

November 15, 2010

Federal Trade Commission  
Office of the Secretary  
Room H-135 (Annex W)  
600 Pennsylvania Avenue, NW  
Washington, D.C. 20580  
(submitted at: <https://ftcpublic.commentworks.com/ftc/mapadrulenprm>)

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

Dear Sir or Madam:

HomeServices of America, Inc. appreciates the opportunity to comment on the above-referenced proposed rule. We respectfully submit these comments to alert the Commission to aspects of the proposed rule that would discourage real estate brokers and agents from providing consumers with useful information about mortgage products generally and, at the same time, would impose a costly administrative burden on those real estate brokers and agents who would continue to provide such useful information despite the rule's deterrent effect. We hope you will consider our suggested revisions in light of this potentially harmful consequence of the rule.

## **I. Background.**

HomeServices of America, Inc. (hereinafter "HomeServices") is based in Minneapolis, Minnesota and is the second largest residential real estate brokerage firm and the largest brokerage-owned settlement services (mortgage, title, escrow and insurance) provider in the United States. We do business under 22 brands in 20 states and in 2009 our companies collectively closed approximately 120,000 brokerage transactions and more than 50,000 related settlement transactions (title, escrow, mortgage and insurance). Nearly 16,000 real estate agents are associated with HomeServices companies. More information about our company is available at [www.homeservices.com](http://www.homeservices.com).

## **II. Proposed Rule: Mortgage Acts and Practices.**

### **A. The Proposed Rule Would Remove a Valuable Service from the Marketplace.**

In our view, a significant problem with the rule as proposed is that it would stifle the natural flow of basic, useful information about mortgages from real estate brokers and agents to prospective home buyers. In addition to showing houses and assisting in negotiating and

coordinating a buyer's purchase of a home, real estate brokers and agents also serve as trained, licensed, professional guides to the home-buying process. Home buyers rely on their real estate brokers and agents to fill this role.

Real estate brokers and agents perform this service in their one-on-one discussions with clients and prospective clients generally and in the written materials provided through their offices and Websites, and it naturally and necessarily includes providing information about mortgages. Real estate brokers and agents often make statements about mortgages in response to direct questions from clients or prospective home buyers generally, or within materials designed to help prospective home buyers understand unfamiliar concepts (e.g., through answers to frequently asked questions or in a glossary of real estate terms). And real estate brokers and agents may also provide the means for prospective home buyers to obtain more specific information on their own, such as by offering a link to a monthly payment calculator or to the Website for a recommended mortgage lender that is actually offering to provide mortgage financing.

In short, helping clients and prospective clients to understand their financing options and to identify qualified lenders is a valuable part of the services that real estate brokers and agents provide. The proposed rule would, for all practical purposes, eliminate this service, leaving home buyers to fend for themselves. Mortgage-related information would of course remain accessible from innumerable sources, but access to a trusted professional's knowledge and experience in this area would be effectively shut off.

This unnecessary and harmful consequence of the rule would result from the combination of (i) the risk of liability under Section 321.3 for providing mortgage-related information that proves to be inaccurate in any respect and (ii) the need, pursuant to Section 321.5, to keep a record of any statements made concerning mortgages generally, apparently including even statements made in casual conversation, whether oral or through electronic media. The latter risk is based on the understanding that the vast majority of communications real estate brokers and agents make in their day-to-day business would fall within the proposed rule's broad definition of "commercial communication."

B. The Proposed Rule's Definition of "Commercial Communication" is Overbroad.

Section 321.2 of the proposed rule defines "commercial communication" as follows:

"Commercial communication" means any written or verbal statement, illustration, or depiction, whether in English or any other language, that is designed to effect a sale or create interest in purchasing goods or services, whether it appears on or in a label, package, package insert, radio, television, cable television, brochure, newspaper, magazine, pamphlet, leaflet, circular, mailer, book insert, free standing insert, letter, catalogue, poster, chart, billboard, public transit card, point of purchase display, film, slide, audio program transmitted over a telephone system, telemarketing script, onhold script, upsell script, training materials provided to telemarketing firms, program-length commercial ("infomercial"), the

Internet, cellular network, or any other medium. “Commercial communication” includes but is not limited to promotional materials and items as well as Web pages.

This definition is overbroad in that it goes beyond the core conduct the Commission is trying to regulate – mortgage advertising – to encompass communications about *any* goods or services. Accordingly, real estate brokers’ and agents’ statements designed to spur interest in the purchase of a home or of real estate brokerage services would fall within the rule. By narrowing the definition slightly, and distinguishing between statements designed to inform consumers in a general sense and those designed to advertise a particular mortgage product, the Commission could aim the rule directly at its target and avoid the chilling effect described above. (Specific recommendations for changes follow in paragraph II.D of this letter.) This would have the added effect of eliminating the unreasonable record-keeping burden Section 321.5 would otherwise appear to impose on real estate brokers and agents with respect to informal, unscripted statements made in conversations with clients and potential home buyers concerning financing options, not to mention similar statements made in electronic social media.

In considering this recommendation, please note that the real estate broker’s and agent’s primary objective is to assist the buyer in finding and purchasing a home. Although most home buyers will need a mortgage to complete the transaction, the agent’s focus and incentive is on helping the buyer find a home, not to promote and sell any particular mortgage product. The existing regulatory structure effectively precludes real estate agents from simultaneously acting as mortgage brokers.<sup>1</sup> Accordingly, in no case are the real estate brokers and agents actually offering terms of credit, and the Real Estate Settlement Procedures Act (RESPA) prohibits them from receiving kickbacks for referrals to any mortgage broker or lender.<sup>2</sup> Additionally, real estate brokers and agents depend on state licensure for their livelihood, with the attendant threat of revocation for violation of applicable state law and regulations on standards of conduct and prohibited practices.<sup>3</sup> By law, they owe fiduciary duties to their clients, and the vast majority of

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<sup>1</sup> The Real Estate Settlement Procedures Act (RESPA) and the implementing regulations of the U.S. Department of Housing and Urban Development (HUD) broadly prohibit the giving or receiving of anything of value pursuant to an agreement or understanding to refer real estate settlement services to a particular entity in connection with a federally related mortgage loan. 12 U.S.C. 2607(a); 24 C.F.R. Part 3500.14(b). RESPA allows payments for services rendered or goods actually provided, but a review of HUD’s 1999 RESPA Policy Statement illustrates the difficulty real estate agents would have in providing adequate mortgage-related services to justify compensation from a lender. *See* RESPA Statement of Policy 1999-1, 64 Fed. Reg. 39, 10080-10087 (Mar. 1, 1999)(listing 14 services normally performed in origination of mortgage loan and explaining degree to which HUD, in an enforcement action, would examine services provided in a particular transaction to ensure payment for such services was not merely a disguised fee for steering a consumer to a particular lender).

<sup>2</sup> 12 U.S.C. 2607(a); 24 C.F.R. Part 3500.14(b).

<sup>3</sup> *See, e.g.*, Minn. Stat. § 82.81(12) (2010) (including misleading or inaccurate advertising, misrepresentation, and the making of “any false or misleading statement” among non-exclusive list of acts and practices by real estate licensees that constitute grounds for license revocation).

agents are also bound by the professional Code of Ethics promulgated by the National Association of Realtors® to treat all parties to a transaction honestly.<sup>4</sup>

To summarize, real estate brokers and agents have every incentive to treat the public at large, as well as their clients, fairly and honestly in all of their business dealings. Statements by real estate brokers and agents that would fall within the ambit of the proposed rule are categorically different than those of other covered persons and the rule should be revised to account for this.

C. A Clear Exception for Good Faith Errors is Needed.

Section 321.3 provides that it would be a violation of the proposed rule for “any person to make any material misrepresentation, expressly or by implication, in any commercial communication, regarding any term of any mortgage credit product ...” Thus, as proposed, the rule covers any “material misrepresentation.” But neither term in the phrase “material misrepresentation” is defined. Without making a clear element of intent a prerequisite for violation of the rule or including some other qualification with equal effect, the prohibition in Section 321.3 would appear to result in strict liability for any mortgage-related statement that proves to be inaccurate, even a simple error in transcribing rate information. Without a clear definition of “misrepresentation” or some sort of safe harbor covering inaccuracies that occur despite demonstrated good-faith attempts to comply with the rule, Section 321.3 would discourage real estate brokers and agents from answering even the simplest mortgage-related question from a client or potential home buyer and would deprive the public of convenient and useful resources (e.g., links and informational material on real estate brokerage Websites that allow consumers to educate themselves on mortgage financing concepts from the same place they search for homes online).

D. Recommended Changes.

To avoid effectively shutting down real estate brokers and agents as a source of information about mortgage financing, we urge the Commission to consider the following recommended changes to the proposed rule. (Suggested deletions are noted in ~~striketrough font~~ and the suggested additions are underlined.)

1. Section 321.2(a); definition of “Commercial Communication.”

Revising the definition as follows would address the two prongs of the chilling effect discussed above by limiting the scope of statements that could subject real estate brokers and agents to liability and by concurrently limiting the effect of the record-keeping requirements tied to the same definition:

**§ 321.2 Definitions.**

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<sup>4</sup> National Association of Realtors®, 2010 Code of Ethics and Standards of Practice (available at: <http://www.realtor.org/mempolweb.nsf/pages/code>).

(a) “Commercial communication” means any written or verbal statement, illustration, or depiction, whether in English or any other language, that is designed to effect or create interest in ~~purchasing goods or services~~obtaining a particular mortgage credit product, whether it appears on or in a label, package, package insert, radio, television, cable television, brochure, newspaper, magazine, pamphlet, leaflet, circular, mailer, book insert, free standing insert, letter, catalogue, poster, chart, billboard, public transit card, point of purchase display, film, slide, audio program transmitted over a telephone system, telemarketing script, onhold script, upsell script, training materials provided to telemarketing firms, program-length commercial (“infomercial”), the Internet, cellular network, or any other medium. Promotional materials and items and Web pages are included in the phrase “commercial communication.” Informational or educational statements made by real estate brokers and agents in an effort to explain or illustrate concepts relating to mortgage credit products generally, and not designed to advertise a particular mortgage credit product, are not included in the phrase “commercial communication.”

By clarifying that, with respect to real estate brokers and agents, informational tools and general discussions of mortgage options are outside the scope of the rule, the proposed revision to the definition of “Commercial Communication” would serve the public interest in preserving the availability of real estate brokers and agents as a resource for mortgage-related information.

2. Revision to Section 321.5 and New Section 321.8.

Alternatively, the Commission could improve the proposed rule substantially, and to a similar effect as that described above, if it left the definition of “Commercial Communication” alone but narrowed the scope of the record-keeping requirement within the text of Section 321.5 and added a good-faith exception as described below:

**§ 321.5 Recordkeeping requirements.**

(a) Any person subject to this rule shall keep, for a period of twenty-four months from the last date of dissemination of the applicable commercial communication, the following evidence of compliance with this rule:

(1) Copies of all materially different commercial communications that advertise the availability of any specified mortgage credit product and are disseminated by such covered person, including but not limited to sales scripts, training materials, related marketing materials, websites, and weblogs;

(2) Documents describing or evidencing all mortgage credit products advertised by such covered person available to consumers during the time period in which each commercial communication was disseminated, including but not limited to the names and terms of each such mortgage credit product available to consumers; and

(3) Documents describing or evidencing all additional products or services (such as credit insurance or credit disability insurance) that are or may be offered or provided by such covered person with the mortgage credit products available to consumers during the time period in which each commercial communication was disseminated, including but not limited to the names and terms of each such additional product or service available to consumers.

....

**§ 321.8 Exception.**

The provisions of this rule [Section 321.3] shall not apply to any unintentional inaccuracy in a commercial communication, provided that such inaccuracy is the product of a diligently maintained system or process that is reasonably calculated to provide accurate information in commercial communications.

**III. Conclusion.**

Purchasing a home is often the single largest financial transaction in a person's life. Knowledgeable real estate brokers and agents can be invaluable in helping their clients and the general public understand the process. They should not be chilled into withholding information from those who could use it. We believe it would be a disservice to consumers to deter real estate brokers and agents from providing basic facts about such an important element of the home-buying process as mortgage financing and hope the commission will consider revising to the rule to ensure this unnecessary consequence is avoided.

HomeServices appreciates the opportunity provided by the Commission to comment on the proposed rule. Thank you for your time.

Respectfully,

HOMESERVICES OF AMERICA, INC.

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