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By electronic delivery to: ftcpublic.commentworks.com/ftc/holderrule

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Federal Trade Commission
Office of the Secretary
Constitution Center
400 7th Street SW
5th Floor Suite 5610 (Annex B)
Washington, DC 20024

Re: Holder Rule Review, FTC File No. P164800

Wells Fargo Bank, N.A. (Wells Fargo) is responding to the request by the Federal Trade Commission (FTC) for public comments on the FTC's Trade Regulation Rule Concerning Preservation of Consumers' Claims and Defenses (the Holder Rule).[i] As part of its regular review of its regulations and guides, the FTC has asked 15 questions about the Holder Rule, encompassing the following:

- The economic impact and continuing need for the Holder Rule, including the need for any potential expansion of the Holder Rule's applicability;
- Developments in case law that should be reflected in the Holder Rule; and
- Industry changes that may warrant changing the Holder Rule.

As the largest residential mortgage lender in the United States, Wells Fargo welcomes and appreciates the opportunity to provide our initial thoughts about the Holder Rule. At this point, we limit our comment to one issue--namely, we respectfully request that the FTC not expand the reach of the Holder Rule to residential mortgage loans beyond existing federal law, because of the potential impact such a change would have on the availability of credit.

The Holder Rule effectively subjects a third-party creditor or assignee of a consumer credit contract involving the sale of goods or services to any claims or defenses that the consumer could assert against the seller.[ii] Generally speaking, the Holder Rule preempts through federal regulation state laws that otherwise would restrict the ability of a borrower to assert claims and defenses against an assignee of a credit contract.

The Holder Rule only applies to certain sales or leases to consumers of goods or services for personal, family, or household use. Since real property does not constitute a "good," a residential mortgage loan to finance or refinance the purchase of a home is not subject to the Holder Rule.

In soliciting comments on the Holder Rule, it is possible that the FTC will receive requests to extend the Holder Rule to residential mortgage loans. We believe it would be inappropriate to implement such an extension, because it would potentially have a material adverse effect on the availability of consumer credit by introducing significant risk and uncertainty into a secondary market struggling to recover. Further, it conflicts with the express policy choices made by Congress to carefully expand assignee liability only in targeted situations.

In 1994, in response to evidence of allegedly abusive lending practices involving residential mortgage loans with high interest rates, points and fees, Congress enacted the Home Ownership Equity Protection Act (HOEPA). HOEPA explicitly imposes assignee liability, by providing that any person who purchases or takes assignment of a HOEPA mortgage is subject to all claims and defenses the consumer could assert against the creditor of the mortgage. This language is taken almost verbatim from the FTC's Holder Rule.

Importantly, though, Congress limited Holder Rule-like assignee liability under HOEPA to "**high cost**," closed-end, first lien, owner occupied, refinancing, residential mortgage loans. In 2010, the Dodd-Frank Act amended HOEPA to extend its protections to purchase money loans and to lower the financial triggers that constitute a "high cost" loan. The key is that first in 1994 and then again in 2010 Congress made the express decision to borrow the principles of the Holder Rule solely for "high cost" residential mortgage loans.

In large part because of the broad assignee liability provided under HOEPA, the residential finance industry does not make, finance, purchase, sell, or securitize newly originated HOEPA loans. Such loans are ineligible for sale to Fannie Mae or Freddie Mac or for pooling in private mortgage-backed securities rated by Standard & Poor's, Moody's, Fitch, and other credit rating agencies. Private investors routinely exclude such loans from their purchase eligibility criteria. We believe the extension of the Holder Rule to non-"high cost" mortgage loans would diminish the interest of the capital markets to invest in residential mortgage loans, which would significantly impair consumers' access to the credit needed to finance their homes.

Congress also has imposed assignee liability on purchasers of residential mortgage loans under TILA in three other limited circumstances: (1) to authorize a borrower to assert a defense to foreclosure against a holder of a "non-qualified" mortgage loan based on alleged violations by the originator of TILA's new "ability to repay" requirements,[iii] (2) as a defense to foreclosure against a holder for alleged violations of loan originator compensation rules by the originator, and (3) where violations are apparent on the face of the disclosure statement provided to the consumer.[iv] In all three cases, assignee liability is based solely on defenses arising out of violation of the specific statutory provisions of TILA, and does not include the more open-ended assignee liability of the Holder Rule and HOEPA. Clearly Congress has made an express policy choice to impose assignee liability in a very narrow and surgical manner. We do not think it is prudent public policy for the FTC to use federal regulation to circumvent these carefully crafted Congressional determinations of policy with respect to the residential mortgage market.

Assignee liability impacts consumers' access to the credit they need to finance their homes because it significantly influences how lenders do business and the willingness of private investors to invest in residential mortgage loans and the related securities and affects the functioning of capital markets. Wells Fargo strongly urges the FTC to carefully study the potential impacts of any expansion, and to engage with participants in all aspects of the residential mortgage market. Any such study should analyze how the capital markets have reacted to the broad based assignee liability found in HOEPA. We appreciate the opportunity to present these comments, and we would welcome the opportunity to further discuss this important policy matter.

Sincerely,

Peter Diliberti
Executive Vice President
Wells Fargo Bank

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[i] Federal Trade Commission, Rules and Regulations Under the Trade Regulation Rule Concerning Preservation of Consumers' Claims and Defenses, 80 Fed. Reg. 75,018 (Dec. 1, 2015).

[ii] 16 C.F.R. part 433.

[iii] 15 U.S.C. § 1640(k).

[iv] 15 U.S.C. § 1641(e).