



November 5, 2007

**Regulation Comments
Chief Counsel's Office
Office of Thrift Supervision
1700 G Street, NW
Washington, DC 20552**

Attn: OTS-2007-0015

Re: Advance Notice of Proposed Rulemaking; Unfair or Deceptive Acts or Practices; 12 CFR Part 535

Dear Sir or Madam:

The Consumer Bankers Association (CBA) is pleased to submit these comments on the Advance Notice of Proposed Rulemaking regarding Unfair or Deceptive Acts or Practices (UDAP). The CBA is the recognized voice on retail banking issues in the nation's capital. Member institutions are the leaders in consumer, auto, home equity and education finance, electronic retail delivery systems, privacy, fair lending, bank sales of investment products, small business services and community development. The CBA was founded in 1919 to provide a progressive voice in the retail banking industry. The CBA represents over 750 federally insured financial institutions that collectively hold more than 70% of all consumer credit held by federally-insured depository institutions in the United States.

The Office of Thrift Supervision (OTS) is issuing this Advance Notice of Proposed Rulemaking (ANPR) to determine whether it should expand its current prohibitions against unfair or deceptive acts or practices. Numerous issues are identified in the ANPR that might warrant OTS's review.

Federally chartered thrifts, like all federally regulated depository institutions, are largely free from the taint of unfair or deceptive practices. If for no other reason, they are subject to continual oversight and examination for compliance with numerous consumer protection laws. The agencies have long had the authority to enforce the FTC Act against violators of any form of unfair or deceptive practice over which they have jurisdiction, without having to enact regulations in advance. A recent example is the enforcement action of the OCC against Provident National Bank. Thus, it would be disingenuous for the OTS to suggest that there may be unfair or deceptive practices at federal thrifts that are flying beneath the agency's radar. The question is really whether, in fairness to the institutions being supervised, some additional clarity on the question of what is unfair or deceptive is necessary to prevent surprise application of the FTC Act's proscription. As noted below, we believe that, if the agency has any such concerns, they should be handled through the use of guidance, rather than regulation, and should be undertaken jointly with the other financial institution regulatory agencies.

Importance of Uniformity

At the outset, we wish to stress the importance of all the agencies acting uniformly in such a venture. We recognize that the FTC Act does not mandate that you adopt uniform rules on unfair or deceptive practices in this case, but uniformity is a highly desirable goal and should be your first and most important consideration. The provisions of section 18(f), which require that other agencies adopt substantially similar rules to any adopted by the FTC, or show why they are not needed, suggests however that it was always considered desirable for there to be substantially similar rules emanating from the multiple regulators in this area. It is hard to imagine many situations where a practice that is unfair or deceptive when engaged in by a financial institution wearing one hat ceases to be unfair or deceptive when engaged in by another. Yet individual agencies, acting separately in adopting regulations defining unfair or deceptive practices, would be operating on the assumption that it is the norm rather than the exception.

Many of our member institutions have multiple charters. At such institution, managing compliance enterprise-wide could lead to chaos if one branch of the institution could do what in another were unfair or deceptive by agency rulemaking. Institutions would be forced to comply with the most restrictive of the agency issuances, permitting one agency to ride herd on the others. Additionally, any determination that a practice is unfair or deceptive by any one agency would have far-reaching effects. Plaintiffs would employ them when suing under state “mini-FTC Acts,” forcing every institution subject to those state laws to comply with any agency issuance on UDAP.

The goal of uniformity is even more important from the perspective of the consumer. Why should the charter of the financial institution matter to the consumer if the consumer is the victim of an unfair or deceptive practice? The consumer will suffer the same either way. If there are genuine unfair or deceptive practices that require agency pronouncement, we urge you to act in concert with the other relevant agencies rather than independently.

A Principles-based Approach is Preferable

To date, the OTS has not adopted comprehensive guidance on what principles define unfair or deceptive practices nor what specific practices (other than in the credit practices rule) may be unfair or deceptive. Both the FDIC and the Federal Reserve Board have spelled out the standards that they consider unfair or deceptive, drawing from the FTC’s model, discussed the relationship to other laws, and offered guidance on strategies for managing risk. The OCC has done the same in its Guidance on Unfair or Deceptive Acts or Practices. We recommend that the OTS do the same.

Ideally, in the interest of uniform guidance, the OTS should work with the federal FFIEC agencies to provide one set of guidelines for all the regulated entities. The absence of a uniform policy on what constitutes unfair or deceptive practices, as noted above, would create major compliance problems for financial institutions and irrational and uneven consumer protection.

Problems with Targeted Practices Approach

One option offered by the OTS is the “Targeted Practices Approach”, in which the agency could “simply list a number of specific practices that it would prohibit as unfair or deceptive.” We do not believe that regulation of specific practices as *per se* unfair or deceptive by the OTS is appropriate. Instead, we would encourage the agency to work with the others to adopt a uniform set of principles based on the FTC model, which could then be enforced consistently by the appropriate agencies.

The list of possible targeted practices in the ANPR provides an excellent case study for why proscribing targeted practices by rulemaking is a blunt instrument. Each of them is either overly broad, and its prohibition will sweep in perfectly legitimate practices, or in some cases (e.g. encouraging default) are rarely if ever a practice of federal thrifts and do not require rulemaking. A prohibition on mandatory arbitration in credit cards, for example, would fail to recognize the many benefits of arbitration—lower cost, speedier resolution, reduced burden on courts, etc. Numerous predatory lending laws enacted by the states permit arbitration, provided it meets certain minimum consumer protection standards. Prohibiting so-called universal default could sweep in pricing adjustments based on changes in credit—a practice which helps protect the institution from a change in the risk profile of a portfolio. The use of risk-based pricing practices has been beneficial for consumers by making credit available at the best price to the greatest number.

Virtually every item on the list is problematic. Prohibiting discretionary pricing in real estate lending would have a dramatic effect on the industry by changing the pricing structure of mortgage loans. Sweeping it away would also sweep away benefits to consumers who may wish to obtain low-closing cost loans. Freezing accounts under a court order pending determination of account fund sources is merely an example of a practical response to judicial process that protects the institution from liability. It has no business on this list.

In short, listing practices as per se violations creates an overly broad proscription on financial institutions, making it impossible to allow for the flexibility that is necessary to determine if something is truly unfair or deceptive. A financial institution supervisory agency is in the best position to make those determinations on a case by case basis, employing guidelines that reflect widely accepted principles.

Uniform Guidelines Preferable to Regulation

The OTS, either individually or collectively, has issued a number of guidelines to thrift institutions that have been an effective means of ensuring a certain minimum level of compliance. This is far preferable to the use of regulation in the case of unfair and deceptive practices. The interagency guidance on nontraditional mortgage lending and subsequent subprime lending statement are recent examples of the way in which such a tool can be successfully employed. If it should prove necessary to target specific practices, we believe the use of guidance is preferable.

Institutions treat guidelines by their supervisory agency as de facto requirements, not mere suggestions of the agency's preference. The failure to comply with agency guidance is a serious problem for the institution, which can result in a series of increasingly strict penalties until the problem has been fixed. If the informal supervisory process is inadequate, these steps can range from a memorandum of understanding through and including formal enforcement actions.

The advantage of guidance over regulation in this case is that it allows for greater flexibility and a greater adaptability. It takes advantage of the supervisory process to ensure compliance, and it can be modified as markets and industry practice changes over time more easily than regulations. If it is necessary to focus on specific practices as unfair or deceptive, risk is great that the market will quickly adapt and the regulation will be out of date and ineffective before long. Guidance, on the other hand, can more easily

keep up with change and reflect what the examiners are encountering in the financial institutions over time.

Exclude Existing Consumer Protection Regulation

There are many consumer credit laws and regulations already in existence. These include the now gargantuan Regulation Z (TILA), which includes the HOEPA rules; Equal Credit Opportunity Act; Electronic Funds Transfer Act; Fair Housing Act; Fair Debt Collection Practices Act; Truth in Savings Act; and the list goes on. Each of these and their brethren were designed to address specific practices with thoughtful and thorough rules regarding practices and procedures. For the most part, regulations under these laws are drafted uniformly to apply to all the necessary parties under one set of rules by agency personnel who are expected to develop significant expertise in the area.

The OCC, FDIC and Federal Reserve have all noted in their issuances on unfair or deceptive practices that violations of these other laws may also be unfair or deceptive under the FTC Act, and that compliance with these other consumer protection laws does not necessarily imply that a practice is not unfair or deceptive. Hence, they have all alluded to these other regulations in their guidance, and encouraged their institutions not to necessarily be lulled into complacency by mere technical compliance with those rules. In any general guidance, we would certainly encourage you to do the same. However, to the extent you go beyond general guidance to target specific practices, we would urge you to avoid essentially re-regulating areas that are already covered by these and other federal consumer protection laws. If you believe there are practices subject to those laws that are in all cases unfair or deceptive, we encourage you to work with the agency responsible for the appropriate regulation, so that institutions are not subject to multiple, conflicting requirements covering the same ground.

Similarly, to the extent you wish to focus on specific practices, we recommend you exclude issues of mortgage lending. As a signatory to the Interagency Statement on Subprime Mortgage Lending, you have already provided some significant guidance in

this area. Furthermore, the guidance had the advantage of being uniformly applicable—at least to regulated financial institutions and their affiliates. Anything adopted pursuant to your authority under the FTC Act would be limited in applicability to federal thrifts. We believe, and we think you would concur, that federal thrifts have had few problems in this area, and therefore the focus on it here would be inappropriate. Finally, we believe that, in the interest of uniformity, it would be preferable for you to allow the Federal Reserve Board to continue its existing rulemaking under HOEPA. That agency is expected to issue a proposal shortly that will address unfair or deceptive practices in mortgage lending, and will apply to all mortgage lenders. The uniformity that will be achieved is far preferable to the piece-meal approach of each agency adopting UDAP rules.

Thank you for the opportunity to comment on the ANPR. If you have any questions, please do not hesitate to contact us.

Sincerely,

Steven Zeisel
Senior Counsel