**Via Electronic Delivery**

November 5, 2007

Regulation Comments
Attention: OTS– 2007–0015
Chief Counsel's Office
Office of Thrift Supervision
1700 G Street, NW.
Washington, DC 20552

Re: OTS– 2007–0015; Part 535: Unfair or Deceptive Acts or Practices (UDAP); 72 Federal Register 43570; August 6, 2007

Ladies and Gentlemen:

The American Bankers Associations (ABA)[1] and America's Community Bankers (ACB)[2] welcome the opportunity to respond to the Advance Notice of Proposed Rulemaking (ANPR) issued by the Office of Thrift Supervision (OTS) regarding the OTS' review of its regulations relating to unfair or deceptive acts or practices. We understand that the review is intended to determine whether and, if so, to what extent, additional regulation is needed to ensure that customers of OTS-regulated entities are treated fairly.

**Position**

ABA and ACB appreciate and share the concerns of the OTS that American consumers be treated fairly in financial transactions. We also share Director Reich's goal of transparency in the agency's supervisory expectations with respect to unfair or deceptive acts or practices[3] and his long-standing commitment to avoid unnecessary regulatory burden. We caution, therefore, against overly prescriptive regulation that could ultimately harm consumers and the banks that serve them by limiting access to credit and stifling the development of new products. OTS regulated institutions overwhelmingly have refrained from the unfair and deceptive acts and practices that have resulted in the subprime lending crisis. Additionally, the OTS already has ample authority to supervise and take enforcement against any outlying

[1] ABA brings together all categories of banking institutions to best represent the interests of this rapidly changing industry. Its membership--which includes community, regional, and money center banks and holding companies, as well as savings associations, trust companies, savings banks, and bankers banks--makes ABA the largest banking trade association in the country.

[2] ACB is the national trade association committed to shaping the future of banking by being the innovative industry leader strengthening the competitive position of community banks. To learn more about ACB, visit www.AmericasCommunityBankers.com.

[3] Remarks of John M. Reich, Director of the Office of Thrift Supervision, to the Exchequer Club, September 19, 2007 at page 5. http://www.ots.treas.gov/docs/8/87146.pdf

institutions that may engage in improper lending practices. If the agency nevertheless determines that further instruction is necessary for OTS regulated institutions and their affiliates, it should employ uniform, principle-based guidance with uniform supervision and enforcement consistent with the standards established for all industry participants by all the relevant regulatory agencies.

We explain below why we do not believe that the issuance of new regulations by the OTS is needed. We also provide answers to the questions presented by the OTS in this ANPR.

**Background**

Under provisions of the Federal Trade Commission Act (FTC Act) and the Home Owners' Loan Act (HOLA), the OTS has exclusive rulemaking authority to promulgate unfair or deceptive acts or practices regulations applicable to savings associations[4] as well as the obligation to prevent and/or prohibit savings associations from engaging in unfair or deceptive acts or practices (UDAP) against the public. The OTS has exercised this authority previously, most importantly in issuing the OTS' Credit Practices Rule, which largely paralleled a similar rule issued by the FTC. The OTS has also issued consumer protection regulations relating to unfair or deceptive acts or practices, specifically the Advertising Rule and additional consumer protections with respect to late fees, prepayment penalties and changes in terms with respect to home mortgages. In addition, OTS has responsibility to examine and supervise savings associations, including their subsidiaries and affiliates, for overall safety and soundness and for their compliance with applicable consumer protection laws.

Thus, the OTS states that it is "considering using its rulemaking authority under HOLA to issue regulations on unfair or deceptive acts or practices that would cover savings associations, non-functionally regulated subsidiaries owned in whole or part by a savings association, service corporations owned in whole or in part by a savings association, savings and loan holding companies, and nonfunctionally regulated subsidiaries of savings and loan holding companies other than a bank or subsidiary of a bank. OTS is not contemplating covering service providers directly with such a rulemaking at this time."[5] Towards that end, the OTS asks a number of questions involving fundamental issues relating to the formulation of an appropriate regulatory framework for its responsibility to prevent unfair or deceptive acts and practices as well as a number of questions about specific acts and practices.

**Analysis**

The ABA and ACB begin by noting that there have been remarkably few UDAP enforcement actions against insured depository institutions. According to staff of the OTS, very few actions for unfair or deceptive acts or practices have ever been undertaken by OTS, and virtually all of them involved violations of existing consumer protection regulations and

[4]Section 5(a)(2) of the FTC Act, 15 U.S.C. 45(a)(2), expressly provides that the FTC's power to prevent unfair or deceptive acts or practices in or affecting commerce does not apply to savings associations, banks, or federal credit unions, among others.

[5] 72 FR 43573.

so were resolved under those regulations. Thus, the OTS' ANPR is issued against a background of few, if any, problems with unfair or deceptive acts or practices by savings associations that are not already the subject of existing regulation, but also against an enormous backdrop of apparent unfair and deceptive acts and practices in the subprime industry by non-bank lenders and brokers.

**Questions about the appropriate regulatory framework for UDAP regulation:**

The ANPR presents a number of issues related to the appropriate regulatory framework for further UDAP guidance, regulation or enforcement. Because they are closely related, we will take these first six issues together.

Issue 1. Should OTS consider further rulemaking on unfair or deceptive acts or practices that would cover products and services in addition to consumer credit? If so, should the rule be limited to financial products and services and how should that scope be defined?

Issue 2. Should OTS consider further rulemaking on unfair or deceptive acts or practices that would cover more than just the savings association, but related entities as well?

Issue 3. What would be the impact on the industry and consumers of any of the various models and approaches discussed?

Issue 4. OTS's current Credit Practices rule lists specific acts or practices that are unfair or deceptive *per se*; it prohibits such practices regardless of the specific facts or circumstances. Would it be appropriate for OTS to determine that additional acts or practices are unfair or deceptive *per se*
regardless of the specific facts or circumstances?

Issue 5. Should OTS consider a principles-based approach to a potential rulemaking that can evolve as products, practices and services change? If so, what principles should OTS consider in determining that a specific act or practice is unfair or deceptive? Please provide examples.

Issue 6. Are the principles in the FTC guidance appropriate for the thrift industry? Should OTS consider adopting and incorporating them as part of an enhanced rule on unfair or deceptive acts or practices that includes standards to determine whether a particular act or practice is unfair or deceptive?

As the OTS outlines its overall authority and responsibilities to prevent unfair or deceptive acts and practices, it would appear to go beyond simply consumer credit. However, the record does not present evidence that there is a need for such new regulations. The ABA and ACB believe that the OTS, before it acts to create a new regulation, should first be convinced and demonstrate publicly that there is a need in fact for such regulation, by showing through specific supervisory enforcement against entities under the OTS' jurisdiction that there exists a problem. To date, we do not see that the record has shown a need for such additional regulation.

As to related entities of savings associations, if the OTS addresses UDAP pursuant to its authority under Section 5 of the FTC Act, then we believe that the OTS should limit the rulemaking to cover only savings associations and not their related entities, for two reasons. First, Section 133 of the Gramm-Leach-Bliley Act specifically clarified that affiliates of savings associations, including subsidiaries, are not exempt from FTC's jurisdiction under the FTC Act. This raises the issue of what authority does the OTS have to supervise these related entities for the purposes of the FTC Act. We recognize that the OTS believes that it has such general supervisory authority under its authority as a thrift holding company supervisor, but the specific reserving of authority to the FTC over these entities in GLBA raises a serious question as to whether the Congress did not specifically want the FTC to have UDAP authority over them.

The second reason for the OTS to refrain from asserting UDAP authority over these related entities is that this would create a triple overlay of enforcement of UDAP issues, which appears to us to be burdensome and confusing to the entities and inefficient in terms of use of supervisory and enforcement resources. These related entities are clearly subject to FTC jurisdiction. They are also subject to state consumer protection and UDAP laws, and thus under the jurisdiction of each of the states in which they operate. To impose yet another UDAP framework, originating in the OTS, on these entities would be unnecessary and could impose conflicting and confusing standards. This is not to say that the OTS should not coordinate with the FTC and state authorities, as well as the other federal banking regulators. Such coordination is *vital* in preventing the application of conflicting standards and the inefficient use of all of the agencies' resources.

**As a basic principle, the ABA and ACB believe that it is very important that the OTS work with the other agencies that have UDAP authority in formulating consistent regulations and enforcement policies. The financial services industry and our customers need consistent standards across the banking agencies and across other agencies with UDAP authority. We also need consistent regulations, supervision and enforcement on banks and non-bank financial market participants.** As the recent revelations of fraud and deception in the subprime mortgage market have demonstrated, uneven regulation and supervision give license to the bad actors to exploit inadequacies of supervision; unfortunately, however, their bad actions eventually damage not only consumers but also the entire financial services sector.

Assessing the wisdom of the various regulatory options open to OTS is a daunting task. However, bankers consulted by the ABA and ACB were able to reach a broad consensus on some general principles for UDAP enforcement, which we submit to the OTS for consideration in evaluating how the OTS might implement the range of powers it has available and the choice of enforcement approaches enumerated in the ANPR.

## General Principles

**First: Act Jointly and Uniformly.** As stated above, it is very important that OTS coordinate its efforts with the other agencies, as the industry needs consistent standards across the banking agencies and on banks and non-bank financial market participants. Moreover, not only must there be uniformity of enforcement approach, but also there needs

to be an equal level of supervision and examination. This is a key element in achieving transparency of supervisory expectations. As ABA's Vice-Chairman Art Johnson testified before the Congress this summer:

> While each agency has asserted the authority to enforce the UDAP statute, arguably not every agency has the authority to define in advance through a rulemaking what practices are unfair or deceptive. To address this anomaly, we support vesting all of the federal banking agencies with UDAP rule-writing authority to be exercised **jointly**. Only by a grant of **joint** authority can we maintain uniformity in any formal regulatory action to impose specific UDAP standards on the different components of the banking system.
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> Just as it is anomalous to vest rulemaking authority in some but not all of the banking agencies, it would be anomalous – and harmful – for the five federal agencies that are members of the FFIEC to adopt different standards of what is an unfair or deceptive act or practice. An act becomes no more or less unfair or deceptive by virtue of the actor's type of charter. Thus, there is no reason to vest the banking regulators with authority to initiate individual rulemakings under the UDAP law.
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> Indeed, there is a good reason **not** to vest the agencies with **independent** rulemaking authority under the UDAP law. Consumers should receive the same level of fair treatment at all financial institutions. Weaker consumer protection standards at only some financial institutions can taint the entire industry, while overly prescriptive standards imposed on only some institutions result in unnecessary burdens on the affected entities. Neither outcome is desirable. We can be certain that both will be avoided only by the joint exercise of rulemaking authority.[6]

As an example of such coordination, we expect that the Federal Reserve Board, before the end of the year, will propose new consumer protections under their Home Ownership and Equity Protection Act (HOEPA)[7] authority to prevent unfair or deceptive acts and practices involving mortgages. Clearly, the OTS and the other agencies will need to conform their regulations and guidance to any new regulations, particularly since these will apply to all mortgage creditors.

**Second: Harmonize with FTC Standards**. Related to this, we note that the OTS has not formally adopted the FTC standards for identification and suppression of unfair or deceptive acts or practices under the FTC Act, as the other banking agencies have done. In the OTS' discussion of the FTC model, the OTS notes that the other banking agencies have issued guidance for institutions under their jurisdiction, guidance based on the FTC's Policy Statement on Unfairness issued in 1980. We urge the OTS to adopt a similar policy statement as an initial step towards uniform standards.

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[6] Testimony of Arthur C. Johnson, Chairman, and CEO, United Bank of Michigan, Grand Rapids, Michigan on Behalf of the American Bankers Association before the Committee on Financial Services, United States House of Representatives, July 25, 2007, pp. 13-14.

[7] See, 15 U.S.C. 1639.

Uniformity in approach to UDAP is triply necessary because of the overlapping jurisdiction of enforcement entities. As OTS notes, while the FTC has no enforcement authority over savings associations, it does have such authority over affiliates and subsidiaries. Thus, a practice by an affiliate, depending upon how the OTS decides to proceed with respect to related entities, may or may not be the subject of separate—and even conflicting—enforcement actions by the OTS, by the FTC, and by each state in which the affiliate operated.[8] With the possibility of multiple enforcement agencies applying different standards to determine whether there is a UDAP violation, many institutions are rightly concerned that risk assessment and compliance efforts will be very difficult. A major reduction in that difficulty could be achieved through uniform standards and consultation between the various enforcement entities.

**Third: Coordinate Supervision**. Related to the need for creating and maintaining uniform standards, we recommend that all of the banking agencies continue their UDAP oversight by coordinating through the Federal Financial Institutions Examination Council (FFIEC). Specifically, not only does the industry need uniform guidance, but also the industry needs uniform examination procedures, based on joint agency FFIEC guidance, to enable appropriate flexibility while reducing uncertainty for financial institutions.

An example of why we urge such coordination can be found in this ANPR. Under specific practices that the OTS might find to be unfair or deceptive is the question from OTS as to whether it should restrict savings associations from imposing fees that exceed a certain amount or percentage of the original gift amount. This step would be inconsistent with guidance on gifts cards already issued by the OCC that requires certain disclosures to consumers if there are fees associated with the gift card, but no limit on those fees. Such potential inconsistencies create compliance difficulties and unnecessarily create regulatory burden, and would be confusing to consumers. Additionally, the OTS has not indicated how a disclosed fee on a gift card would be *per se* unfair to the consumer (we assume that a disclosed fee cannot be deemed deceptive).

**Fourth: Use the Flexibility of Guidance**. In general, ABA and ACB believe that the OTS (and the other agencies) should provide guidance on UDAP rather than issue regulations. We believe that the agencies' use of guidance on nontraditional mortgages and on subprime mortgage lending has been effective, and might well have been delayed or had to be modified if they had been issued as proposed regulations. Both issuances consider the risk of UDAP violation in arriving at their guidance. Both have been very successful in bringing about improved lending practices. As Director Reich has observed:

> [A]lthough guidance by a federal banking regulator does not carry the force of law, it carries a weight that is recognized by our examiners and by the institutions we regulate. Regulatory guidance sets supervisory expectations, providing direction for examiners and, yes, *transparency* for regulated institutions so institution executives understand where examiners will be focusing. Our examiners follow up with the institutions on how they are complying with such guidance and generally, the examiners find compliance. If institutions are not adequately following the guidance,

[8] As best as staff of ABA and ACB have been able to determine, neither the OTS nor the OCC has suggested that its preemption powers would be used to preempt a state UDAP statute.

> we find out why, and we work with institutions to address particular issues and problems. [9]

We share Director Reich's conviction that effective transparent supervision can be achieved without promulgating static rules. This is especially feasible where the banking agencies have established coordinating structures like the FFIEC.

**Fifth: Prioritize Area of Concern.** If the OTS must do rulemaking, then OTS should address significant problems, such as unfair subprime mortgage market practices, and otherwise issue guidance or pursue case-by-base enforcement under the general principles of UDAP rather than over prescribe through detailed regulation. The real impetus for exercise of UDAP authority is provided by the current subprime mortgage crisis. If regulatory resources are going to be expended on issuing new rules, the focus should be on the source of the impetus—subprime mortgage practices, and consideration of other areas should be postponed.

The OTS, in its discussion of alternative models of UDAP enforcement, suggests a Targeted Practices Approach, under which OTS could simply list a number of specific practices that it would prohibit as unfair or deceptive, such as in the areas of credit card lending, residential mortgage lending, gift cards, and deposit accounts. While there have been serious problems with subprime lending that the ACB and ABA believe need to be addressed, we believe that the OTS focus must be on areas with significant risk of unfairness and deception for consumers. Our associations have suggested that the Federal Reserve exercise its HOEPA authority to address unfair, deceptive or abusive practices in the subprime market.[10] This approach has the benefit of reaching all creditors in the market and can provide a uniform foundation for OTS, other banking supervisors and also other regulatory agencies to conform their UDAP enforcement efforts in this important policy area.

While there may be some problems with gift cards or with the freezing of deposit accounts under state attachment or garnishment orders, these simply do not rise to the level of concern over subprime lending practices. We note that the agencies have already issued proposed best practices with respect to garnishment that appear to conflict with state law and judicial procedure and that may increase the financial institutions' exposure to liability under state garnishment law. Due to the severe penalties to institutions found violating UDAP prohibitions, care must be taken by the OTS and the other banking agencies to not hastily issue new prohibitions or regulatory restrictions, particularly when the agencies are defining legal and long standing practices as "unfair or deceptive." The OTS should not follow a scattergun approach to UDAP enforcement.

**Sixth: Take a Principles Approach**. OTS should use a principles approach. ABA and ACB believe that highly specific rules should be avoided, since not only can highly specific rules be evaded by bad actors but also highly specific rules have to be changed in a formal process that is slow to adjust to market changes. We note also that highly specific rules tend

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[9] Remarks of John M. Reich, supra at page 4.

[10] On August 15, 2007, ABA and ACB filed a joint comment letter in support of the Federal Reserve's exercise of HOEPA authority to regulate abuses in the subprime mortgage markets. See, http://www.aba.com/aba/documents/press/comment_letter_81507.pdf

to be more difficult to justify under an unfair or deceptive acts or practices standard unless the specific standard is so high as to be clearly unfair. For example, a principles approach under RESPA would be that settlement services fees must be for services actually provided and must bear a reasonable relationship to the cost. Actually setting fees for some settlement services would raise issues as to how fees will be adjusted as costs change, how a particular dollar amount of a fee was determined by the agency to be unreasonable, why such standards are not price controls, and other practical regulatory concerns. Worse, bad actors will simply respond by creating new fees outside of the regulation.

Federal Reserve Board Governor Krozner observed as follows:

> Crafting effective rules under the "unfair or deceptive" standard presents significant challenges. Whether a practice is unfair or deceptive depends heavily on the particular facts and circumstances. To be effective, rules must have broad enough coverage to encompass a wide variety of circumstances so they are not easily circumvented. At the same time, rules with broad prohibitions could limit consumers' financing options in legitimate cases that do not meet the required legal standard.[11]

If the OTS, and the other agencies, issue specific regulations, then the ABA and ACB believe that the agencies should focus on specific practices rather than specific products, consistent with the statutory basis of UDAP. For example, we believe that the agencies should not prohibit specific ARM products that may be of significant value for some if not for all borrowers, but rather that the agencies should enunciate the characteristics of practices involving a product that might make it unfair or deceptive, as they have done in the guidance. The nontraditional mortgage guidance focuses on characteristics that expose the borrower to payment shock and provides that loans with those characteristics need greater and earlier disclosure and a more thorough review of the borrower's ability to repay.

**Seventh: Apply Changes Prospectively**. Any determination by the OTS that a particular act or practice is unfair or deceptive, when that practice has been legal and accepted by regulators and the industry, can only be safely and soundly implemented if the OTS and other agencies limit adoption to prospective application of such new UDAP standards. Otherwise, there will be claims against banks and savings associations for past acts that they could not have been aware would be viewed as unfair or deceptive.

For example, when the OTS issued its mortgage rule prohibiting charging of a late fee before the payment was past due 15 days, there may well have been institutions imposing a late fee at 10 or 11 or 14 days past due. If the 15 days past due standard had been determined to have been "unfair," it would have called into question every previously leveled late fee, even though the fees had been disclosed and properly imposed. Setting a standard for future conduct allows institutions to conform their practices prospectively. Declaring the same

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[11] Statement of Randall S. Kroszner, Board of Governors of the Federal Reserve System, Committee on Financial Services, U.S. House of Representatives -- June 13, 2007
http://www.house.gov/apps/list/hearing/financialsvcs_dem/htkroszner061307.pdf

activity "unfair" retroactively jeopardizes bank behavior based on established practices that may have been implemented in good faith.

**Eighth: Proceed Cautiously if Issuing *Per Se* Rules.** ABA and ACB urge caution and care in determining that additional acts or practices are unfair or deceptive *per se*. Primarily, we believe that the standard for determining whether there has been a UDAP violation requires some analysis of the reasonable consumer standard, which most likely requires reference to the specific facts and circumstances.

The OTS list of potential targeted practices illustrates the problems with a *per se* approach. First, several practices listed are long-standing credit terms that have never been considered to be unfair nor deceptive as implemented by savings associations. Such established credit terms include mandatory arbitration, default penalty rates, and acceleration of principal upon default. Compensating loan officers for making loans above par is historically common even in the prime mortgage market, and it may benefit consumers by allowing them to get a "no point" and/or "no closing cost" loan. Applying payments on credit cards to promotional balances first is another common practice that is a long-time feature of credit card promotions with which card users are well-acquainted and which are popular with customers, based upon their affirmative responses.

Second, other listed practices display none of the indicia of unfairness or deception considered elemental by the FTC under its Section 5 UDAP authority. So-called "universal default" is nothing more than pricing adjusted based on adverse credit history changes—using the same source for credit reporting and credit scoring that determined initial pricing of open-end credit. Freezing accounts pursuant to state court orders pending judicial determination of account fund sources is a safe and sound response to judicial due process that averts the liability banks face for failure to garnish under local state laws.[12] Finally, labeling a gift card with an expiration date less than one year is neither automatically unfair nor patently deceptive under the standards applied by the FTC.

Third, other listed practices capture a virtually null set of OTS regulated institutions as violators. Where are the savings association borrowers whose banks have encouraged them to default on a loan as a prerequisite to refinancing? Which current OTS institutions engage in a practice of force-placing hazard insurance without reasonable notice? Passing rules about hypothetical ills that are not manifested in the thrift industry is poor use of regulatory resources.

ABA and ACB are mindful that there are instances of egregious practices among non-depository creditors that have little chance of occurring as part of responsible lending behavior and could be singled out for treatment similar to that applied in the Credit Practices Rule.[13] Although they may rarely if ever occur in the supervised banking sector, it may be valid in the interests of comity for such practices to be identified as standard prohibitions

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[12] See also, Testimony of Montrice Yakimov, Managing Director for Compliance and Consumer Protection, Office of Thrift Supervision, before the Finance Committee, United States Senate, September 20, 2007 at pages 2-3.

[13] Many of the contract administration and collection practices remedied in the FTC's *Fairbanks Case, infra*, are candidates for such targeted treatment.

through the FTCA Section 18 process and adopted by all agencies. But other than such egregiously fraudulent acts or practices, we believe that the totality of the facts and circumstances must be considered before finding that a particular act or practice is unfair or deceptive.

In conclusion, we believe that the OTS should use the FTC Policy, as well as consideration of the other banking agencies' policies, to formulate guidance (rather than regulations) consistent among the agencies.

Issue 7. Can the acts or practices encompassed within any particular model or approach described in part III of the SUPPLEMENTARY INFORMATION be conducted in a manner that is not unfair or deceptive to the consumer? If so, how?

As previously noted, many practices on the list of targeted practices described in Part III of the Supplementary Information can and have been conducted in a manner that is not unfair or deceptive and are most commonly so conducted.

Issue 8. The FTC has taken enforcement actions for violations of section 5 of the FTC Act. Should OTS draw specific examples of unfair or deceptive practices from FTC enforcement actions? If so, which examples?

We would encourage the OTS, along with the other banking agencies, to review any FTC enforcement actions against lenders to determine if there are acts or practices that might occur within the savings association and banking industry. Such comparative analysis is crucial to a uniform approach to supervision and enforcement. For example, the *FTC v. Fairbanks Capital, et al., October 2003*, highlighted a number of unfair or deceptive practices that were apparently widespread and routine at Fairbanks:[14]

> A. Failing to accept as of the date of receipt, or to credit effective as of the date of receipt, all amounts paid in connection with a loan against interest and principal due, and before crediting taxes, insurance or fees.
> B. Failing to accept as of the date of receipt, or to credit effective as of the date of receipt, amounts paid in connection with a loan that are less than the total amount due (i.e., partial payments).
> C. Misrepresenting, expressly or by implication, any amount that a consumer owes;
> D. Misrepresenting, expressly or by implication, that any fee is allowed under the loan instruments, permitted by law, or imposed for services actually rendered;
> E. Misrepresenting, expressly or by implication, the amount, nature, or terms of any fee or other condition or requirement of any loan; and
> F. Failing to make disbursements of escrow funds for insurance, taxes and other charges with respect to the property in a timely manner.
> G. Force-placing insurance without any notice to the consumer, and in some cases, when in fact the consumer had insurance.
> H. Charging fees for servicing the loan when either the services were not performed or there was no provision for the fee, or both.

[14] Note that these unfair practices were not simply acts of inadvertence or mistake, but the result of internal policy.

I. Various violations of the Fair Debt Collection Practices Act, including issuing threats, misrepresenting amounts owed, penalties due, and possible consequences of failing to pay.
J. Filing false information with credit bureaus and failing to correct false information or to provide correct information.

Certainly, any of these appears on its face to be unfair or deceptive when conducted chronically, and it is difficult to find facts or circumstances that would justify them as a regular practice. Does the OTS need to put these into a regulation? We do not think so, as we think that they are clearly subject to OTS sanction if the OTS should find a savings association engaging in any of these.[15] Nonetheless, the OTS could maintain a section of the website for savings associations highlighting FTC enforcement actions that might have relevance for savings associations.

Issue 9. How would the practices in OTS' current Credit Practices rule and those identified in part III of this SUPPLEMENTARY INFORMATION fit into any of those approaches?

The Credit Practices rule is the result of rule-making initiated by the FTC and extended to the banking industry and savings associations by virtue of Section 18(f) of the FTC Act in 1985. This is the only instance of OTS' exercise of its FTC Act rule-making authority. We believe that Section 18(f) is still a viable mechanism for maintaining consistency across creditors in different sectors and to that end should be considered part of an interagency strategy for implementing a uniform federal UDAP standard, especially if specific practices will be targeted.

Issue 10. Are the acts or practices currently listed in the Credit Practices rule the only ones that are capable of targeting specific conduct without allowing for easy circumvention or having unintended consequences?

It is noteworthy that in the 22 years to follow the Credit Practices rule, the FTC has not invoked its Section 18 powers to regulate credit practices further through rule-making. The existing Credit Practices rule contains several illustrations of the static nature of rule-based UDAP enforcement. Under the Credit Practices Rule, restrictions for taking a security interest against household goods excludes electronic entertainment equipment—other than one television and one radio! This type of archaic limitation is emblematic of how a rules-based system becomes antiquated and constitutes fair warning about the hazards of promulgating definitive rules. This does not mean that the FTC or the OTS has been idle in applying UDAP principles to creditor practices. To the contrary, the *Fairbanks Case* and the *Ocwen Case*[16] illustrate both agencies' activity to eradicate the isolated instances of egregious practices that have been identified in the mortgage servicing market. Whether there is real value in translating these enforcement orders into amendments to the Credit Practices Rule is uncertain—especially when the Credit Practices Rule excludes from its definition of consumer that activity conducted in connection with the purchase of real property.

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[15] See e.g., *Ocwen Federal Bank FSB,* Supervisory Agreement, OTS Docket No. 04592, April 19, 2004. http://www.ots.treas.gov/docs/9/93606.pdf

[16] *Id.*

Part IV: Advertising

Issue 12. Should OTS expand its regulations on advertising to incorporate guides on advertising the FTC has issued under the FTC Act? If so, which examples or principles should OTS consider?

Issue 13. What other acts or practices that may not currently be covered by OTS's advertising regulation should OTS consider prohibiting as unfair or deceptive in the advertising or marketing of products or services offered by OTS supervised entities?

Issue 14. What would be the impact on the industry and consumers of expanding OTS's advertising regulation?

We address the three questions from Part IV of the Supplementary Information together. The OTS Advertising Rule is a straight-forward example of a principle-based regulation that has broad applicability and affords appropriate supervisory flexibility. The Rule reaches to all sales, promotional, marketing or product/service descriptive communications—not just paid advertising. As carefully applied by OTS, the Advertising Rule parallels the deceptive practices side of UDAP authority. Although explicit precedent is not readily available, we understand that supervisory application of the rule has tended to view misrepresentation along the lines of the criteria used by FTC to interpret the meaning of deceptive practices. Expanding application of the current rule beyond savings associations to the broader range of affiliates within OTS jurisdiction as suggested in this ANPR should be approached with care so as not to admit differences in regulatory requirements for those affiliates that are subject to over-lapping jurisdiction with the FTC or others.

We also caution that asserting broad regulatory authority over the advertising and sales communications of diversified holding companies or even differentiated financial affiliates is a substantial undertaking that will demand investment in expertise to understand such varied markets and resources to conduct oversight and enforcement of those far-flung industries and their products.

**Conclusion**

The American Bankers Association and the America's Community Bankers believe that the OTS has raised important issues with respect to its UDAP authority. As discussed above, we believe that the OTS should work closely with the other banking agencies and should follow the FTC model for its approach to UDAP enforcement. Overwhelmingly, bankers believe that the OTS should avoid issuing regulations that over prescribe acts and practices that the OTS would see as unfair or deceptive. Such an approach would likely cause far more problems than it would solve, and would hamper savings associations while being ignored by the true bad actors in the financial services market.

ABA and ACB appreciate being allowed to comment on this ANPR. If there are any questions about these comments, please do not hesitate to contact Richard Riese, at (202) 663-5051, or Janet Frank, at (202) 857-3129.

Sincerely,

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