

November 12, 2010

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

Re: Mortgage Acts and Practices – Advertising Rulemaking, Rule No. R011013

Submitted via: <https://ftcpublic.commentworks.com/ftc/mapadrulenprm>

Dear Commission Secretary:

The following comments are submitted by the Boeing Employees' Credit Union ("BECU") in response to the Notice of Proposed Rulemaking: Mortgage Acts and Practices – Advertising Rule ("Proposed Rule") issued by the Federal Trade Commission ("FTC").<sup>1</sup>

BECU is a Washington State-chartered credit union with assets of approximately \$9 billion and more than 650,000 members, the majority of whom reside in Washington State. BECU is the second largest state-chartered credit union in the country. Deposits at BECU are insured by the National Credit Union Share Insurance Fund ("NCUSIF"), administered by the National Credit Union Administration ("NCUA"). BECU, like other federally insured, state-chartered credit unions, is governed by extensive regulations promulgated by its state regulator and NCUA. In addition, these credit unions are already subject to a panoply of other related laws and regulations,<sup>2</sup> including the Truth in Lending Act<sup>3</sup> and Regulation Z,<sup>4</sup> which were used by the FTC as a benchmark for the development of these proposed regulations.

Because the FTC's jurisdiction excludes banks and federally chartered credit unions, state-chartered credit unions would be the only depository institutions subject to this rule. As discussed below, such an inequity within the depository institution industry is not needed or justified given the extensive regulations already governing mortgage advertising by federally insured, state-chartered credit unions.

---

<sup>1</sup> 75 Fed. Reg. 60352 (Sept. 30, 2010).

<sup>2</sup> See Real Estate Settlement Procedures Act and Regulation X (12 U.S.C. §§ 2601-2617; 24 C.F.R. Pt. 3500), Home Mortgage Disclosure Act and Regulation C (12 U.S.C. §§ 2801-2811; 12 C.F.R. Pt. 203), Homeowners Protection Act (12 U.S.C. §§ 4901-4910), National Flood Insurance Act and related regulations (42 U.S.C. §§ 4001-4129; 12 C.F.R. Pt. 760), credit union advertising rules (12 C.F.R. Pt. 740, § 741.211), credit union rules restricting incentive-based compensation (12 C.F.R. §§ 701.21(c)(8), 741.203(a)) and credit union real estate appraisal rules (12 U.S.C. § 3339; 12 C.F.R. Pt. 722, § 741.203(b)).

<sup>3</sup> 15 U.S.C. §§ 1660-1667f.

<sup>4</sup> 12 C.F.R. Pt. 229.

The FTC has asked for comments on the inclusion of state-chartered credit unions within the definition of “persons” subject to the Proposed Rule:

*B. Specific Questions for Comment on Proposed Provisions*

1. Section 321.2; Definitions

(4) . . .

(i) Should state-chartered credit unions be excluded from coverage? Why or why not? Should such an exclusion apply to all forms of state-chartered credit unions, or only to some of these entities? Why or why not?<sup>5</sup>

BECU provides these comments in response to that request.

BECU strongly supports the purpose of this rulemaking, but also strongly believes that **federally insured, state-chartered credit unions** should be **excluded** from coverage because:

- They are not and were not part of the problem underlying this rulemaking;
- Mortgage advertising by federally insured, state-chartered credit unions is extensively governed by other federal laws and regulations, and the NCUA and state regulators;
- Regular compliance examinations are conducted on federally insured, state-chartered credit unions, including examinations for compliance with relevant mortgage product laws and regulations; and
- State and federal regulators already have substantial enforcement authority that can be used to address any violations relating to unfair or deceptive mortgage advertising.

**I. Federally Insured, State-Chartered Credit Unions Are Not Part of the Problem**

Congress directed the FTC to undertake this rulemaking in order to “do more to investigate, challenge, and take enforcement actions against mortgage brokers, lenders, and loan servicers who engage in deceptive or unfair marketing practices or fraudulent financial practices directed at subprime borrowers.”<sup>6</sup>

Credit unions are non-profit financial cooperatives that provide financial services for their members. They do not have the incentive to advertise or provide unfair or deceptive mortgage loans in order to increase profits that some stockholder-owned institutions may have. Credit

---

<sup>5</sup> 75 Fed. Reg. 60352, 60363 (Sept. 30, 2010).

<sup>6</sup> 155 Cong. Rec. H2059 (Feb. 23, 2009) (Explanatory Statement Submitted by Mr. Obey); *see also* 2009 Omnibus Appropriations Act, Pub. L. No. 111-8, § 626(a), 123 Stat. 678 (Mar. 11, 2009) (codified at 12 U.S.C. § 5538 note); Credit Card Accountability Responsibility and Disclosure Act of 2009, Pub. L. No. 111-24, § 511(a)(1), 123 Stat. 1763 (May 22, 2009) (clarifying that the rulemaking shall relate to unfair or deceptive acts or practices regarding mortgage loans).

unions depend solely on their members for the capital needed to provide the services of the credit union. They do not and cannot tap the private sector capital market. Their focus – and their financial lifeline – is the financial stability of their members, not the financial impairment of their members.

**II. Mortgage Advertising by Federally Insured, State-Chartered Credit Unions Is Extensively Regulated by the NCUA and Subject to Other Federal Laws**

The FTC notes that the Proposed Rule is needed because “[n]one of the [other] federal or state measures duplicates the specificity and breadth of practices . . . covered in the [Proposed Rule].”<sup>7</sup> While other types of entities may not be adequately covered by restrictions on mortgage advertising, federally insured, state-chartered credit unions are subject to a comprehensive set of laws and regulations that are overlapping and duplicative of the Proposed Rule. For these credit unions, the conduct that resulted in the mortgage crisis is proscribed by existing laws and regulations. Therefore, although the Proposed Rule does not directly conflict with existing laws, it adds an unnecessary layer of compliance costs for these institutions. On this basis, we urge the FTC to exempt federally insured, state-chartered credit unions from the Proposed Rule.

**A. General Prohibitions against Misrepresentation and Deception Already Govern Federally Insured, State-Chartered Credit Unions**

Like the Proposed Rule, federally insured, state-chartered credit unions are subject to rules that are all-encompassing prohibitions against inaccurate, deceptive, or misrepresentative advertising terms, including those relating to mortgage products.

Proposed Rule		Overlapping or Duplicate Law or Regulation	
16 C.F.R. § 321.3	“It is a violation of this rule for any person to <u>make any material misrepresentation</u> . . . , in any commercial communication, regarding any term of any mortgage credit product . . . .”	“No insured credit union may use any advertising . . . or make <u>any representation which is inaccurate or deceptive</u> in any particular . . . .”	12 C.F.R. §§ 740.2, 741.211.
		“No insured credit union may use any advertising . . . or make any representation . . . which <u>in any way misrepresents its services [or] contracts</u> . . . .”	12 C.F.R. §§ 740.2, 741.211
		“If an advertisement for credit states specific credit terms, it shall state <u>only those terms that actually are or will be arranged or offered by the creditor.</u> ”	12 C.F.R. §§ 226.16(a), 226.24(a)

<sup>7</sup> 75 Fed. Reg. 60352, 60368 (Sept. 30, 2010).

**B. The Proposed Rule’s Specific Listed Concerns are Similar to and Duplicate Existing Laws and Regulations**

Both the Proposed Rule and existing laws and regulations applicable to federally insured, state-chartered credit unions go beyond the general prohibition to identify specific issues and restrictions. The lists of issues identified are extensive, sometimes duplicative and sometimes closely related. Neither framework claims to be all-inclusive, with some issues specifically identified and others to be covered by the general prohibition against deceptive advertising.<sup>8</sup> As shown below, the extent of overlap and duplication applicable to federally insured, state-chartered credit unions supports exempting these entities from the Proposed Rule.

Proposed Rule		Overlapping or Duplicate Law or Regulation	
16 C.F.R. § 321.3(a)	Interest	Finance charges	12 C.F.R. §§ 226.16(b)(i), 226.18(d)
		Total payments and time to repay	12 C.F.R. § 226.16(b)(2)
		Terms of repayment, reflecting repayment obligation over full term	12 C.F.R. § 226.24(d)(2)(ii)
		Reverse payment credit costs	12 C.F.R. § 226.33(c)
16 C.F.R. § 321.3(b)	Rates	Annual percentage rates, periodic rates, discount rates, premium rates, promotional rates	15 U.S.C. §§ 1663(2), 1664(c)-(d); 12 C.F.R. §§ 226.16(b), (d), (g), 22
		Annual percentage rate increases	12 C.F.R. §§ 226.24(c), 24(d)(2)(iii)
		Simple annual rates, annual percentage rates	12 C.F.R. § 226.24(f)(2)
		Oral rate disclosure	12 C.F.R. § 226.26

<sup>8</sup> See *id.* at 60370 (prefacing the list of prohibited misrepresentations in proposed rule 321.3 with “including, but not limited to”); 12 C.F.R. §§ 226.16(a), 226.24(a), 740.2 (prohibiting misrepresentations in advertising generally and mortgage product advertising specifically).

Proposed Rule		Overlapping or Duplicate Law or Regulation	
16 C.F.R. § 321.3(c)	Fees or costs for base product	Membership or participation fees	12 C.F.R. § 226.16(b)(1)(iii)
		Home equity loan fees	12 C.F.R. § 226.16(d)(1)(i)
		Downpayment	12 C.F.R. § 226.24(d)(2)(1)
		Terms of legal obligations	12 C.F.R. §§ 226.17(c), 31(d)(1)
		Reverse mortgage costs	12 C.F.R. § 226.33(c)
		Total sale price	12 C.F.R. § 226.18(j)
		Uniform settlement statement, clearly itemizing costs	12 U.S.C. § 2603(a); 24 C.F.R. § 3500.8
		Mortgage loan information disclosed to NCUA and publicly available	12 U.S.C. § 2803; 12 C.F.R. §§ 203.4-5
16 C.F.R. § 321.3(d)	Terms or costs for additional products ( <i>e.g.</i> , insurance)	Terms of legal obligations	12 C.F.R. §§ 226.17(c), 31(d)(1)
		Annuities purchased as part of reverse mortgages	12 C.F.R. § 226.33(c)(1)
		Total sale price	12 C.F.R. § 226.18(j)
		Insurance and debt cancellation charges	12 C.F.R. §§ 226.4(e), 18(n)
		Uniform settlement statement, clearly itemizing costs	12 U.S.C. § 2603(a); 24 C.F.R. § 3500.8
		Private mortgage insurance disclosures	12 U.S.C. § 4903
		Lender-paid mortgage insurance disclosures	12 U.S.C. § 4905
		Flood insurance disclosures, fees	42 U.S.C. § 4104a; 12 C.F.R. §§ 760.6, 8-9

Proposed Rule		Overlapping or Duplicate Law or Regulation	
16 C.F.R. § 321.3(e)	Taxes and insurance terms, amounts, and payments	Inclusion of taxes and insurance in payments	12 C.F.R. § 226.24(f)(3)(i)(C)
		Tax deductibility of home equity loan interest	12 C.F.R. §§ 226.16(d)(4), 24(h)
		Total sale price	12 C.F.R. § 226.18(j)
		Insurance and debt cancellation charges	12 C.F.R. §§ 226.4(e), 18(n)
		Uniform settlement statement, clearly itemizing costs	12 U.S.C. § 2603(a); 24 C.F.R. § 3500.8
16 C.F.R. § 321.3(f)	Prepayment penalty	Repayment terms	12 C.F.R. § 226.24(d)(2)(ii)
		Terms of legal obligations	12 C.F.R. §§ 226.17(c), 31(d)(1)
		Prepayment penalties for high-cost mortgages	12 C.F.R. § 226.32(d)(6)-(7)
		Prepayment	12 C.F.R. § 226.18(k)

Proposed Rule		Overlapping or Duplicate Law or Regulation	
16 C.F.R. § 321.3(g)	Variability	Variable rates	12 C.F.R. §§ 226.16(b)(1)(ii), 18(f)
		Special disclosures for certain variable rate mortgages	12 C.F.R. § 226.19(b)
		Maximum rate in a variable rate plan	12 C.F.R. § 226.16(d)(1)(iii)
		Balloon payments	12 C.F.R. §§ 226.16(d)(3), 24(c)
		Promotional periods	12 C.F.R. § 226.16(d)(5)
		“Fixed” rates and payments	12 C.F.R. §§ 226.16(f), 24(i)(1)
		Variable rate adjustments	12 C.F.R. § 226.20(c)
		Timing	12 C.F.R. §§ 226.19(b), 20(c)
		Annual percentage rate increases	12 C.F.R. §§ 226.24(c), 24(d)(2)(iii)
		Multiple applicable simple annual rates	12 C.F.R. § 226.24(f)(2)
		Variable payments	12 C.F.R. § 226.24(f)(3)
		Maximum rates included in contract	12 C.F.R. § 226.30
		High-cost mortgages	12 C.F.R. § 226.32
Private mortgage insurance disclosures for variable rate mortgages	12 U.S.C. § 4903		

Proposed Rule		Overlapping or Duplicate Law or Regulation	
16 C.F.R. § 321.3(h)	Comparing rate or payment: temporary vs. actual or hypothetical	Simple annual rate stated with annual percentage rate	12 C.F.R. § 226.24(c)
		Misleading comparisons between actual and hypothetical rates or payments	12 C.F.R. § 226.24(i)(2)
16 C.F.R. § 321.3(i)	Type of product	Terms of legal obligations	12 C.F.R. §§ 226.17(c), 31(d)(1)
16 C.F.R. § 321.3(j)	Cash or credit available to consumer	“Free money” and similar terms prohibited	12 C.F.R. § 226.16(d)(5)
		Terms of legal obligations	12 C.F.R. §§ 226.17(c), 31(d)(1)
		Reverse mortgage payments to consumer	12 C.F.R. § 226.33(c)(2)
		Amount financed	12 C.F.R. § 226.18(b)-(c)
16 C.F.R. § 321.3(k)	Minimum or required payments	Terms of legal obligations	12 C.F.R. §§ 226.17(c), 31(d)(1)
		Payment schedule, total of payments	12 C.F.R. § 226.18(g)-(h)
		Late payments	12 C.F.R. § 226.18(l)
16 C.F.R. § 321.3(l)	Default	Terms of legal obligations	12 C.F.R. §§ 226.17(c), 31(d)(1)
		Due-on-demand clauses for high-cost mortgages	12 C.F.R. § 226.33(d)(8)
		Demand features	12 C.F.R. § 226.18(i)
16 C.F.R. § 321.3(m)	Debt restructuring	Claims of debt elimination	12 C.F.R. § 226.24(i)(5)

Proposed Rule		Overlapping or Duplicate Law or Regulation	
16 C.F.R. § 321.3(n)	Provider is governmental entity; product related to government benefit	Regulations relating to displaying and advertising deposit insurance	12 U.S.C. § 1785(a); 12 C.F.R. §§ 740.3-5, 741.211
		Tax deductibility of home equity loan interest	15 U.S.C. § 1664(e); 12 C.F.R. §§ 226.16(d)(4), 226.24(h)
		Misrepresenting government endorsement	12 C.F.R. § 226.24(i)(3)
16 C.F.R. § 321.3(o)	Source of communication	Relationship to current lender	12 C.F.R. § 226.24(i)(4)
		Disclosures for multiple lenders or multiple consumers	12 C.F.R. §§ 226.17(d), 31(d)(3)
		Identity of creditor	12 C.F.R. § 226.18(a)
		Assumptions	12 C.F.R. § 226.20(b)
		Loan transfer disclosure required	12 C.F.R. § 226.39
		Notice of servicing transfer	12 U.S.C. § 2605; 24 C.F.R. § 3500.21
16 C.F.R. § 321.3(p)	Residing in dwelling	Reverse mortgage disclosures	12 C.F.R. §§ 226.31(c)(2), 33
		Terms of legal obligations	12 C.F.R. §§ 226.17(c), 31(d)(1)
		Security interest	12 C.F.R. § 226.18(m)
16 C.F.R. § 321.3(q)	Likelihood of certain terms	Amount	15 U.S.C. §§ 1662(1), 1663
		Downpayment	15 U.S.C. § 1662(2)
16 C.F.R. § 321.3(r)	Likelihood of refinancing ability	Certain actions not treated as refinancings	12 C.F.R. § 226.20(a)
16 C.F.R. § 321.3(s)	Counseling services	Claiming to be “counselors”	12 C.F.R. § 226.24(i)(6)

Proposed Rule		Overlapping or Duplicate Law or Regulation	
16 C.F.R. § 321.5	Keep for 24 months:	Keep for 24 months evidence of compliance	12 C.F.R. § 226.25
	(i) materially different communications, (ii) available base products, and (iii) additional products	Must be able to reconstruct disclosures for each program	12 C.F.R. Supp. I to Pt. 226, comments 25(a)-1 to 4

In some instances, the restrictions applicable to state-chartered credit unions are even more specific than the Proposed Rule. For example, the FTC’s release notes the role of the misleading use of a foreign language as a contributor to the mortgage crisis,<sup>9</sup> yet the Proposed Rule does not include a specific prohibition against the practice. Regulation Z, which is applicable to state-chartered credit unions, on the other hand, includes as a prohibited act or practice:

*Misleading foreign-language advertisements.* Providing information about some trigger terms or required disclosures, such as an initial rate or payment, only in a foreign language in an advertisement, but providing information about other trigger terms or required disclosures, such as information about the fully-indexed rate or fully amortizing payment, only in English in the same advertisement.<sup>10</sup>

### III. Federally Insured, State-Chartered Credit Unions are Subject to Regular Examinations that Include Compliance with State and Federal Law and Regulation

Federally insured, state-chartered credit unions are subject to regular examinations, which are generally conducted by state regulators and shared with NCUA. These examinations review the credit union’s compliance with a variety of issues, including, if appropriate, potential misrepresentations in mortgage advertising.

Because federally insured, state-chartered credit unions are subject to examination by both their state regulator and NCUA, the NCUA and the state regulators cooperate in the examination process in order to avoid unnecessary duplication of effort and undue burden on the credit union. The state examiner, usually the primary examiner, uses the Automated Integrated Regulatory Examination Software (“AIRES”) platform that was jointly developed by NCUA and state regulators to identify a common set of questions and actions to be taken in relation to any item included in the examination.<sup>11</sup> Once completed, a copy of the state regulator’s examination report is sent to NCUA, which reviews the examination report for issues relating to the credit union’s continuing eligibility for NCUSIF coverage.

<sup>9</sup> 75 Fed. Reg. 60352, 60357 (Sept. 30, 2010).

<sup>10</sup> 12 C.F.R § 226.24(i)(7).

<sup>11</sup> Only the State of Utah does not use AIRES. It uses different software developed by the Federal Deposit Insurance Corporation.

#### **IV. NCUA and State Regulators Have Substantial Enforcement Authority to Address Any Misrepresentation in Mortgage Advertising by Federally Insured, State-Chartered Credit Unions**

As rationale for the Proposed Rule, the FTC cites its ability to seek civil penalties for violations. NCUA and state regulators currently have extensive enforcement authority to investigate and, if necessary, penalize any misrepresentation in mortgage advertising by federally insured, state-chartered credit unions. Duplicative enforcement by the FTC is unnecessary for these credit unions.

In order to be eligible for NCUSIF coverage, a state-chartered credit union must be in compliance with all applicable laws and regulations.<sup>12</sup> NCUA has the authority to take action to enforce any violation of “a law, rule, or regulation,” including misrepresentations in mortgage advertising.<sup>13</sup>

In the event a violation is found, NCUA can issue a cease and desist order to a federally insured, state-chartered credit union or any person affiliated with the credit union.<sup>14</sup> Through a cease and desist order, the NCUA can order a credit union or an individual to take affirmative action to correct the violation, including making restitution, rescinding contracts and restricting activities to those approved by the NCUA.<sup>15</sup> If needed, NCUA is authorized to impose civil penalties, criminal penalties and administrative fines, and, ultimately, terminate insurance coverage.<sup>16</sup>

State regulators have similar enforcement authorities and can take separate action to address any violation of state or federal law that is found.<sup>17</sup> Sufficient enforcement authority over federally insured, state-chartered credit unions is, therefore, already provided to state and federal regulators for there to be adequate enforcement against any misrepresentations by such institutions related to mortgage products.

#### **V. The Exclusion Should Apply to Federally Insured, State-Chartered Credit Unions**

BECU is addressing only the issue of whether federally insured, state-chartered credit unions should be exempted from the Proposed Rule. BECU takes no position on whether any other type of credit union should be exempted.

Thank you for your consideration.

Sincerely,  
J. Parker Cann  
Senior Vice President and General Counsel  
Boeing Employees' Credit Union (BECU)

---

<sup>12</sup> 12 U.S.C § 1786(b)(1).

<sup>13</sup> *Id.* at § 1786(b)(1), (e)(1); *see also* 12 C.F.R. Pt. 226, § 740.2.

<sup>14</sup> *Id.* at § 1784(e).

<sup>15</sup> *Id.* at § 1784(e)(3)-(4).

<sup>16</sup> *Id.* at § 1784.

<sup>17</sup> *See, e.g.*, WASH. REV. CODE §§ 31.12.516-518, 545, 585-595, 664, 850-853; *see also* WASH. REV. CODE §§ 19.144.005-120.