acts or practices regarding mortgage loans under the Omnibus Appropriations Act, 2009.⁸ This is the same authority the Commission relies upon for the present rulemaking.

The Dodd-Frank Act includes new TILA Sections 129B and 129C, for the purpose of assuring that residential mortgage loans are not unfair, deceptive, or abusive.⁹ The Bureau will have TILA rulewriting authority.¹⁰ TILA regulations must prohibit acts or practices relating to residential mortgage loans that are abusive, unfair, or deceptive.¹¹

The Bureau is also required to establish an Office of Financial Protection for Older Americans that will, among other things, help seniors recognize warning signs of, and protect themselves from, unfair, deceptive, or abusive practices.¹²

Both the Bureau and Commission have authority over unfair and deceptive acts and practices. The Bureau will enforce, against certain persons, Commission rules under the Federal Trade Commission Act relating to unfair and deceptive acts and practices.¹³ The

² Dodd-Frank Act, Pub. L. No. 111-203, § 1021(a), 124 Stat. 1376, 1979 (2010).

³ Dodd-Frank Act, Pub. L. No. 111-203, § 1002(14), 124 Stat. 1376, 1957 (2010).

⁴ Dodd-Frank Act, Pub. L. No. 111-203, § 1021(b)(2), 124 Stat. 1376, 1980 (2010).

⁵ Dodd-Frank Act, Pub. L. No. 111-203, § 1022, 124 Stat. 1376, 1980 – 81 (2010).

⁶ Dodd-Frank Act, Pub. L. No. 111-203, § 1029A, 124 Stat. 1376, 2004 (2010) (making § 1022 effective on enactment).

⁷ Dodd-Frank Act, Pub. L. No. 111-203, § 1031(b), 124 Stat. 1376, 2005-06 (2010).

⁸ Dodd-Frank Act, Pub. L. No. 111-203, § 1097, 124 Stat. 1376, 2102 (2010).

⁹ Dodd-Frank Act, Pub. L. No. 111-203, § 1402(a)(2), 124 Stat. 1376, 2139 (2010).

¹⁰ Dodd-Frank Act, Pub. L. No. 111-203, § 1100A, 124 Stat. 1376, 2107 (2010).

¹¹ Dodd-Frank Act, Pub. L. No. 111-203, § 1405(a), 124 Stat. 1376, 2141 (2010).

¹² Dodd-Frank Act, Pub. L. No. 111-203, § 1013(g)(3)(A)(i), 124 Stat. 1376, 1973 (2010).

¹³ Dodd-Frank Act, Pub. L. No. 111-203, § 1061(b)(5)(B)(ii), 124 Stat. 1376, 2037 (2010).

Commission will enforce, against certain persons, under the Federal Trade Commission Act, Bureau rules as unfair or deceptive acts or practices.¹⁴

The Dodd-Frank Act Will Impact The Types of Mortgage Products Available

Rules on unfair and deceptive acts and practices are only one area in which the Dodd-Frank Act is relevant to the present rulemaking. The new law will also restrict the types of mortgage loan products. The Commission solicits comment on the types of mortgage products currently being offered or that may be offered in the future.

The mortgage markets are in the midst of a painful retrenchment. Loan products that were widely available just a few years ago have disappeared. The provisions in the Dodd-Frank Act will likely ensure that the nontraditional loan products and loans with more lenient underwriting guidelines will not return to the marketplace.

The Dodd-Frank Act requires that creditors determine that a consumer has the ability to repay a loan before making the loan.¹⁵ The law provides that creditors and assignees may presume a loan meets the ability to repay requirements if it is a “qualified mortgage.”¹⁶ The need to prevent liability and assignee liability will drive the market to “qualified mortgages.”

As the Commission and other regulators move forward, we would recommend that the regulators take into consideration the effects of the new law on the types of products that will be available in the marketplace given the statutory changes that have been enacted since 2009.

Congress Mandated Coordinated Rules

The fact that the Commission and Bureau share authority to prevent unfair and deceptive acts and practices and to regulate financial services and products has the potential to result in conflicting and overlapping rules. Having foreseen this possibility, Congress mandated that the Commission and Bureau avoid duplication or conflict between their authorities:

“To avoid duplication of or conflict between rules prescribed by the Bureau under section 1031 of this title and the Federal Trade Commission under section 18(a)(1)(B) of the Federal Trade Commission Act that apply to a covered person or service provider with respect to the offering or provision of consumer financial products or services, the agencies shall negotiate an agreement with respect to rulemaking by each agency, including consultation with the other agency prior to proposing a rule and during the comment period.”¹⁷

¹⁴ Dodd-Frank Act, Pub. L. No. 111-203, § 1061(b)(5)(C)(ii), 124 Stat. 1376, 2037 (2010).

¹⁵ Dodd-Frank Act, Pub. L. No. 111-203, § 1411(a)(2), 124 Stat. 1376, 2142 (2010).

¹⁶ Dodd-Frank Act, Pub. L. No. 111-203, § 1412, 124 Stat. 1376, 2145 (2010).

¹⁷ Dodd-Frank Act, Pub. L. No. 111-203, § 1061(b)(5)(D), 124 Stat. 1376, 2037 (2010).

We believe this Congressional mandate is important, and that it should be applied to the present rulemaking. This rulemaking is not necessarily a narrow one. The Commission solicits comment on dozens of broad questions, and it is possible that a far-reaching rule could result.

The Bureau is not yet fully functional, as some of its authorities are not effective until the designated transfer date. However, the Bureau's broad rulewriting authority under § 1022 became effective on enactment. Moreover, the Bureau, even in its nascent form with limited staff and no director, has already begun to work on some mortgage rules, such as a streamlining of disclosures under TILA and the Real Estate Settlement Procedures Act. Though small, the Bureau is established sufficiently that the Commission is able to consult with the Bureau at this time. There is no reason for the Commission to ignore the joint jurisdiction in this matter and move forward without the Bureau.

It would be counterproductive for the Commission to write a rule before consulting with the Bureau, then to have to repropose and rewrite the rule after consultation between the regulators. Moreover, writing and rewriting rules during the transfer of authorities among regulators risks requiring the industry come into compliance twice for the same purpose. Consumers, who the regulators are trying to protect, will undoubtedly be confused with overlapping or, potentially, conflicting communications.

It would be a technical point to note that the Congressional mandate for coordinated rulemakings is in a provision that does not become effective until the designated transfer date. The Congressional purpose is a substantive and important one, not a mere technicality. We believe relying on this technical point to avoid coordinated rulemakings would elevate form over substance.

Expanded Homeownership Counseling Under The Dodd-Frank Act Is An Opportunity To Educate Consumers

The Dodd-Frank Act contains the Expand and Preserve Home Ownership Through Counseling Act,¹⁸ which will expand homeownership counseling. Among the many provisions in this new law is one that requires the Secretary of the Department of Housing and Urban Development (HUD) to certify various mortgage software systems for consumers to use in evaluating different residential loan proposals.¹⁹

The use of technology in counseling can greatly improve the quality of counseling. With access to a "smart" technology system that provides information about loan products and terms, housing counselors could more readily provide more accurate information to consumers. Common consumer questions, such as "Should I refinance?" can be difficult to answer. Technology could equip counselors to better assist consumers with questions

¹⁸ Dodd-Frank Act, Pub. L. No. 111-203, Title XIV, Subtitle D, §§ 1441 – 1452, 124 Stat. 1376, 2163 – 78 (2010).

¹⁹ Dodd-Frank Act, Pub. L. No. 111-203, § 1443(a), 124 Stat. 1376, 2167 – 68 (2010), to be codified at 12 U.S.C. § 1701x(g)(3).

such as this. The technology tools should also include videotapes and computer programs that could be distributed widely with the assistance of electronic mass media.

These technology tools should not be limited to homeownership counselors alone. The industry has advocated, for many years, that these technology tools should also be available to consumers themselves. The industry has long advocated a robust three-step program to increase public awareness and improve consumers' understanding of their loan obligation:

Public Service Campaign

Federal policymakers should implement an ongoing, nationwide public service campaign to advise consumers, but particularly the more vulnerable such as senior citizens and the poorly educated, that they should seek the advice of an independent third party before signing any loan agreements.

Public Awareness Infrastructure

A nationwide network should be put in place to ensure that all consumers can easily access advice and counseling to help them determine the loan product that best fits their financial needs. A public awareness infrastructure could include websites and counselors, with technology as contemplated by the Dodd-Frank Act, to help consumers talk through their questions and the loan product they are considering. In addition, programs could be developed with community organizations and other organizations serving senior citizens to provide on-site counseling assistance at local senior and community centers and churches. HUD's 800 number for counseling could be listed on required mortgage disclosures as an initial step to increase awareness of available advice. Links to the technology that the Dodd-Frank Act requires HUD to certify could be publicized.

"Good Housekeeping Seal of Approval" for Online Mortgage Calculators

In 1998, the Board and HUD issued a *Joint Report on the Real Estate Settlement Procedures Act and Truth in Lending Act* (Joint Board/HUD Report) recommending, among other things, that:

"New educational materials or other tools, including videotapes and computer programs, could be developed and widely distributed with the aid of the electronic mass media. This might be undertaken by the mortgage industry in conjunction with consumer and community organizations. . . . The innovative use of technology to reach consumers should also be explored. For example, electronic kiosks at creditors' retail locations or other public places might bring information resources to those who do not have similar private access. Also, electronic information might be provided to some consumers through third parties, such as credit counselors or civic organizations."²⁰

²⁰ Joint Board/HUD Report p. 76.

Obviously, great strides in technology have occurred since 1998, with Internet access much more widespread and with many mortgage calculators available online. Technology developed by the private sector is widely available.

An appropriate role for the federal government today would be to make the technology that HUD will certify under the Dodd-Frank Act widely available on federal agency websites, similar to HUD's recent posting on its website of videos for consumers to learn about the mortgage process.²¹

Consumers would greatly benefit from access to the technology and, relevant to the Commission's rulemaking, would be less susceptible to misleading advertisements.

Disclosures in Languages Other Than English

The Commission solicits comment on several issues related to advertisements that are not in English or that "mix" languages. We believe this is an area that may relate to more than advertisements, but to loan disclosures in general. For this reason, we believe it is important that the Commission coordinate with the Bureau to ensure a consistent approach, especially now while the Bureau is revising consumer mortgage disclosure rules.

To the extent that regulations require disclosures in languages other than English, we would recommend that the regulators write model disclosure forms. This would ensure sound disclosures, while maintaining consistency across mortgage lenders and service providers, as well as consistency under the federal mortgage laws. This consistency would ensure that disclosures will be easy for consumers to understand.

Conclusion

We acknowledge the importance of transparency and of preventing unfairness and deception in mortgage advertising. We request, however, that the Commission postpone its issuance of this rule and work directly with the Bureau in this rulemaking to avoid duplicative, overlapping, or confusing rules. We suggest that the Commission consider the ability of technology to protect consumers from deception in advertisements.

With best regards,

Consumer Mortgage Coalition
Mortgage Bankers Association

²¹ Three videos, entitled *Shopping for Your Home*, *Shopping for Your Loan*, and *Closing the Deal*, are available here: <http://www.youtube.com/user/HUDchannel#p/a/u/2/8IQ7BI0VGTs>