

electronic form, as FHFA shall deem appropriate.

(d) *No waiver of privilege.* The release of information under this section does not constitute a waiver by FHFA of any privilege, or its right to control, supervise, or impose limitations on, the subsequent use and disclosure of any information concerning a Bank. To the extent that any reports of examination or other materials provided to a Bank or the Office of Finance pursuant to this section otherwise qualify as Unpublished Information under § 911.1 of this title or any successor provision, those materials shall continue to qualify as such and shall continue to be subject to the restrictions on disclosure set forth in part 911 of this title, or any successor provisions.

(e) *Transition provision.* Following the effective date of this section, FHFA will distribute promptly to each Bank and the Office of Finance a copy of the most recent report of examination of all other Banks. Each Bank shall have ten (10) business days following the effective date of this section within which to submit a written request to withhold information as described in paragraph (b)(1) of this section. Upon the expiration of the time period described in the preceding sentence, the distribution of the initial reports of examination shall proceed in accordance with paragraphs (b)(2) and (c) of this section.

Dated: September 24, 2010.

Edward J. DeMarco,

Acting Director, Federal Housing Finance Agency.

[FR Doc. 2010-24578 Filed 9-29-10; 8:45 am]

BILLING CODE 8070-01-P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

Proposed Modification of the Seattle, WA, Class B Airspace Area; Public Meetings

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of meetings.

SUMMARY: This notice announces three fact-finding informal airspace meetings to solicit information from airspace users and others concerning a proposal to revise the Class B airspace area at Seattle, WA. The purpose of these meetings is to provide interested parties an opportunity to present views, recommendations, and comments on the proposal. All comments received during

these meetings will be considered prior to any revision or issuance of a notice of proposed rulemaking.

DATES: The informal airspace meetings will be held on Thursday, December 9, 2010, from 6:30 p.m.–9 p.m.; Tuesday, December 14, 2010, from 6:30 p.m.–9 p.m.; and Thursday, December 16, 2010, from 6:30 p.m.–9 p.m. Comments must be received on or before January 31, 2011.

ADDRESSES: (1) The meeting on Thursday, December 9, 2010, will be held at Snohomish County Auditorium, 2320 California Street, Everett, WA 98201. (2) The meeting on Tuesday, December 14, 2010, will be held at the Highline Performing Arts Center, 401 South 152nd Street, Burien, WA 98148. (3) The meeting on Thursday, December 16, 2010, will be held at The Theater at Auburn Mountainview, 28900 124 Avenue South East, Auburn, WA, 98092.

Comments: Send comments on the proposal, in triplicate, to: Clark Desing, Manager, Operations Support Group, AJV-W2, Western Service Center, Air Traffic Organization, Federal Aviation Administration, 1601 Lind Avenue, SW., Renton WA 98057.

FOR FURTHER INFORMATION CONTACT: To obtain details including a graphic depiction regarding this proposal, please contact Everett Paul Delay, FAA Support Manager Seattle TRACON, Sea-Tac International Airport, 825 South 160th Street, Burien, WA 98148, (206) 214-4620.

SUPPLEMENTARY INFORMATION:

Meeting Procedures

(a) Doors open 30 minutes prior to the beginning of each meeting. The meetings will be informal in nature and will be conducted by one or more representatives of the FAA. A representative from the FAA will present a briefing on the planned modification to the Class B airspace at Seattle, WA. Each participant will be given an opportunity to deliver comments or make a presentation, although a time limit may be imposed. Only comments concerning the plan to modify the Class B airspace area at Seattle WA, will be accepted.

(b) The meetings will be open to all persons on a space-available basis. There will be no admission fee or other charge to attend and participate.

(c) Any person wishing to make a presentation to the FAA panel will be asked to sign in and estimate the amount of time needed for such presentation. This will permit the panel to allocate an appropriate amount of time for each presenter. These meetings

will not be adjourned until everyone on the list has had an opportunity to address the panel.

(d) Position papers or other handout material relating to the substance of these meetings will be accepted. Participants wishing to submit handout material should present an original and two copies (3 copies total) to the presiding officer. There should be additional copies of each handout available for other attendees.

(e) These meetings will not be formally recorded. However, a summary of comments made at the meeting will be filed in the docket.

Agenda for the Meetings

- Sign-in.
- Presentation of meeting procedures.
- FAA explanation of the planned Class B airspace area modifications.
- Solicitation of public comments.
- Closing comments.

Issued in Washington, DC, on September 21, 2010.

Paul Gallant,

Acting Manager, Airspace and Rules Group.

[FR Doc. 2010-24543 Filed 9-29-10; 8:45 am]

BILLING CODE P

FEDERAL TRADE COMMISSION

16 CFR Part 321

[RIN 3084-AB18]

Notice of Proposed Rulemaking: Mortgage Acts and Practices – Advertising Rule

AGENCY: Federal Trade Commission (FTC or Commission).

ACTION: Notice of proposed rulemaking; request for comment.

SUMMARY: Pursuant to the 2009 Omnibus Appropriations Act (Omnibus Appropriations Act), as clarified by the Credit Card Accountability, Responsibility and Disclosure Act of 2009 (Credit CARD Act), the Commission issues a Notice of Proposed Rulemaking (NPRM) relating to unfair or deceptive acts and practices that may occur with regard to mortgage advertising, the Mortgage Acts and Practices (MAP) – Advertising Rule (proposed rule). The proposed rule published for comment, among other things, would prohibit any misrepresentation in any commercial communication regarding any term of any mortgage credit product; and impose recordkeeping requirements. **DATES:** Comments must be received by November 15, 2010.

ADDRESSES: Interested parties are invited to submit written comments

electronically or in paper form by following the instructions in the Requests for Comments part of the **SUPPLEMENTARY INFORMATION** section below. Comments in electronic form should be submitted at (<https://ftcpublic.commentworks.com/ftc/mapadrulenprm>) (and following the instructions on the web-based form). Comments in paper form should be mailed or delivered to the following address: Federal Trade Commission, Office of the Secretary, Room H-135 (Annex W), 600 Pennsylvania Avenue, NW, Washington, DC 20580, in the manner detailed in Part IV of the **SUPPLEMENTARY INFORMATION** section below.

FOR FURTHER INFORMATION CONTACT:

Laura Johnson or Carole Reynolds, Attorneys, Division of Financial Practices, Federal Trade Commission, 600 Pennsylvania Avenue, NW, Washington, DC 20580, (202) 326-3224.

SUPPLEMENTARY INFORMATION:

I. Background

A. Statutory Authority

On March 11, 2009, President Obama signed the Omnibus Appropriations Act.¹ Section 626 of this Act directed the Commission to commence, within 90 days of enactment, a rulemaking proceeding with respect to mortgage loans.² Section 626 also directed the FTC to use the notice and comment rulemaking procedures specified by Section 553 of the Administrative Procedure Act,³ in this proceeding, rather than the rulemaking procedures set forth in Section 18 of the Federal Trade Commission Act (FTC Act).⁴

On May 22, 2009, President Obama signed the Credit Card Accountability Responsibility and Disclosure Act of 2009 (Credit CARD Act).⁵ Section 511 of the Credit CARD Act clarified the conduct and types of entities for which the Commission may promulgate rules to implement the Omnibus Appropriations Act.⁶

1. Covered Acts and Practices

Section 511 of the CARD Act specified that the FTC rulemaking “shall relate to unfair or deceptive acts or practices regarding mortgage loans, which may include unfair or deceptive

acts or practices involving loan modification and foreclosure rescue services.”⁷ The Omnibus Appropriations Act, as clarified by the Credit CARD Act, does not otherwise specify what the Commission should include in, or exclude from, a rule, but rather directs the FTC to issue mortgage rules that “relate to” unfairness or deception.⁸

Section 5 of the FTC Act broadly proscribes unfair or deceptive acts or practices in or affecting commerce. An act or practice is deceptive if there is a representation, omission of information, or practice that is likely to mislead consumers who are acting reasonably under the circumstances, and the representation, omission, or practice is one that is material, *i.e.*, likely to affect consumers’ decisions to purchase or use the product or service at issue.⁹ Section 5(n) of the FTC Act sets forth a three-part test to determine whether an act or practice is unfair. First, the practice must be one that causes or is likely to cause substantial injury to consumers. Second, the injury must not be outweighed by countervailing benefits to consumers or to competition. Third, the injury must be one that consumers could not reasonably have avoided.¹⁰

The express statutory language of the Credit CARD Act allows the FTC to promulgate rules that “relate to” unfairness or deception. The Commission interprets this language to allow it to issue rules that prohibit or restrict unfair or deceptive conduct or that are reasonably related to the goal of preventing unfair or deceptive practices. The FTC, however, also notes that all of the conduct prohibited by the proposed rule is itself deceptive.

2. Covered Entities

Section 511 of the Credit CARD Act also clarified that the Commission’s rulemaking authority is limited to entities over which the FTC has jurisdiction under the FTC Act.¹¹ Under the FTC Act, the Commission has jurisdiction over any person,

partnership, or corporation that engages in unfair or deceptive acts or practices in or affecting commerce, except, among others:¹² banks,¹³ savings and loan institutions, federal credit unions,¹⁴ non-profits,¹⁵ and common carriers. The proposed rule does not cover the practices of entities that are excluded from the FTC’s jurisdiction.

3. Enforcement

The Omnibus Appropriations Act, as clarified by the Credit CARD Act, also permits both the Commission and the states to enforce the rules the FTC issues.¹⁶ The Commission can use its powers under the FTC Act to conduct investigations and bring law enforcement actions against those who violate FTC rules. In such actions, the Commission may seek injunctive relief, as well as civil penalties if the defendant committed the violations

¹² See 15 U.S.C. 44, 45(a)(2).

¹³ The FTC Act defines “banks” by reference to a listing of certain distinct types of depository institutions. See 15 U.S.C. 44, 57a(f)(2). That list includes: national banks, federal branches of foreign banks, member banks of the Federal Reserve System, branches and agencies of foreign banks, commercial lending companies owned or controlled by foreign banks, banks insured by the Federal Deposit Insurance Corporation (FDIC), and insured state branches of foreign banks. The Commission has jurisdiction over entities that are affiliated with banks, such as parent or subsidiary companies, that are not themselves banks. This jurisdiction is held concurrently with the federal bank regulatory agencies (the Board of Governors of the Federal Reserve System (Federal Reserve Board or Board), the Office of the Comptroller of the Currency (OCC), the FDIC, and the Office of Thrift Supervision (OTS)) and the National Credit Union Administration (NCUA) as to their respective institutions. See Section 133(a) of the Gramm-Leach-Bliley Act, Pub. L. 106-102, 113 Stat. 1383 (1999) (codified at 15 U.S.C. 41 note (a)); *Minnesota v. Fleet Mortg. Corp.*, 181 F. Supp. 2d 995 (D. Minn. 2001). The FTC also has jurisdiction over non-bank entities that provide services to or on behalf of a bank, such as credit card marketing. See, e.g., *FTC v. CompuCredit Corp.*, No. 08-1976, at 6-15 (N.D. Ga. Oct. 8, 2008) (magistrate judge’s non-final report and recommendation) (finding that the FTC has jurisdiction under FTC Act against entity that contracted to provide services to a bank); *FTC v. Am. Std. Credit Sys.*, 874 F. Supp. 1080, 1086 (C.D. Cal. 1994) (dismissing argument that entity that contracted to perform credit card marketing and other services for a bank is not subject to FTC Act).

¹⁴ The exclusion is limited to federal credit unions; thus, the FTC has jurisdiction over state-chartered credit unions, among others. See *infra* notes 116-118 and accompanying text.

¹⁵ Section 4 of the FTC Act, 15 U.S.C. 44, specifies that the Commission’s jurisdiction over “corporations” is limited to entities that are organized to carry on business for their own profit or that of their members. Thus, the non-profit exemption does not apply to ostensible non-profits that operate for the profit of their “members,” a term that courts have interpreted to include affiliates and corporate officials. See, e.g., *FTC v. AmeriDebt, Inc.*, 343 F. Supp. 2d 451 (D. Md. 2004); *Am. Med. Ass’n v. FTC*, 638 F.2d 443 (2d Cir. 1980), *aff’d by an equally divided court*, 455 U.S. 676 (1982).

¹⁶ Omnibus Appropriations Act § 626; Credit CARD Act § 511(a)(1)(C) and (a)(2).

⁷ Section 511(a)(1)(B), Pub. L. 111-24, 123 Stat. 1734, 1763 (2009) (codified at 15 U.S.C. 1638 note). The Commission is conducting a separate rulemaking with respect to mortgage assistance relief services. See *infra* note 19.

⁸ Section 511(a)(1)(B), Pub. L. 111-24, 123 Stat. 1734, 1763 (2009) (codified at 15 U.S.C. 1638 note).

⁹ Federal Trade Commission Policy Statement on Deception, *appended to In re Cliffdale Assocs., Inc.*, 103 F.T.C. 110, 174-84 (1984) (Deception Policy Statement).

¹⁰ 15 U.S.C. 45(n). Section 5(n) of the FTC Act also provides that “[i]n determining whether an act or practice is unfair, the Commission may consider established public policies as evidence to be considered with all other evidence. Such public policy considerations may not serve as a primary basis for such determination.”

¹¹ Credit CARD Act § 511(a)(1)(C).

¹ 2009 Omnibus Appropriations Act, Pub. L. 111-8, 123 Stat. 524 (2009).

² Section 626(a), Pub. L. 111-8, 123 Stat. 524, 678 (2009) (codified at 15 U.S.C. 1638 note).

³ 5 U.S.C. 553.

⁴ 15 U.S.C. 57a.

⁵ Pub. L. 111-24, 123 Stat. 1734 (2009) (codified in scattered sections of 15 U.S.C.).

⁶ Pub. L. 111-24, 123 Stat. 1734, 1763-64 (2009) (codified at 15 U.S.C. 1638 note).

with actual knowledge or knowledge fairly implied on the basis of objective circumstances that its practices were unfair or deceptive and violated the rule.¹⁷ In addition, states can enforce the rules by bringing civil actions in federal district court or another court of competent jurisdiction to obtain civil penalties and other relief. Before bringing such an action, however, a state must give 60 days advance notice to the “primary federal regulator” of the proposed defendant (unless such notice is not feasible), and the regulator has the right to intervene in the action.

B. Advance Notice of Proposed Rulemaking

On June 1, 2009, the Commission published in the **Federal Register** an Advance Notice of Proposed Rulemaking (ANPR) soliciting comments on the contours of a possible rule that would prohibit or restrict unfair and deceptive acts and practices that may occur throughout the life-cycle of a mortgage loan,¹⁸ *i.e.*, in the advertising and marketing of the loan, at the time of loan origination, in the home appraisal process, and during the servicing of the loan.¹⁹ The ANPR described these services generically as “Mortgage Acts and Practices,” and the rulemaking proceeding was entitled the Mortgages Acts and Practices (MAP) Rulemaking. In response to the ANPR, the Commission received a total of 55 comments, of which 46 were germane.²⁰ About half of the comments were from individuals, with the rest from industry trade associations or groups, consumer advocacy groups, credit unions, a

government-sponsored enterprise (GSE), a state attorney general, a group of state credit union regulators, and a labor union. Most of the comments express support for FTC regulatory action regarding various aspects of the mortgage loan life-cycle.²¹ Several comments, however, urge the FTC to focus its resources on enforcement or wait to gauge the effectiveness of other mortgage-related rules promulgated recently by other federal agencies before proceeding with its own regulations.²²

The Commission received several comments that focus specifically on mortgage advertising; these are addressed below.²³ Six of these discuss various advertising issues,²⁴ while three additional comments refer to other federal advertising regulations.²⁵ Several commenters expressed various degrees of support for FTC rules on mortgage advertising generally or specific aspects of mortgage advertising or marketing.²⁶ Others urged the Commission to incorporate through this rulemaking aspects of Regulation Z under the Truth in Lending Act (TILA)²⁷ to enable the Commission to obtain civil penalties for violations of those provisions.²⁸ Commenters representing banks and credit unions, and a group of state credit union regulators, raised questions about the application of the prospective rules to banking

²¹ See, e.g., MICA at 9; NAR at 2; AG Mass. at 1; NCLC at 1; NCRC at 1; CRL at 1.

²² See, e.g., MBA at 1; ABA at 6.

²³ See *infra* Parts III and IV.

²⁴ See CMC/AFSA at 7; HPC at 3; ABA at 5; MBA at 5; MICA at 3; CUNA at 2.

²⁵ See BECU at 3; NASCUS at 2; GCUA at 2.

²⁶ See, e.g., HPC at 3; MICA at 3; CMC/AFSA at 7; ABA at 6.

²⁷ 12 CFR 226. The Federal Reserve Board issued Regulation Z, which implements TILA, 15 U.S.C. 1601-1666j. The Home Ownership and Equity Protection Act (HOEPA), 15 U.S.C. 1639, is part of TILA.

²⁸ See, e.g., ABA at 6 (certain aspects of advertising rules for nonbank entities); CRL at 19.

The Commission has authority to obtain civil penalties for violations of rules that the Board promulgates under Section 129(l)(2) of TILA (part of HOEPA), 15 U.S.C. 1639(l)(2). See Omnibus Appropriations Act § 626(c). As discussed further below, see *infra* note 56, the Board issued mortgage-related rules in July 2008, some of which were promulgated under Section 129(l)(2) of TILA. See generally 73 FR 44522 (July 30, 2008).

In contrast, the Commission does not have specific authority to obtain civil penalties for violations of rules that the Board promulgates under Section 105 of TILA, 15 U.S.C. 1604. See generally Omnibus Appropriations Act § 626(c). Some provisions of the Board’s July 2008 mortgage rules were promulgated under Section 105. See 73 FR 44522-23. Incorporating the Board’s Section 105 rules into the proposed MAP – Advertising Rule would give the Commission authority to seek civil penalties for violations of the Section 105 rules. The advantages and disadvantages of incorporating the Section 105 rules, which include technical and complex advertising requirements, are discussed below. See *infra* Parts III.C.2 and IV.C.2.

subsidiaries or affiliates,²⁹ or to state-chartered credit unions.³⁰

As discussed more fully below, advertising is the initial step and often a crucial part of the mortgage process. Consumers may not make well-informed decisions if the information they receive through advertising is deceptive. The Commission therefore has determined to issue this NPRM focused exclusively on mortgage advertising practices. The Commission may issue additional proposed rules regarding other aspects of the mortgage process in the future.

II. Mortgage Advertising Practices

A. Overview

As discussed in the ANPR, the mortgage life-cycle begins when a consumer initially shops for a mortgage, whether to purchase a home or real property,³¹ refinance an existing mortgage, or obtain a home equity loan or line of credit (known as a HELOC) based on the consumer’s equity in the home.³² In this process, the consumer may encounter diverse types of mortgage products. The loan may either be a *forward mortgage*, the most prevalent type of loan, where the homeowner borrows funds and remits payments for principal, interest, and in some cases other charges; or a *reverse mortgage*, a home-secured loan typically offered to senior citizens which the borrower is not required to repay as long as he or she remains in the home and which only becomes due when the homeowner moves out or sells the home, dies, or fails to satisfy certain loan conditions.³³ Forward mortgages may be *traditional*, such as 30-year

²⁹ See, e.g., CMC/AFSA at 3; ABA at 4-5. For a discussion of the FTC’s jurisdiction, see *supra* Part I.A.2.

³⁰ See generally CUNA; NASCUS; BECU; Zager; GCUA. Among other things, various comments note that the Commission lacks jurisdiction to issue rules for federally-chartered credit unions. Some comments assert that credit union advertising is already regulated.

³¹ Traditional mortgages are considered “closed-end credit,” generally consisting of installment financing where the amount borrowed and repayment schedule are set at the transaction’s outset. TILA and Regulation Z set various advertising and other requirements for closed-end credit. See, e.g., 12 CFR 226.17-.24.

³² HELOCs typically are “open-end credit,” which TILA defines as credit extended to a consumer under a plan in which: (1) the consumer reasonably contemplates repeated transactions; (2) the creditor may impose a finance charge from time to time on the outstanding unpaid balance; and (3) the amount of credit that may be extended to the consumer during the plan’s term is generally made available to the extent that any unpaid balance is repaid. See 15 U.S.C. 1602(i); 12 CFR 226.2(a)(10) and (20).

³³ See generally 12 CFR 226.33 (reverse mortgages under Regulation Z), and U.S. Department of Housing and Urban Development (HUD), Glossary, definition of “reverse mortgage,” available at (<http://www.hud.gov/offices/hsg/sfh/buying/glossary.cfm>).

¹⁷ See 15 U.S.C. 45(m)(1)(A). The Commission must refer any action for civil penalties to the Department of Justice, which may file the case or return it to the Commission for filing. See 15 U.S.C. 56.

¹⁸ The Omnibus Appropriations Act and the Credit CARD Act use the term “loan” in referring to mortgage credit generally and do not limit that term in any way. Accordingly, this NPRM and the proposed rule use the term “loan” to refer to any form of mortgage credit.

¹⁹ Mortgage Acts and Practices, ANPR, 74 FR 26118 (June 1, 2009). On the same date, the Commission issued another ANPR, the Mortgage Assistance Relief Services Rulemaking, addressing the acts and practices of for-profit companies that offer to work with lenders or servicers on behalf of consumers seeking to modify the terms of their loans or to avoid foreclosure on their loans. Mortgage Assistance Relief Services (MARS), ANPR, 74 FR 26130 (June 1, 2009). The Commission has issued an NPRM on the MARS Rule. 75 FR 10707 (Mar. 9, 2010).

²⁰ The other nine comments are duplicates, replacements, blank, or “test” submissions. Public comments associated with the MAP ANPR are available at (<http://www.ftc.gov/os/comments/map/index.shtml>). In addition, a list of commenters cited in this NPRM, along with their short citation names or acronyms used throughout the NPRM, is attached to this document. See Table A – List of Commenters and Short-names/Acronyms, *infra*.

fixed-rate or adjustable rate amortizing mortgages (ARMs),³⁴ or *nontraditional*,³⁵ the latter having proliferated in the mortgage marketplace in recent years.

Consumers receive information about mortgages through many different channels of communication. Some consumers seek out mortgage information on their own, for example, on the Internet or by contacting a real estate broker, mortgage lender, mortgage broker, or others. Marketers and advertisers widely disseminate mortgage advertisements to consumers through print media (such as newspapers and magazines), television, radio, the Internet, billboards, and other methods. Marketers and advertisers also send targeted information to particular consumers through direct mail or electronic communications such as e-mail or text messages.

Many types of entities market and advertise mortgage products. Mortgage lenders, mortgage brokers, mortgage servicers, and real estate brokers advertise and market mortgage products. In addition, advertising agencies, home builders, lead generators,³⁶ rate aggregators,³⁷ and others also may

market and advertise mortgage products to consumers. Mortgage lenders and servicers in particular may market products to their current customers, in addition to prospective customers.

B. Deception in Mortgage Advertising

Advertising and marketing can provide consumers with valuable information about mortgage options, costs, and features. This information is critical to the decisions consumers make throughout the mortgage origination process and is especially important because mortgage products typically are complex.³⁸ Information is useful for decision making, however, only if it is truthful and non-misleading.³⁹ Preventing and deterring deception in advertisements for mortgages, therefore, is a primary objective of FTC law enforcement and of the proposed rule.

credit product terms for free by searching or viewing this information sorted by rate, loan amount, mortgage credit product, or other criteria. Rate aggregators may supply the lenders' or brokers' contact information, so the consumer can reach them directly, or they may act as a lead generator and provide the consumer's information to lenders or brokers.

³⁸ This is particularly true for nontraditional mortgages, the terms of which are often unfamiliar to consumers. See generally FTC Comment on Home Equity Lending and Alternative Mortgage Workshop, *supra* note 35.

³⁹ Conversely, deceptive claims in marketing information undermine the ability of consumers to make well-informed decisions. See generally *Prepared Statement of the Federal Trade Commission: Hearing Before the Senate Committee on Commerce, Science, and Transportation, Subcommittee on Consumer Protection, Product Safety, and Insurance*, July 14, 2009, available at (<http://www.ftc.gov/os/2009/07/P094492antifraudlawtest.pdf>); *Prepared Statement of the Federal Trade Commission on "Foreclosure Rescue and Loan Modification Scams"*: Hearing Before the House Committee on Financial Services, Subcommittee on Housing and Community Opportunity, May 6, 2009, available at (<http://www.ftc.gov/os/2009/05/P064814foreclosurerescue.pdf>); see also *Interagency Guidance on Nontraditional Mortgage Products Risks (Interagency Nontraditional Mortgage Guidance)*, 71 FR 58609 (Oct. 4, 2006) (federal bank regulatory agencies' guidance to address risks associated with growing use of mortgage products that allow borrowers to defer payment of principal and sometimes interest); *Interagency Statement on Subprime Mortgage Lending (Interagency Subprime Mortgage Statement)*, 72 FR 37569 (July 10, 2007) (federal bank regulatory agencies' guidance to address risks with subprime mortgage products and lending practices, including adjustable rate mortgages with low initial payments that expire after a short period and could result in payment shock); Federal Financial Institutions Examination Council (FFIEC); *Reverse Mortgage Products: Guidance for Managing Compliance and Reputation Risks (FFIEC Reverse Mortgage Guidance)*, 75 FR 50801 (Aug. 17, 2010) (guidance issued by federal and state bank regulatory agencies on need for adequate information and other consumer protections regarding reverse mortgage products); and Press Release, FTC, *FTC Warns Mortgage Advertisers and Media That Ads May Be Deceptive*, Sept. 11, 2007, available at (<http://www.ftc.gov/opa/2007/09/mortsurf.shtm>).

In 1984, the FTC issued its Deception Policy Statement, setting forth the elements of deception. An act or practice is deceptive if: (1) there is a representation, omission of information, or practice that is likely to mislead consumers acting reasonably under the circumstances; and (2) that representation, omission, or practice is material to consumers.⁴⁰

A representation may be express or implied. "Express claims directly represent the fact at issue, while implied claims do so in an oblique or indirect way."⁴¹ Whether an implied claim is made depends on the overall net impression that consumers take away from an advertisement or other representation based on all its elements (language, pictures, graphics, etc.).⁴² The FTC evaluates whether consumers' impression or interpretation of a representation or omission is reasonable. Reasonableness is evaluated based on the sophistication and understanding of consumers in the group to which the representation is targeted, which may be a general audience or a specific group, such as children or the elderly.⁴³ A claim may be susceptible to more than one reasonable interpretation, and if one such interpretation is misleading, then the advertisement is deceptive, even if other, non-deceptive interpretations are possible.⁴⁴

A disclaimer or qualifying statement may correct a misleading impression, but only if it is sufficiently clear and prominent to convey the qualifying information effectively, *i.e.*, it is both noticed and understood by consumers. "[I]n many circumstances, reasonable consumers do not read the entirety of an ad or are directed away from the importance of the qualifying phrase by

⁴⁰ See Deception Policy Statement, *supra* note 9, at 175-183; see also *FTC v. Tashman*, 318 F.3d 1273, 1277 (11th Cir. 2003); *FTC v. Gill*, 265 F.3d 944, 950 (9th Cir. 2001); *FTC v. QT, Inc.*, 448 F. Supp. 2d 908, 957 (N.D. Ill. 2006), *aff'd*, 512 F.3d 858 (7th Cir. 2008); *FTC v. Think Achievement Corp.*, 144 F. Supp. 2d 993, 1009 (N.D. Ind. 2000); *FTC v. Minuteman Press*, 53 F. Supp. 2d 248, 258 (E.D.N.Y. 1998).

⁴¹ *FTC v. QT, Inc.*, 448 F. Supp. 2d at 957.

⁴² See *FTC v. Cyberspace.com*, 453 F.3d 1196, 1200 (9th Cir. 2006) ("A solicitation may be likely to mislead by virtue of the net impression it creates even though the solicitation also contains truthful disclosures."); *FTC v. Gill*, 265 F.3d at 956 (affirming deception finding based on "overall 'net impression' of statements"); *Removatron Int'l Corp. v. FTC*, 884 F.2d 1489, 1497 (1st Cir. 1989) (advertisement was deceptive despite written qualification); *Thompson Med. Co. v. FTC*, 791 F.2d 189, 197 (D.C. Cir. 1986) (literally true statements may nonetheless be deceptive); *FTC v. QT, Inc.*, 448 F. Supp. 2d at 958.

⁴³ See Deception Policy Statement, *supra* note 9, at 177-79.

⁴⁴ See *id.* at 178.

³⁴ In an amortizing loan, the borrower pays principal and the full amount of interest that is due each month throughout the life of the loan.

³⁵ Nontraditional mortgages include loan products that may offer consumers financial options but also pose substantial risk. These include, for example, interest-only (I/O) loans and payment option ARMs (option ARMs). I/O loans involve an initial loan period in which the borrower pays only the interest accruing on the loan balance; after the initial period, the borrower either makes increased payments of principal and interest and/or remits a large payment, sometimes referred to as a "balloon payment." Option ARMs offer borrowers several choices each month during the loan's introductory period, including a minimum payment that is smaller than the interest accruing on the principal. After the introductory period, the loan is recast, and the borrower's payments increase to amortize and repay principal and the adjustable interest rate over the remaining loan term. See generally FTC, Comment To Jennifer L. Johnson, Secretary, Board of Governors of the Federal Reserve System (Sept. 14, 2006), at 5-13 (providing comments on the home equity lending market and summarizing the Commission's May 2006 alternative mortgage workshop, Protecting Consumers in the New Mortgage Marketplace), available at (<http://www.ftc.gov/opa/2006/09/fyi0661.shtm>) (FTC Comment on Home Equity Lending and Alternative Mortgage Workshop).

³⁶ Lead generators are business entities that provide, in exchange for consideration, consumer information to a seller or telemarketer for use in the marketing of goods or services. See, e.g., *Quik Payday, Inc. v. Stork*, 549 F.3d 1302, 1304 (10th Cir. 2008); *FTC v. Connelly*, No. SA CV 06-701 DOC (RNBx), 2006 U.S. Dist. LEXIS 98263, at *11 (C.D. Cal. Dec. 20, 2006); *United States v. Ameriquist Mortg. Co.*, No. 8:07-cv-01304 CJC-MLG (C.D. Cal. 2007) (stipulated judgment and order).

³⁷ Rate aggregators regularly collect and publish rates and other information from numerous mortgage lenders, mortgage brokers, or other sources. Consumers typically can compare mortgage

the acts or statements of the seller;⁴⁵ thus, a fine print disclosure at the bottom of a print advertisement or a brief video superscript in a television advertisement is unlikely to qualify a claim effectively.⁴⁶ Similarly, because consumers “may glance only at the headline” of an advertisement, “accurate information in the text may not remedy a false headline.”⁴⁷

A representation, omission, or practice is material if it is likely to affect a consumer’s choice of or conduct regarding a product.⁴⁸ If consumers are likely to have chosen differently but for the claim, the claim is likely to have caused consumer injury.⁴⁹ Express claims are presumed material.⁵⁰ Similarly, information regarding the cost of a product or service is presumed material.⁵¹ Intentional implied claims,⁵² and claims about the purpose and efficacy of a product or service,⁵³ are also presumed material.

C. Other Mortgage Advertising Requirements⁵⁴

In addition to the FTC Act, mortgage advertisers and marketers are subject to TILA (including HOEPA) and Regulation Z, among other legal requirements.⁵⁵ In July 2008, the

Federal Reserve Board issued many new mortgage advertising rules under Regulation Z; these rules took effect on October 1, 2009.⁵⁶

For example, for closed-end credit, TILA and Regulation Z contain four basic requirements for mortgage advertisements.⁵⁷ First, an advertisement must reflect terms actually available to the consumer.⁵⁸ Second, required disclosures must be made clearly and conspicuously in the advertisement.⁵⁹ Third, any advertisement that includes any credit rate must state the annual percentage rate, or “APR.”⁶⁰ The APR must be stated at least as conspicuously as a stated interest rate.⁶¹ Fourth, if any major triggering loan term (e.g., a monthly payment amount) is advertised, other major terms, including the APR, must also be advertised.⁶²

For closed-end credit secured by a dwelling, Regulation Z also prohibits the following advertising claims based on the Board’s conclusion that they are misleading or deceptive: (1) advertising as “fixed” a rate or payment that will change after a period of time, unless the advertisement meets certain criteria, such as having an equally prominent and closely proximate disclosure that the rate or payment is “fixed” for only

a limited period of time; (2) comparing actual or hypothetical rates or payments to the rates or payments on an advertised loan, unless the advertisement discloses the rates or payments that will apply over the full term of the advertised loan; (3) misrepresenting an advertised loan as part of a “government loan program” or otherwise endorsed or sponsored by a government entity; (4) using the name of the consumer’s current lender, unless the advertisement has an equally prominent disclosure of the person actually disseminating the advertisement and includes a clear and conspicuous statement that the advertiser is not associated with the consumer’s current lender; (5) making any misleading claim that an advertised loan will eliminate debt or result in a waiver or forgiveness of a consumer’s existing loan terms with, or obligations to, another creditor; (6) using the term “counselor” in an advertisement to refer to a for-profit mortgage broker or mortgage lender; and (7) advertising mortgages in a language other than English while providing critical advertising disclosures only in English.⁶³

TILA and Regulation Z require certain other advertising disclosures for HELOCs, a type of open-end credit.⁶⁴ HELOC advertisements may not refer to a home equity plan as “free money” or contain a similarly misleading term.⁶⁵ For example, such an advertisement could not state “no closing costs” or “we waive closing costs” if consumers may be required to pay any closing costs.⁶⁶

The states also have enacted various laws or regulations that address aspects of deceptive mortgage advertising practices,⁶⁷ including laws implementing the federal Secure and Fair Enforcement for Mortgage Licensing Act of 2008 (SAFE Act), which requires a nationwide licensing and/or registration system for mortgage loan originators.⁶⁸

⁴⁵ *Id.* at 181.

⁴⁶ See, e.g., *id.* at 180; see also *In re Stouffer Food Corp.*, 118 F.T.C. 746 (1994); *In re Kraft, Inc.*, 114 F.T.C. 40, 124 (1991), *aff’d*, 970 F.2d 311 (7th Cir. 1992).

⁴⁷ Deception Policy Statement, *supra* note 9, at 180.

⁴⁸ See *Kraft, Inc. v. FTC*, 970 F.2d 311, 322 (7th Cir. 1992); *In re Cliffdale Assocs., Inc.*, 103 F.T.C. 110, 165 (1984); see also *FTC v. SlimAmerica, Inc.*, 77 F. Supp. 2d 1263, 1272 (S.D. Fla. 1999).

⁴⁹ See Deception Policy Statement, *supra* note 9, at 183.

⁵⁰ See *FTC v. Pantron I Corp.*, 33 F.3d 1088, 1095-96 (9th Cir. 1994).

⁵¹ See *In re Peacock Buick*, 86 F.T.C. 1532, 1562 (1975), *aff’d*, 553 F.2d 97 (4th Cir. 1977); Deception Policy Statement, *supra* note 9, at 182-83.

⁵² See *In re Thompson Med. Co., Inc.*, 104 F.T.C. 648, 816 (1984), *aff’d*, 791 F.2d 189 (D.C. Cir. 1986).

⁵³ *Novartis Corp. v. FTC*, 223 F.3d 783, 786-87 (D.C. Cir. 2000).

⁵⁴ This discussion is not intended as a comprehensive list of all potentially applicable mortgage advertising and marketing laws.

⁵⁵ These other requirements include mortgage advertising mandates under the Helping Families Save Their Homes Act of 2009, Pub. L. 111-22, § 203, 123 Stat. 1632 (2009) (codified at 12 U.S.C. 5201 note), which HUD enforces, and advertising regulations and guidance for Federal Housing Administration programs, which HUD has issued. For example, FHA-approved lenders or mortgagees must use their HUD-registered business names in advertisements and promotional materials for FHA programs and maintain copies of their materials for two years. See 75 FR 20718 (Apr. 20, 2010), to be codified at 24 CFR 202. Lenders and others are permitted to distribute the FHA and fair housing logos in marketing materials to prospective FHA borrowers. HUD-approved mortgagees are required to establish procedures for compliance with FHA program requirements, including to avoid engaging

in false or misrepresentative advertising. See HUD Mortgage Letters 2009-02 and 2009-12, available at (<http://www.hud.gov/offices/adm/hudclips/letters/mortgagee/2009ml.cfm>); see also *infra* note 116 (discussing NCUA and OTS advertising regulations).

⁵⁶ See 73 FR at 44599-602, codified generally at 12 CFR 226.16, 226.24; see also *supra* note 28. On August 16, 2010, the Board proposed additional protections and disclosure requirements for mortgage advertisements. See Press Release, Board, *Federal Reserve Board Proposes Enhanced Consumer Protections and Disclosures for Home Mortgage Transactions*, (<http://www.federalreserve.gov/newsevents/press/bcreg/20100816e.htm>) (Aug. 16, 2010).

⁵⁷ See 15 U.S.C. 1661-62, 1664-65a; 12 CFR 226.24. For TILA and Regulation Z open-end credit advertising requirements, see 15 U.S.C. 1661-63, 1665-65b; 12 CFR 226.16.

⁵⁸ See 15 U.S.C. 1662; 12 CFR 226.24(a).

⁵⁹ See 15 U.S.C. 1664; 12 CFR 226.24(b).

⁶⁰ See 15 U.S.C. 1664; 12 CFR 226.24(c). For closed-end credit advertisements, the Board also expressly prohibits advertising any rate that is lower than the rate at which interest is accruing, such as an effective rate, payment rate, or qualifying rate. See 74 FR 44581-82, 44608, codified at Federal Reserve Board Official Staff Commentary (Regulation Z Commentary), 12 CFR 226.24(c)-2, Supp. I. The Board promulgated this rule using its authority under TILA Section 105. *Id.* In some circumstances, for closed-end credit secured by a dwelling, advertisements must provide other disclosures relating to rates. See, e.g., 12 CFR 226.24(f).

⁶¹ See 15 U.S.C. 1664; 12 CFR 226.24(c).

⁶² See 15 U.S.C. 1664; 12 CFR 226.24(d). In some circumstances, for closed-end credit secured by a dwelling, advertisements must provide other disclosures relating to payments. See, e.g., 12 CFR 226.24(f).

⁶³ See 12 CFR 226.24(i); see also 73 FR at 44586-590, 44602, 44610. As noted above, the Board promulgated these rules using its authority under TILA Section 129(l)(2), which is part of HOEPA. See *supra* note 28.

⁶⁴ See, e.g., 12 CFR 226.16(d). The Board promulgated these rules using its authority under TILA Section 105(a). See *supra* note 28.

⁶⁵ See 16 CFR 226.16(d)(5).

⁶⁶ See Regulation Z Commentary, 12 CFR 226.16(d)-4, Supp. I; 75 FR 7658, 7898 (Feb. 22, 2010); see also 12 CFR 226.16(f).

⁶⁷ State advertising requirements differ from one another in the practices, types of credit, and entities covered. See, e.g., Me. Rev. Stat. Ann. tit. 9-A, § 9-301 (2009); Md. Code Regs. 09.03.06.05 (2009); Nev. Rev. Stat. Ann. 645B.196 (2009); N.Y. Bank. Law 595-a (Consol. 2010).

⁶⁸ Title V of the Housing and Economic Recovery Act of 2008, Pub. L. 110-289 (2008) (codified at 12

None of these federal or state measures duplicates the specificity and breadth of practices, and diversity of entities⁶⁹ covered in the proposed rule.

D. Consumer Protection Problems in Mortgage Advertising

The FTC has substantial law enforcement experience with mortgage advertising practices. Since 1995, the Commission has brought 18 law enforcement actions, including three in 2009, against individuals or companies that allegedly engaged in unfair or deceptive practices and/or violations of TILA in connection with mortgage advertising.⁷⁰ These actions have targeted large and small mortgage lenders, mortgage brokers, and others, located throughout the country.⁷¹ The cases have involved advertisements and marketing materials in various media, including print advertisements,⁷² unsolicited emails,⁷³ direct mail marketing,⁷⁴ Internet advertisements

and websites,⁷⁵ telemarketing,⁷⁶ and in-person sales presentations.⁷⁷ The alleged violations have included deceptive claims – often made to subprime borrowers – about key terms and other aspects of the loans, such as:

- misrepresentations of the loan amount or the amount of cash disbursed;⁷⁸
- claims for loans with specified terms, when no loans with those terms were available from the advertiser;⁷⁹
- claims of low “teaser” rates and payment amounts, without disclosing that the rates and payments would increase substantially after a limited period of time;⁸⁰
- misrepresentations that rates were fixed for the full term of the loan;⁸¹
- misrepresentations about, or failure to adequately disclose, the existence of a prepayment penalty⁸² or large balloon payment due at the end of the loan;⁸³
- claims about the monthly payment amounts that the borrower would owe, without disclosing the existence, cost, and terms of credit insurance products “packed” into the loan;⁸⁴
- claims that the loans were amortizing, when, in fact, they involved interest-only transactions;⁸⁵
- claims of mortgage payment amounts that failed to include loan fees

and closing costs of the kind typically included in loan amounts;⁸⁶

- false or misleading savings claims in high loan-to-value loans;⁸⁷
- false or misleading claims regarding the terms or nature of interest rate lock-ins;⁸⁸
- false claims that an entity was a national mortgage lender;⁸⁹
- failure to disclose adequately that the advertiser, not the consumer’s current lender, was offering the mortgage;⁹⁰ and
- false or misleading claims that consumers were “pre-approved” for mortgage loans.⁹¹

In addition, the Commission has brought actions against mortgage companies that allegedly deceptively offered loans to consumers whose primary language was a language other than English. One action challenged as deceptive a mortgage company’s alleged practice of stating loan terms orally to Spanish-speaking consumers in Spanish, only to provide loan documents with different and less favorable terms in English.⁹² In a second case, the company allegedly offered certain mortgage terms in both Chinese and English advertisements, but failed to disclose a large balloon payment.⁹³

Numerous states have brought enforcement actions under state laws alleging deceptive mortgage advertising and marketing, challenging misrepresentations about: (1) the lack of closing costs;⁹⁴ (2) low fixed or teaser rates or payments;⁹⁵ (3) the advertiser’s

U.S.C. 5101). Since the SAFE Act’s enactment on July 30, 2008, the states have been moving to enact or amend laws to license mortgage loan originators. See generally (<http://www.cbsb.org>); see also HUD SAFE Mortgage Licensing Act, available at (<http://hud.gov/offices/hsg/rmra/safe/sfea.cfm>). Various new state SAFE laws address advertising in different ways. See, e.g., H.B. 1085, 67th Gen. Assem., Reg. Sess. (Colo. 2009); S.B. 948, 2009 Gen. Assem., Reg. Sess. (Conn. 2009); S.B. 1218, 25th Leg., 1st Spec. Sess. (Haw. 2009); H.B. 4011, 96th Gen. Assem., Reg. Sess. (Ill. 2009); A.B. 3816, 213th Leg., 2nd Ann. Sess. (N.J. 2009). The federal banking agencies and Farm Credit Administration also are implementing a registration system and other requirements for mortgage loan originators. See 74 FR 27386 (June 9, 2009).

⁶⁹ See *infra* Part III.B.4.

⁷⁰ See Table B - List of FTC Mortgage Advertising Enforcement Actions, *infra*.

⁷¹ See, e.g., *FTC v. Mortgages Para Hispanos.com Corp.*, No. 4:06-cv-19 (E.D. Tex. 2006); *FTC v. Ranney*, No. 04-F-1065 (MJW) (D. Colo. 2004); *FTC v. Chase Fin. Funding, Inc.*, No. SACV04-549 GLT (ANx) (C.D. Cal. 2004); *FTC v. OSI Fin. Servs., Inc.*, No. 02-C-5078 (N.D. Ill. 2002); *United States v. Mercantile Mortg. Co.*, No. 02-C-5079 (N.D. Ill. 2002); *FTC v. Assocs. First Capital Corp.*, No. 1:01-00606 JTC (N.D. Ga. 2001); *FTC v. First Alliance Mortg. Co.*, No. SACV 00-964 DOC (EEx) (C.D. Cal. 2000).

⁷² See, e.g., *FTC v. Safe Harbour Found. of Fla., Inc.*, No. 08-C-1185 (N.D. Ill. 2008); *FTC v. Ranney*, No. 04-F-1065 (MJW) (D. Colo. 2004).

⁷³ See, e.g., *FTC v. 30 Minute Mortg., Inc.*, No. 03-60021 (S.D. Fla. 2003); *FTC v. Chase Fin. Funding, Inc.*, No. SACV04-549 GLT (ANx) (C.D. Cal. 2004).

⁷⁴ See, e.g., *In re Am. Nationwide Mortg. Co., Inc.*, F.T.C. Dkt. No. C-4249 (2009); *In re Michael Gendrolis*, F.T.C. Dkt. No. C-4248 (2009); *FTC v. Chase Fin. Funding, Inc.*, No. SACV04-549 GLT (ANx) (C.D. Cal. 2004); *FTC v. First Alliance Mortg. Co.*, No. SACV 00-964 DOC (EEx) (C.D. Cal. 2000); *United States v. Unicor Funding, Inc.*, No. SACV99-1228 (C.D. Cal. 1999); *FTC v. Assocs. First Capital Corp.*, No. 1:01-00606 JTC (N.D. Ga. 2001); *FTC v. Safe Harbour Found. of Fla., Inc.*, No. 08-C-1185 (N.D. Ill. 2008); *In re FirstPlus Fin. Group, Inc.*, F.T.C. Dkt. No. C-3984 (2000).

⁷⁵ See, e.g., *In re Shiva Venture Group, Inc.*, F.T.C. Dkt. No. C-4250 (2009); *FTC v. Ranney*, No. 04-F-1065 (MJW) (D. Colo. 2004).

⁷⁶ See, e.g., *FTC v. First Alliance Mortg. Co.*, No. SACV 00-964 DOC (EEx) (C.D. Cal. 2000).

⁷⁷ See, e.g., *id.*; *FTC v. Assocs. First Capital Corp.*, No. 1:01-00606 JTC (N.D. Ga. 2001).

⁷⁸ See, e.g., *id.*; *FTC v. OSI Fin. Servs., Inc.*, No. 02-C-5078 (N.D. Ill. 2002); *United States v. Mercantile Mortg. Co.*, No. 02-C-5079 (N.D. Ill. 2002); *In re FirstPlus Fin. Group, Inc.*, F.T.C. Dkt. No. C-3984 (2000).

⁷⁹ See, e.g., *FTC v. 30 Minute Mortg., Inc.*, No. 03-60021 (S.D. Fla. 2003).

⁸⁰ See, e.g., *In re Am. Nationwide Mortg. Co., Inc.*, F.T.C. Dkt. No. C-4249 (2009); *In re Shiva Venture Group, Inc.*, F.T.C. Dkt. No. C-4250 (2009); *In re Michael Gendrolis*, F.T.C. Dkt. No. C-4248 (2009). The FTC also sent over 200 warning letters in 2007 to mortgage lenders, mortgage brokers, and media outlets regarding mortgage advertising claims, including teaser rates, that could be deceptive or violate TILA. See Press Release, FTC, *FTC Warns Mortgage Advertisers and Media That Ads May Be Deceptive* (Sept. 11, 2007), available at (<http://www.ftc.gov/opa/2007/09/mortsurf.shtm>).

⁸¹ See, e.g., *In re Am. Nationwide Mortg. Co., Inc.*, F.T.C. Dkt. No. C-4249 (2009).

⁸² See, e.g., *FTC v. Chase Fin. Funding, Inc.*, No. SACV04-549 (GLT) (ANx) (C.D. Cal. 2004); *FTC v. OSI Fin. Servs., Inc.*, No. 02-C-5078 (N.D. Ill. 2002).

⁸³ See, e.g., *FTC v. OSI Fin. Servs., Inc.*, No. 02-C-5078 (N.D. Ill. 2002).

⁸⁴ See, e.g., *FTC v. Assocs. First Capital Corp.*, No. 1:01-00606 JTC (N.D. Ga. 2001). The complaint in that case alleged, among other things, that the defendants included credit insurance products in the loan package without the borrower’s knowledge.

⁸⁵ See, e.g., *FTC v. Capital City Mortg. Corp.*, No. 1:98CV237 (D.D.C. 1998).

⁸⁶ See, e.g., *FTC v. Assocs. First Capital Corp.*, No. 1:01-00606 JTC (N.D. Ga. 2001). In addition, in making these statements, the lender allegedly did not reveal that the loans were interest-only and that borrowers would owe the entire principal amount in a large balloon payment at the end of the loan term.

⁸⁷ See, e.g., *In re FirstPlus Fin. Group, Inc.*, F.T.C. Dkt. No. C-3984 (2000).

⁸⁸ See, e.g., *In re Lomas Mortg. U.S.A., Inc.*, 116 F.T.C. 1062 (1993).

⁸⁹ See, e.g., *FTC v. 30 Minute Mortg., Inc.*, No. 03-60021 (S.D. Fla. 2003).

⁹⁰ See, e.g., *In re Michael Gendrolis*, F.T.C. Dkt. No. C-4248 (2009).

⁹¹ See, e.g., *United States v. Unicor Funding, Inc.*, No. SACV99-1228 (C.D. Cal. 1999).

⁹² See *FTC v. Mortgages Para Hispanos.com Corp.*, No. 4:06-cv19 (E.D. Tex. 2006).

⁹³ See *In re Felson Builders, Inc.*, 119 F.T.C. 652 (1995).

⁹⁴ See, e.g., *In re Lenox Fin. Mortg., LLC*, No. 2007-017383 (Ariz. Sup. Ct. 2007) (assurance of discontinuance), available at (http://www.azag.gov/press_releases/sept/2007/LenoxFinancialAssuranceApproval.pdf).

⁹⁵ See, e.g., *State v. Lifetime Fin., Inc.*, No. LC080829 (Cal. Super. Ct. 2008), available at (http://www.ag.ca.gov/cms_attachments/press/pdfs/n1533_complaint_for_civil_penalties.pdf); *State v. Green River Mortg.*, No. 2009CV89 (Colo. Dist. Ct. 2009), press release available at (<http://www.coloradoattorneygeneral.gov/press/news/>)

affiliation with the consumer's current lender;⁹⁶ (4) the availability of government grants for home repairs;⁹⁷ (5) the savings available by refinancing;⁹⁸

(6) reverse mortgage terms and government affiliation;⁹⁹ (7) the availability of rates compared to competitors;¹⁰⁰ and (8) the advertiser's self-description as a "bank."¹⁰¹

2009/05/12/

attorney general announces settlement barring mortgage broker operating inside; *State v. One Source Mortg., Inc.*, No. 07CH34450 (Ill. Cir. Ct. 2007), press release available at (http://www.ag.state.il.us/pressroom/2007_11/20071126.html); *In re Paramount Equity Mortg., Inc.*, No. C-07-405-08-SC01 (Wash. Dep't of Fin. Inst. 2008), available at (<http://www.dfi.wa.gov/CS%20Orders/C-07-405-08-SC01.pdf>).

⁹⁶ See, e.g., *State v. Sroka*, No. 2007-16-61 (Idaho Dep't of Fin. 2007), available at (http://finance.idaho.gov/ConsumerFinance/Actions/Administrative/2007-16-61_Sroka_Terrazas_Order_Cease_and_Desist.pdf); *State v. Sage*, No. 2007-8-45 (Idaho Dep't of Finance 2007), press release available at (http://finance.idaho.gov/PR/2007/PressRel_Sage_CDOOrder.pdf); *State v. Goldstar Home Mortg.*, No. 09AB-CV02310 (Mo. Cir. Ct. 2009) press release available at (http://ago.mo.gov/newsreleases/2009/AG_Koster_files_lawsuits_after_mortgage_fraud/).

⁹⁷ See, e.g., *State v. Ellis*, No. 07CH34451 (Ill. Cir. Ct. 2007), press release available at (http://www.ag.state.il.us/pressroom/2007_11/20071126.html).

⁹⁸ See, e.g., *State v. Advantage Mortg. Serv., Inc.*, No. C107 (Neb. Dist. Ct. 2007), available at (http://www.ndbf.ne.gov/forms/Advantage_Mortgage_Complaint.pdf).

⁹⁹ See, e.g., *State v. Upstate Capital, Inc.*, No. 08-036 (N.Y. Office of Att'y Gen. 2008), press release available at (http://www.ag.ny.gov/media_center/2008/apr/apr24a_08.html). Other cases have charged other entities with deceptive advertising, including using the words "United States of America" or an image of the Statue of Liberty, when the advertiser had no affiliation with the government (see *State v. Island Equity Mortg., Inc.*, (N.Y. Banking Dep't 2007), available at (<http://www.banking.state.ny.us/ea070412.htm>), and falsely representing that the advertisers were affiliated with a government program (see *In re Assurity Fin. Servs., LLC*, No. C-07-320-08-SC01 (Wash. Dep't of Fin. Inst. 2008), available at (<http://www.dfi.wa.gov/CS%20Orders/C-07-320-08-SC01.pdf>); see also *State v. Am. Advisors Group, Inc.*, No. 2010CH00158 (Ill. Cir. Ct. filed Feb. 8, 2010), available at (<http://www.scribd.com/doc/33748621/People-Illinois-v-American-Advisors-Group-Complaint>); *State v. Hartland Mortg. Ctrs., Inc.*, No. 10CH05339 (Ill. Cir. Ct. filed Feb. 8, 2010), press release available at (http://www.ag.state.il.us/pressroom/2010_02/20100208.html). HUD also recently took action against two lenders for deceptive advertising of HUD-insured reverse mortgages. See Press Release, HUD, *FHA Withdraws Three Lenders, Suspends a Fourth* (Feb. 25, 2010), available at (http://portal.hud.gov/portal/page/portal/HUD/press/press_releases_media_advisories/2010/HUDNo.10-019).

¹⁰⁰ See, e.g., *In re Paramount Equity Mortg., Inc.*, No. C-07-405-08-SC01 (Wash. Dep't of Fin. Inst. 2008), available at (<http://www.dfi.wa.gov/CS%20Orders/C-07-405-08-SC01.pdf>).

¹⁰¹ See, e.g., *id.*

III. Discussion of the Proposed Rule

The Commission's law enforcement experience, state law enforcement activities and legislation, and the comments received in response to the ANPR demonstrate that deceptive claims in mortgage advertising and marketing pose a risk of significant harm to consumers. In addition to continuing to engage in aggressive law enforcement against those who make such claims, the FTC believes that a rule prohibiting misrepresentations in mortgage advertising would enable the agency to protect prospective borrowers more effectively by establishing clear standards for advertisers, increasing the efficiency of law enforcement efforts, and serving as a deterrent to unlawful behavior. In particular, as discussed above, the proposed rule would allow the Commission to seek civil penalties for violations, thereby enhancing the effect of the Commission's law enforcement actions. Civil penalties may be an especially useful deterrent in cases in which consumer redress or disgorgement is not available or not feasible.

A. Section 321.1: Scope

As detailed in Part I.A, the scope of this rulemaking is set forth in the Omnibus Appropriations Act, as clarified by the Credit CARD Act. These statutes direct the Commission to commence a rulemaking proceeding to issue rules "related to unfair or deceptive acts or practices." The Commission's rulemaking authority also is limited by the Credit CARD Act to persons over whom the FTC has enforcement power under the FTC Act.

B. Section 321.2: Definitions

1. Sections 321.2(e): "mortgage credit product;" 321.2(d): "dwelling;" and 321.2(b): "consumer"

The proposed rule would prohibit any person from making any material misrepresentation in any commercial communication regarding any term of any mortgage credit product. Proposed § 321.2(f) defines "mortgage credit product." To fall within that definition, the product must meet three criteria. First, it must be a form of "credit." The term "credit" is defined as "the right to defer payment of debt or to incur debt and defer its payment."¹⁰² Second, the

¹⁰² Proposed § 321.2(c). This definition is largely based on that in Regulation Z. See 12 CFR 226.2(a)(14). One difference is that the proposed rule covers all shared equity and shared appreciation mortgages offered to consumers, whereas certain types of such mortgages may not be considered "credit" under Regulation Z. See Regulation Z Commentary, 12 CFR 226.2(a)(14)-1

credit must be secured either by real property or a dwelling. The term "dwelling" is defined as "a residential structure that contains one to four units, whether or not that structure is attached to real property" and includes "an individual condominium unit, cooperative unit, mobile home, and trailer, if it is used as a residence."¹⁰³ Third, the credit must be offered to a consumer primarily for personal, family, or household purposes. "Consumer" is defined as a "natural person to whom a mortgage credit product is offered or extended."¹⁰⁴ Personal, family or household purposes would include, for example, home purchase or improvement loans, debt consolidation or home equity transactions, credit for medical or dental expenses, and educational loans. Credit offered or extended primarily for a business purpose would not be covered, even if it is secured by a lien on a dwelling. The determination of whether the credit is "primarily" for personal, family, or household use, rather than "primarily" for business use, requires an assessment of all of the facts of a particular transaction.

Assuming they meet the above criteria, the proposed definition covers both closed-end credit (e.g., installment financing)¹⁰⁵ and open-end credit (e.g., HELOCs);¹⁰⁶ traditional, fully amortizing loans and nontraditional or

and 226.17(c)(1)-11, Supp. I. In shared equity and shared appreciation mortgages, the consumer receives cash, a lower interest rate, or other favorable terms in exchange for agreeing to share with the lender or other company all or part of the consumer's total equity or the appreciation in the consumer's equity when the loan comes due, or at some other point during the loan.

¹⁰³ Proposed § 321.2(e). Both primary and secondary (or vacation) homes are covered if they are used as collateral for the loan. The term "dwelling" in the proposed rule is based on that used in TILA and Regulation Z. See 15 U.S.C. 1602(v) and 12 CFR 226.2(a)(19).

Note that some aspects of the Regulation Z advertising rules apply only to credit secured by a dwelling and not by real property. See 12 CFR 226.16(d); 12 CFR 226.24(f) and (i).

¹⁰⁴ Proposed § 321.2(b). Thus, credit offered or extended to an organization or governmental entity is not covered.

¹⁰⁵ Construction financing and other forms of credit in which multiple advances may be common are also covered. In these transactions, some or all of the advances may be estimates (as to their dollar amount or the date on which they will occur).

¹⁰⁶ The proposed rule's prohibitions apply uniformly to closed-end and open-end credit. In contrast, the Regulation Z advertising provisions (including restrictions on deceptive claims) are different for closed-end and open-end credit. See, e.g., 12 CFR 226.24(i) and 12 CFR 226.16(d)(5) and (f).

alternative financing;¹⁰⁷ and forward and reverse mortgages.¹⁰⁸

2. Section 321.2(g): “term”

The proposed rule would apply to any “term” of any mortgage credit product. Under the proposal, “term” is defined broadly to mean “any of the fees, costs, obligations, or characteristics of, or associated with, the product.” It also includes any of the conditions on, or related to, the availability of the product. “Term” is intended to cover all aspects of a mortgage credit product without exception.

3. Section 321.2(a): “commercial communication”

As discussed above, the proposed rule applies to claims made in any “commercial communication,” which is defined as follows:

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, 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, catalog, 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.”¹⁰⁹

¹⁰⁷ Covered alternative loans include, for example, hybrid ARMs, teaser rate or teaser payment loans with low rates or payments that expire after a short period, interest-only and balloon mortgages, negative amortization mortgages, shared equity and shared appreciation mortgages, buydowns, and payment option ARMs. For a discussion of the various types of mortgage loans and their features, see generally *Interagency Subprime Mortgage Statement and Interagency Nontraditional Mortgage Guidance*, supra note 39; Conference of State Bank Supervisors (CSBS), *Guidance on Nontraditional Mortgage Product Risks for State-Licensed Entities* (Nov. 14, 2006), available at (http://www.banking.mt.gov/content/pdf/CSBS-AARMR_FINAL_GUIDANCE.pdf) (issuing parallel guidance to federal bank regulatory agencies for residential mortgage brokers and mortgage bankers); CSBS et al., *Statement on Subprime Mortgage Lending* (July 16, 2007), available at (http://www.csbs.org/regulatory/policy/policy-guidelines/Documents/Final_CSBS-AARMR-NACCA_StatementonSubprimeLending.pdf) (issuing similar guidance to federal bank regulatory agencies for residential mortgage brokers and mortgage bankers).

¹⁰⁸ See supra note 33 and accompanying text.

¹⁰⁹ See proposed § 321.2(a).

This definition encompasses commercial communications¹¹⁰ in any medium and in any language(s).¹¹¹

4. Section 321.2(f): “person”

The proposed rule applies to any “person,” defined as “any individual, group, unincorporated association, limited or general partnership, corporation, or other business entity.”¹¹² Thus, any individual or entity that makes representations in a commercial communication about a mortgage credit product is a “person” for purposes of the proposed rule. The types of entities the proposed rule covers include mortgage lenders, mortgage brokers, mortgage servicers, real estate agents and brokers, advertising agencies, home builders, lead generators, rate aggregators, and others under the Commission’s jurisdiction.¹¹³ As mandated by the Omnibus Appropriations Act, individuals and entities that are excluded from the FTC’s jurisdiction are not covered by the proposed rule.

Consistent with the FTC’s jurisdiction, the proposed rule covers all credit unions except federally-chartered credit unions.¹¹⁴ Several representatives of credit unions (and a group of state credit union regulators) filed comments on the ANPR.¹¹⁵ Some commenters urged the Commission to exclude state-chartered credit unions so as not to put them at a competitive disadvantage relative to federally-chartered credit unions. Commenters also noted that the advertising practices of state-chartered credit unions that are federally insured

¹¹⁰ Based on this definition, the proposed rule has broader applicability than the Board’s advertising rules in Regulation Z, which exempt personal contacts, communications about existing accounts, and certain educational materials. See Regulation Z Commentary, 12 CFR 226.2(a)(2), Supp. I.

¹¹¹ The proposed rule broadly prohibits misleading claims in any language. In comparison, for closed-end credit, Regulation Z specifically bans providing information about some trigger terms or required disclosures only in a foreign language in the advertisement but, at the same time, providing information about other trigger terms or required disclosures only in English in that advertisement. See 12 CFR 226.24(i)(7). As discussed below, see *infra* Part IV.B.2(3), the Commission seeks comment on whether the proposed rule should address the use of multiple languages in marketing mortgages to consumers whose primary language is not English.

¹¹² *Id.* This definition is based on that used in Regulation Z. See 12 CFR 226.2(a)(22).

¹¹³ See supra notes 36-37. One commenter raised the need for coverage of mortgage rate aggregators, among others, in the prospective advertising rules. See HPC at 3.

¹¹⁴ The Commission’s jurisdiction includes nonfederally-insured, state-chartered credit unions, nonfederally-insured credit unions in Puerto Rico and other U.S. territories, and any credit unions with no deposit insurance.

¹¹⁵ See supra note 30.

are subject to existing NCUA advertising regulations.¹¹⁶

The proposed rule does not grant any exemptions beyond those already provided by the FTC Act. To the extent that other federal agencies regulate the advertising of certain financial institutions,¹¹⁷ the proposed rule, which simply prohibits misrepresentations, would not conflict with those regulations.¹¹⁸ Nor does the Commission believe that prohibiting certain financial institutions from making deceptive claims would establish a competitive disadvantage. Entities not covered by the proposed rule remain subject to general federal and state truth-in-advertising laws. The Commission seeks comment on whether the rule should grant any exemptions beyond those in the FTC Act.

C. Section 321.3: Prohibited Representations

1. Discussion

Proposed § 321.3 prohibits any material misrepresentation, whether made expressly or by implication, in any commercial communication, regarding any term of any mortgage credit product. FTC and state cases provide numerous examples of misrepresentations made in mortgage advertising. Proposed §§ 321.3(a)-(s) set forth a non-exclusive list of misrepresentations that would violate the proposed rule. This list addresses the most common misrepresentations that have appeared in state and federal enforcement actions over the past several years and is intended to provide illustrative guidance about the kinds of claims that are prohibited. For discussion purposes, the list of representations covered by the proposed rule is informally grouped into three categories below.

As noted above, a claim is deceptive under Section 5 of the FTC Act if there

¹¹⁶ Federally-insured credit unions are prohibited generally by NCUA’s regulations from using advertising or promotional material that contains inaccurate, misleading, or deceptive claims concerning their products, services, or financial condition. See 12 CFR 740.2.

In addition, some commenters asserted that subsidiaries of banks or thrifts should not be covered by the prospective rules or are subject to rules administered by the federal banking agencies. See ABA at 3-6; CMC/AFSA at 3-5; see also, e.g., 12 CFR 563.27 (OTS regulations prohibiting thrifts from using advertisements or other representations that are inaccurate or misrepresent the services or contracts offered).

¹¹⁷ While there are similarities between the proposed rule and existing federal and state requirements, none of the existing requirements duplicate all of the operative provisions of the proposed rule.

¹¹⁸ In other words, nothing in the other agencies’ regulations would require entities to make claims that the proposed rule prohibits.

is a “representation, omission, or practice that . . . is likely to mislead consumers acting reasonably under the circumstances, and . . . the representation, omission, or practice is material.”¹¹⁹ Information is “material” if it is “likely to affect [a consumer’s] choice of, or conduct regarding, a product.”¹²⁰ The types of information in the representations specified in § 321.3 of the proposed rule involve matters central to consumers’ decisions about mortgage credit products. Thus, the types of misrepresentations the proposed rule prohibits are “material.”

a. Fees or Costs

In general, proposed §§ 321.3(a)-(f) address representations related to fees or costs associated with a mortgage credit product. **Proposed § 321.3(a)** covers misrepresentations about interest charged for the product, including but not limited to misrepresentations about (1) whether the loan includes a negative amortization feature;¹²¹ (2) the amount of interest owed each month that is included in the consumer’s payments, loan amount, or total amount due; and (3) the interest owed each month that is not included in the payments but is instead added to the total amount due.

Proposed § 321.3(b) bars misrepresentations about the APR, simple annual rate, periodic rate, or any other rate, including but not limited to a payment rate.¹²² The Commission has challenged deceptive rate claims in many cases, some of which included allegations that originators understated the true rate by more than 100

percent.¹²³ This provision also is intended to cover false or misleading savings rate claims in financing promotions. The Commission has challenged, for example, deceptive claims that consumers will save money (such as at a particular rate of savings) by accepting the credit offer.¹²⁴

Proposed § 321.3(c) bars misrepresentations about the existence, nature, or amount of fees or costs associated with any mortgage credit product. It also prohibits false or misleading claims that no fees are charged, for example, if the fees and costs, although not paid separately, are included in the loan amount or total amount due from the consumer. This provision covers fees and costs imposed at any point during the life of the loan.¹²⁵

Proposed § 321.3(d) covers misrepresentations about terms associated with additional products or features that may be sold in conjunction with a mortgage credit product.¹²⁶ Thus, this provision covers claims made in cross-selling other products or features in mortgage credit product offers, including but not limited to credit insurance, credit disability insurance, car clubs, or other “add-ons” to the loan.¹²⁷

Proposed § 321.3(e) covers misrepresentations relating to the taxes on or insurance for the dwelling associated with a mortgage credit product, for example, claims about whether tax or insurance charges are included in the overall monthly

payment or are made separately. Prior Commission cases have challenged claims that the advertised monthly payment included tax and insurance charges, when in fact it did not.¹²⁸

Proposed § 321.3(f) bars misrepresentations about the existence or amount of any penalty for making prepayments on the mortgage. The Commission has brought several cases against entities that allegedly deceived consumers about prepayment penalties.¹²⁹

b. Obligations or Characteristics

Proposed §§ 321.3(g)-(p) generally address representations related to obligations or characteristics associated with a mortgage credit product. **Proposed § 321.3(g)** prohibits misrepresentations pertaining to the variability of interest, payments, or other terms of mortgage credit products, including but not limited to, for example, misrepresentations using the word “fixed” when terms are variable or limited in duration.¹³⁰ **Proposed § 321.3(h)** bars false or misleading comparisons between rates or payments,¹³¹ including but not limited to comparisons involving savings. It also bars false or misleading comparisons between rates or payments available for different parts of the loan term.¹³²

¹²⁸ See, e.g., *United States v. Mercantile Mortg. Co.*, No. 02-C-5079 (N.D. Ill. 2002); *FTC v. OSI Fin. Servs., Inc.*, No. 02-C-5078 (N.D. Ill. 2002); *FTC v. Assocs. First Capital Corp.*, No. 1:01-00606 JTC (N.D. Ga. 2001).

¹²⁹ See, e.g., *United States v. Mercantile Mortg. Co.*, No. 02-C-5079 (N.D. Ill. 2002); *FTC v. OSI Fin. Servs., Inc.*, No. 02-C-5078 (N.D. Ill. 2002); *FTC v. Chase Fin. Funding Inc.*, No. SACV 04-549 GLT (ANx) (C.D. Cal. 2004); see also FTC Bureau of Consumer Protection, Bureau of Economics, and Office of Policy Planning, Comments before Board of Governors of Federal Reserve System, Dkt. No. R-1305, Apr. 8, 2008, n.11, available at (<http://www.ftc.gov/os/2008/04/V080008frb.pdf>).

¹³⁰ The Commission has charged mortgage brokers and other entities with falsely promising consumers low fixed payments and rates on their mortgage loans, including promising “30 year fixed. 1.95%,” “3.5% fixed payment loan,” and other rates that were not, in fact, fixed. See, e.g., *In re Am. Nationwide Mortg. Co., Inc.*, F.T.C. Dkt. No. C-4249 (2009); *FTC v. Chase Fin. Funding, Inc.*, No. SACV 04-549 GLT (ANx) (C.D. Cal. 2004); see also *FTC v. 30 Minute Mortg., Inc.*, No. 03-60021 (S.D. Fla. 2003); *Andrews v. Chevy Chase Bank*, 240 F.R.D. 612 (E.D. Wis. 2007) (describing payment option ARM sold as “fixed rate” when interest was only fixed for one month, although payments were fixed for a year).

¹³¹ Proposed § 321.3(g) has broader applicability than a similar provision in Regulation Z, which applies only to closed-end dwelling-secured credit and requires specific advertising disclosures. See 12 CFR 226.24(i)(1).

¹³² Proposed § 321.3(h) has broader applicability than a similar provision in Regulation Z, which applies only to closed-end dwelling-secured credit and requires specific advertising disclosures. See 12 CFR 226.24(i)(2).

¹³³ See, e.g., *In re FirstPlus Fin. Group, Inc.*, F.T.C. Dkt. No. C-3984 (2000).

¹²³ See, e.g., *FTC v. Safe Harbour Found. of Fla., Inc.*, No. 08-C-1185 (N.D. Ill. 2008) (severely understated APR).

Deceptive payment rate claims were at the heart of three enforcement actions announced in February 2009. See *In re Am. Nationwide Mortg. Co., Inc.*, F.T.C. Dkt. No. C-4249 (2009); *In re Shiva Venture Group, Inc.*, F.T.C. Dkt. No. C-4250 (2009); *In re Michael Gendrolis, F.T.C. Dkt. No. C-4248 (2009)*.

¹²⁴ The Commission has challenged deceptive comparisons in financing that include, among other things, savings rates in non-mortgage contexts. See *In re Automatic Data Processing*, 115 F.T.C. 841 (1992) (alleged deceptive comparisons in automobile financing). Section 321.3(b) would prohibit these types of promotions when used in the mortgage context.

¹²⁵ See, e.g., *FTC v. Ranney*, No. 04-F-1065 (MJW) (D. Colo. 2004); *FTC v. Chase Fin. Funding, Inc.*, No. SACV04-549 GLT (ANx) (C.D. Cal. 2004) (allegedly promoting “NO COSTS . . . NO KIDDING” and “no-fee” loans, when in fact, the loans included such charges); see also *FTC v. Assocs. First Capital Corp.*, No. 1:01-00606 JTC (N.D. Ga. 2001); *FTC v. First Alliance Mortg. Co.*, No. SACV 00-964 DOC (EEx) (C.D. Cal. 2000).

¹²⁶ See, e.g., *FTC v. Assocs. First Capital Corp.*, No. 1:01-00606 JTC (N.D. Ga. 2001).

¹²⁷ The Commission has alleged deceptive practices involving add-ons to non-mortgage personal loans as well. See *FTC v. Stewart Fin. Co. Holdings*, Civ. No. 1:03-CV-2648-JTC (N.D. Ga. 2003).

¹¹⁹ *Cliffdale*, 103 F.T.C. at 165.

¹²⁰ *Id.*; see also *Novartis*, 223 F.3d at 786; *supra* notes 48-53 and accompanying text.

¹²¹ See, e.g., *In re Shiva Venture Group, Inc.*, F.T.C. Dkt. No. C-4250 (2009); *In re Michael Gendrolis, F.T.C. Dkt. No. C-4248 (2009)*; *In re Am. Nationwide Mortg. Co., Inc.*, F.T.C. Dkt. No. C-4249 (2009); *FTC v. OSI Fin. Servs., Inc.*, No. 02-C-5078 (N.D. Ill. 2002); *United States v. Mercantile Mortg. Co.*, No. 02-C-5029 (N.D. Ill. 2002); *FTC v. Capital City Mortg. Corp.*, No. 1:98CV237 (D.D.C. 1998).

¹²² A payment rate is the rate used to calculate the consumer’s monthly payment amount and is not necessarily the same as the interest rate. If the payment rate is less than the interest rate, the consumer’s monthly payment amount does not include the full interest owed each month; the difference between the amount the consumer pays and the amount the consumer owes is added to the total amount due from the consumer.

The proposed rule prohibits misrepresentations about payment rates and any other rate, for both closed-end and open-end credit. In comparison, Regulation Z bans advertising of payment rates for closed-end credit. See Regulation Z Commentary, 12 CFR 226.24(c)-2, Supp. I. Regulation Z also bans advertising of effective rates and qualifying rates (which are similar terms for payment rates) for closed-end credit. *Id.*; see also 73 FR 44581-82. The Board enacted this prohibition under Section 105 of TILA. See *supra* note 28.

Proposed § 321.3(i) prohibits misrepresentations about the type of mortgage credit product that is offered, e.g., false claims that a mortgage is fully amortizing.¹³³ **Proposed § 321.3(j)** bars misrepresentations about the amount of the obligation or the existence, nature, or amount of cash or credit the consumer could receive.¹³⁴ This would include, for example, false claims that the consumer will receive a certain amount of cash by obtaining a home equity loan, or will receive a certain amount of credit through a purchase money loan. **Proposed § 321.3(k)** prohibits misrepresentations about the existence, number, amount, or timing of any minimum or required payments.¹³⁵

Proposed § 321.3(l) prohibits misrepresentations about the potential for default on the mortgage credit product, including but not limited to misrepresentations about the circumstances under which the consumer could default for nonpayment of taxes or insurance, failure to maintain the property, or not complying with other obligations.¹³⁶ **Proposed § 321.3(m)** bars misrepresentations about the effectiveness of the mortgage

credit product in helping consumers resolve problems in paying debts.¹³⁷ This section covers false or misleading claims that the lender's or servicer's product (through a waiver, forgiveness, or otherwise) will reduce, eliminate, or restructure a debt or any other obligation of any person.¹³⁸ **Proposed § 321.3(n)** prohibits misrepresentations about the association between a mortgage credit product or a provider of such product and any other person or program, including but not limited to any affiliation with an organizational or governmental program, benefit, or entity.¹³⁹ **Proposed § 321.3(o)** covers misrepresentations about the source of the mortgage credit product and the commercial communications for it, including but not limited to claims that the communication is made by or on behalf of the consumer's current mortgage lender or servicer.¹⁴⁰ **Proposed § 321.3(p)** prohibits misrepresentations about the consumer's right to reside in the dwelling that is the subject of the mortgage credit product, including but not limited to false or misleading claims about how long or under what

conditions a consumer can stay in the dwelling.¹⁴¹

c. Conditions on or Related to Availability

Proposed §§ 321.3(q)-(s) address representations that pertain to the availability of the mortgage credit product and related advice. **Proposed §§ 321.3(q) and 321.3(r)** bar misrepresentations about the consumer's ability to obtain, or likelihood of obtaining, any mortgage credit product or term thereof, or any refinancing or modification of a mortgage credit product or term thereof. This includes false or misleading claims about whether the consumer or the consumer's property has been preapproved or guaranteed for any such product or term.¹⁴² **Proposed § 321.3(s)** bars misrepresentations about the availability, nature, or substance of counseling services or any other expert advice offered to the consumer regarding any mortgage credit product term, including but not limited to the qualifications of those offering the services or advice.¹⁴³

2. Advertising Disclosures

The proposed rule does not include any affirmative advertising disclosure requirements. The Commission tentatively concludes that it is unnecessary to mandate advertising disclosures in the proposed rule and that not doing so will eliminate the possibility of inconsistencies with other federally- or state-mandated disclosure requirements for mortgage advertising.

¹⁴¹ Issues concerning the consumer's right to reside in the dwelling have frequently arisen in the sale of reverse mortgages. See generally, U.S. Gov't Accountability Office (GAO), GAO-09-606, *Reverse Mortgages: Product Complexity and Consumer Protection Issues Underscore Need for Improved Controls over Counseling for Borrowers* (2009) (GAO Reverse Mortgage Report).

¹⁴² See, e.g., *United States v. Unicor Funding, Inc.*, No. 99-1228 (C.D. Cal. 1999); *In re Lomas Mortg. U.S.A., Inc.*, 116 F.T.C. 1062 (1993); *FTC v. Safe Harbour Found. of Fla., Inc.*, No. 08-C-1185 (D.C. Ill. 2008); *FTC v. Assocs. First Capital Corp.*, No. 1:01-00606 JTC (N.D. Ga. 2001).

¹⁴³ Such misrepresentations have been identified as problematic in the offering of reverse mortgages, see, e.g., *FFIEC Reverse Mortgage Guidance*, supra note 39, and *GAO Reverse Mortgage Report*, supra note 141, and of loan modifications, see generally MARS NPRM, supra note 19.

Proposed § 321.3(s) has broader applicability than a similar provision in Regulation Z, which applies only to closed-end dwelling-secured credit and addresses advertisements that use the term "counselor" to refer to a for-profit mortgage broker or creditor, its employees, or others working for the broker or creditor in offering, originating, or selling mortgages. See 12 CFR 226.24(i)(6). In comparison, the Commission's proposed rule applies to both closed-end and open-end credit secured either by real property or a dwelling and bans misrepresentations regardless of the type of for-profit entity involved.

¹³³ For example, the FTC charged a company with misrepresenting that a loan was fully amortizing when, in fact, it consisted of interest-only payments with a large balloon payment. *FTC v. Capital City Mortg. Corp.*, No. 1:98CV237 (D.D.C. 1998).

¹³⁴ See *FTC v. Assocs. First Capital Corp.*, No. 1:01-00606 JTC (N.D. Ga. 2001) (alleging deceptive representations about loan amounts in home equity mortgages); *FTC v. First Alliance Mortg. Co.*, No. SACV 00-964 DOC (EEx) (C.D. Cal. 2000) (same as above); see also *United States v. Mercantile Mortg. Co.*, No. 02-C-5079 (N.D. Ill. 2002) (alleging deceptive representations about cash dispersal amounts in home equity loans or refinances); *FTC v. OSI Fin. Servs., Inc.*, No. 02-C-5078 (N.D. Ill. 2002) (same as above).

¹³⁵ This provision covers, for example: (1) misrepresentations about whether certain payments are part of the loan (see, e.g., *FTC v. OSI Fin. Servs., Inc.*, No. 02-C-5078 (N.D. Ill. 2002); *United States v. Mercantile Mortg. Co.*, No. 02-C-5079 (N.D. Ill. 2002)); (2) false claims that an aspect of the loan would cover the payments due (see *FTC v. Ranney*, No. 04-F-1065 (MJW) (D. Colo. 2004)); and (3) claims that "no payments" are required on a reverse mortgage that falsely imply that consumers never have to repay the loan or make related tax and insurance payments. See *FFIEC Reverse Mortgage Guidance*, supra note 39, at 50809 (although reverse mortgages generally do not require the consumer to remit payments for principal, interest, and related loan costs during the time the consumer remains in the home, repayment of these amounts can become due if the consumer moves out of the home; also, reverse mortgages generally do not include escrow accounts for taxes and property insurance, and if the consumer does not remit payments separately for these amounts, the consumer could lose the home).

¹³⁶ For example, it would violate this section for a reverse mortgage lender to represent that "no matter what, you can stay in your home for life," when the lender can force the sale of the property if the consumer does not adequately maintain the property.

¹³⁷ Proposed § 321.3(m) has broader applicability than a similar provision in Regulation Z, which applies only to closed-end dwelling-secured credit. See 12 CFR 226.24(i)(5).

¹³⁸ Thus, this provision covers false or misleading claims of debt elimination, debt forgiveness, or savings associated with mortgage credit products. See, e.g., *In re FirstPlus Fin. Group, Inc.*, F.T.C. Dkt. No. C-3984 (2000); *FTC v. Safe Harbour Found. of Fla., Inc.*, No. 08-C-1185 (D.C. Ill. 2008).

¹³⁹ The FTC has challenged many of these types of claims in its loan modification cases, including in cases where the defendants allegedly claimed, in part through the use of names, seals, or symbols, that the mortgage credit product was a government benefit or that the lender was affiliated with the government. See, e.g., *FTC v. Ryan*, No. 1:09-cv-00535-HHK (D.D.C. 2009).

Proposed § 321.3(n) has broader applicability than a similar provision in Regulation Z, which applies only to closed-end dwelling-secured credit and is limited to claims about the loan program advertised. See 12 CFR 226.24(i)(3). In comparison, the Commission's proposed rule applies to both closed-end and open-end credit secured either by real property or a dwelling, covers claims about the loan program as well as the provider of the advertisement, and expressly references use of symbolic representations.

¹⁴⁰ See, e.g., *In re Michael Gendrolis*, F.T.C. Dkt. No. C-4248 (2009). This section also covers false or misleading "trigger lead" solicitations, in which entities: (1) obtain information about the consumer from sources such as prescreened lists sold by consumer reporting agencies; (2) based on that information, contact the consumer to promote a mortgage credit product or term; and (3) misrepresent their identity as the consumer's current lender or servicer. See CMC/AFSA at 2, 7.

Proposed § 321.3(o) has broader applicability than a similar provision in Regulation Z, which applies only to closed-end dwelling-secured credit and is limited to representations about lenders. See 12 CFR 226.24(i)(4). In comparison, the Commission's proposed rule applies to both closed-end and open-end credit secured either by real property or a dwelling and bars misrepresentations about both servicers and lenders.

Under Section 5 of the FTC Act, it is a deceptive practice to omit qualifying information when making a literally truthful claim, if the omission of that information is likely to mislead reasonable consumers in a material way.¹⁴⁴ For example, a closed-end mortgage advertisement likely would be deceptive if it represented that a loan has a very low interest rate, but failed to disclose that the rate would substantially increase after a few months. Such claims often are referred to as “half truths.” Mortgage advertisements that include half truths in most cases also would be considered to have made implied misrepresentations that would fit into the specific categories of misrepresentations in the proposed rule. Continuing with the above example, a claim that a loan has a very low interest rate, in the absence of any qualifying information, is likely to imply to reasonable consumers that the rate lasts at least for longer than a few months. Thus, the proposed rule’s prohibition on misrepresentations likely will cover the sorts of half truths that arise when mortgage advertisers fail to make material disclosures.¹⁴⁵

In addition, there are already substantial federal and state regulations applicable to mortgage advertisements. Mandating advertising disclosures in this rule would create potential conflicts and inconsistencies with the disclosure provisions of these other requirements to which covered entities are also subject, particularly TILA and Regulation Z. For example, under TILA and Regulation Z, the APR must be calculated following certain procedures, and it must be disclosed in mortgage advertisements in some circumstances.¹⁴⁶ If the Commission were to determine that, under the proposed rule, the APR to be disclosed in advertisements must be calculated using different costs and procedures than those established by TILA and Regulation Z, that determination would result in inconsistent federal requirements and inconsistent

disclosures, leading to consumer confusion and increased burden on business.

Although the proposed rule does not include affirmative advertising disclosure requirements, the Commission specifically requests comment on whether there are any advertising disclosures that the Commission should consider mandating.

D. Section 321.4: Waiver Not Permitted

Proposed § 321.4 provides that “[a]ny attempt by any person to obtain a waiver from any consumer of any protection provided by or any right of the consumer under this rule constitutes a violation of this rule.” The Commission intends the proposed rule to protect consumers from being deceived in making decisions about the most important financial product most of them will obtain in their lifetimes. The Commission is unaware of any circumstances under which advertisers of mortgage loans should be able to circumvent the proposed rule – *i.e.*, to make misrepresentations – by placing purported waivers in their contracts or other agreements with consumers.¹⁴⁷

E. Section 321.5: Recordkeeping Requirements

Proposed § 321.5 sets forth specific categories of records that persons covered by the proposed rule would be required to retain.¹⁴⁸ A failure to keep such records would be an independent violation of the rule.¹⁴⁹

Specifically, for a period of 24 months from the last date of dissemination of the applicable commercial communication, covered persons would have to retain the following information:

- (1) Copies of all materially different commercial communications disseminated, including but not limited to sales scripts, training materials, related marketing materials, websites, and weblogs;
- (2) Documents describing or evidencing all 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 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 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.

The Commission believes that a record retention requirement is necessary to ensure that covered persons are complying with the requirements of the proposed rule.¹⁵⁰ Specifically, the requirement that covered persons retain copies of their commercial communications would enable the FTC to review those communications for any misrepresentations that violate the rule and to bring law enforcement actions as appropriate. Moreover, covered persons may offer consumers many different mortgage credit products, and may also offer or provide additional products or services with the mortgage credit products. Therefore, it is important for covered persons to maintain copies of documents describing all of those products and services, so that the Commission and state enforcement agencies can review those items in assessing whether the claims being made for them violate the rule.

The Commission recognizes that recordkeeping provisions impose compliance costs; however, many covered persons already retain in the ordinary course of their business the types of documents that the proposed rule would require be retained. To further reduce any burden, the proposed rule would permit entities to keep the records in any legible form and in the same manner, format, or place as they keep such records in the ordinary course of business.

The proposed rule also seeks to limit the retention requirements to avoid imposing any unnecessary burden. For example, covered entities must retain only “materially different” commercial

¹⁴⁴ See Deception Policy Statement, *supra* note 9, at 176-77.

¹⁴⁵ A failure to disclose also can be an unfair practice if it causes or is likely to cause substantial consumer injury that is not outweighed by countervailing benefits and is not reasonably avoidable. See, e.g., *In re Int'l Harvester Co.*, 104 F.T.C. 949, 1062 (1984). Omissions may be unfair in the mortgage advertising context if the information that is not disclosed concerns aspects of the transaction that are so central to making an informed decision that its omission is likely to be injurious. See *id.* Much of this information is already required to be disclosed by TILA and Regulation Z.

¹⁴⁶ See, e.g., 12 CFR 226.4; 226.14; 226.16(b) and (d)(1), (2) and (6); 226.22; and 226.24(d) and (f)(2).

¹⁴⁷ Other consumer protection laws also include prohibitions on requiring consumers to waive their statutory rights. See, e.g., 15 U.S.C. 1693f (Electronic Fund Transfer Act).

¹⁴⁸ This provision is similar in many respects to the recordkeeping requirements set forth in the FTC’s Telemarketing Sales Rule (TSR), including the mandate to retain scripts, advertisements, and promotional materials. See 16 CFR 310.5. The Telemarketing Sales Act expressly authorized the Commission to impose recordkeeping requirements. 15 U.S.C. 6102(a)(3). Although the Omnibus Appropriations Act, as clarified by the Credit CARD Act, does not contain a specific provision on recordkeeping, the proposed recordkeeping requirements are reasonably related to the statutory goal of preventing deception.

¹⁴⁹ Proposed § 321.5(b); see also 16 CFR 310.5(b) (TSR).

¹⁵⁰ As noted in Part I.A.3, *supra*, the Omnibus Appropriations Act, as clarified by the Credit CARD Act, permits both the Commission and states to enforce the rules issued in connection with this rulemaking. See Credit CARD Act § 511(a)(1)(C) and (a)(2).

communications. The proposed rule imposes a 24-month record retention period, which the Commission believes would strike an appropriate balance between ensuring efficient and effective compliance efforts, while avoiding the imposition of unnecessary costs.

F. Section 321.6: Actions by States

The Omnibus Appropriations Act, as clarified by the Credit CARD Act, permits states to enforce the rules issued in connection with this rulemaking.¹⁵¹ States may enforce the rules, subject to the notice requirements of the Omnibus Appropriations Act, by bringing civil actions in federal district court or another court of competent jurisdiction. Section 321.6 of the proposed rule provides that states have the authority to file actions against those who violate the rule.

G. Section 321.7: Severability

Proposed § 321.6 states that the provisions of this rule are separate and severable from one another. This provision, which is modeled after a similar provision in the TSR,¹⁵² also states that if a court stays or invalidates any provisions in the proposed rule, the Commission intends the remaining provisions to continue in effect.

IV. Requests for Comment

The Commission seeks comment on the proposed rule. Without limiting the scope of issues on which it seeks comments, the FTC is particularly interested in receiving comments on the questions that follow. In responding to these questions, please include detailed factual supporting information if possible.

A. General Questions for Comment

(1) How would the proposed rule affect commercial communications about mortgage credit products? Useful comments would include information about the types of commercial communications provided by particular persons, how these persons provide commercial communications, and the impact of the proposed rule on them.

(2) What types of mortgage credit products currently are being offered to consumers or may be offered in the future? In what ways do the fees, costs, obligations, characteristics of, conditions on, or availability associated with the different types of mortgage credit products vary?

(3) What would be the effects of the proposed rule (including any benefits and costs) on consumers? Would the

costs and benefits to consumers differ depending on the coverage of the proposed rule? How?

(4) In addition to the evidence cited in this NPRM, what evidence is there that consumers are likely to be misled by claims made relating to mortgage credit products? Are consumers likely to be misled by particular covered persons? Which ones? Are consumers likely to be misled by specific types of claims? Which ones?

(5) What would be the effects of the proposed rule (including any benefits and costs) on covered persons?

(6) What changes, if any, should be made to the proposed rule to increase benefits to consumers and competition?

(7) What changes, if any, should be made to the proposed rule to decrease costs to industry or consumers?

(8) How would the proposed rule affect small business entities with respect to costs, profitability, competitiveness, and employment?

B. Specific Questions for Comment on Proposed Provisions

1. Section 321.2; Definitions

(1) Does the definition of “mortgage credit product” in proposed § 321.2(e) adequately describe the products the proposed rule should cover? If not, how should it be modified? In particular, should the definition be modified to include credit in addition to that which “is offered or extended to a consumer primarily for personal, family, or household purposes”? If so, what additional credit should be covered? What would be the costs and benefits of the modified definition?

(2) Does the definition of “term” in proposed § 321.2(g) adequately describe the various aspects of mortgage credit products that the proposed rule should cover? If not, how should it be modified? What would be the costs and benefits of the modified definition?

(3) Does the definition of “commercial communication” in § 321.2(a) adequately describe the conduct the proposed rule should cover? If not, how should it be modified? What would be the costs and benefits of the modified definition?

Does the definition adequately address communications made in languages other than English that the proposed rule should cover? If not, how should it be modified? What would be the costs and benefits of the modified definition?

(4) Does the definition of “person” in § 321.2(f) adequately describe those whom the proposed rule should cover? If not, how should it be modified? For example, should any other entities be

covered? What would be the costs and benefits of the modified definition?

(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?

(ii) Should subsidiaries or affiliates of banks and thrifts be excluded from coverage? Why or why not?

2. Section 321.3: Prohibited Representations

(1) Proposed § 321.3 bans persons from making misrepresentations in commercial communications regarding any term of any mortgage credit product and provides numerous non-exclusive examples pertaining to fees, costs, obligations, or characteristics of, or associated with, the product. It also includes misrepresentations of any of the conditions on or related to the availability of the product. How widespread is each prohibited misrepresentation? Should any of the misrepresentations be deleted? Why? Should any other misrepresentations be added? Is so, what other misrepresentations should be added? Why?

(2) The proposed rule does not specifically address practices related to persons giving substantial assistance or support to those who make misrepresentations covered by the proposed rule and who know or consciously avoid knowing that those they assist are engaging in such conduct. Some individuals and companies engaged in unlawful practices may rely on the support and assistance of other persons. In some nonmortgage transaction cases, for example, the Commission has charged lead generators – who obtained information from consumers for use by third parties – with providing knowing, substantial assistance in violation of the TSR.¹⁵³

Should the rule include a specific prohibition on the provision of substantial assistance or support to others who violate the rule? If so, what specific conduct should be covered by the rule? What evidence exists that mortgage entities receive substantial assistance or support from other persons to deceptively advertise mortgage credit product terms? What evidence exists about the types of persons who provide such substantial assistance or support to

¹⁵³ The Commission has previously included “assisting and facilitating” counts in at least two dozen cases filed under the TSR. See, e.g., *FTC v. Assail, Inc.*, No. W03CA007 (W.D. Tex. 2004); *United States v. DirecTV, Inc.*, No. SACV05 1211 DOC (C.D. Cal. 2005).

¹⁵¹ Credit CARD Act § 511(a)(2).

¹⁵² See 16 CFR 310.9.

others? For example, is there evidence that lead generators or third-party vendors provide substantial assistance to mortgage entities, by identifying potential customers or performing back-room operations, in support of those who engage in practices that would violate the proposed rule? What evidence exists that persons may know or consciously avoid knowing that the mortgage entities they assist are making misrepresentations covered by the rule? What evidence exists that consumers are likely to be injured from any such substantial assistance and support? What would be the costs and benefits of such a prohibition?

(3) Increasingly, many consumers in our society use languages other than English as their primary language.¹⁵⁴ As a result, consumers may be exposed to more advertisements and offers that “mix languages” in connection with mortgage products.¹⁵⁵ For example, in a recent FTC case, the Commission alleged that a mortgage broker engaged in deception when it offered payments and other mortgage terms in promotions to Spanish-speaking borrowers in Spanish, but the terms in the documents at closing, which were provided only in English, were less favorable.¹⁵⁶ One comment submitted in response to the MAP ANPR raises concerns about practices involving non-English speakers. It notes that, in some instances, sales and loan representatives of some home builders or their affiliated lenders have conducted transactions primarily in Spanish, but mortgage documents were provided only in English, making it difficult for buyers to understand or reject mortgage terms.¹⁵⁷

The proposed rule broadly prohibits material misrepresentations in commercial communications regardless of the language in which the claim is made. Are more protections warranted to prevent the use of multiple languages – or “mixing” languages – in a way that makes it difficult for consumers to understand mortgage terms? What evidence exists of the use of mixed languages in commercial

communications for mortgage credit product terms in a deceptive or unfair manner? Is there evidence of mortgage brokers or other entities, in marketing to non-English speaking consumers, using a language other than English to convey a claim, while contradicting that claim in English – e.g., using the consumer’s primary language to convey a very low interest rate, while using English to communicate that the rate will increase after only a few months? Have such practices occurred in both open-end and closed-end mortgage credit advertisements? What evidence is there of mortgages being marketed in languages other than English with contradictory information or additional material terms provided only in English in a manner that is deceptive or unfair? Should the rule address the mixing of languages in commercial communications through disclosure requirements? If so, how should it do so? Should, for example, it prohibit the use of a foreign language to convey some material terms in a commercial communication when other material terms are disclosed only in English? What would be the costs and benefits of doing so?

3. Section 321.5: Recordkeeping

(1) Proposed § 321.5(a) requires a 24-month document retention period. Should the proposed rule include a record retention requirement? Is the specified period of time adequate for effective and efficient law enforcement? Does it impose unnecessary costs on persons making commercial communications covered by the proposed rule? Should the Commission consider an alternative retention period – for example, a time period commensurate with the five-year statute of limitations for an FTC action for civil penalties? If so, explain what would be the appropriate time period, and why.

(2) Proposed § 321.5(a) sets forth specific categories of records that persons covered by the proposed rule are required to retain. Do these categories adequately describe the records needed to ensure that covered persons are complying with the requirements of the proposed rule? If not, how should the categories be modified?

(3) Proposed § 321.5(b) permits persons covered by the proposed rule to retain documents in any form and in the same manner, format, or place as they keep such records in the ordinary course of business. Is this flexibility appropriate? Should the Commission specify how documents should be retained? If so, explain what would be

the appropriate standard for retaining documents.

C. Other Issues

1. Effective Dates

The proposed rule generally prohibits misrepresentations in commercial communications about the terms of mortgage credit products, consistent with the prohibition on deceptive claims that would violate Section 5 of the FTC Act. The persons subject to the proposed rule are within the Commission’s jurisdiction under the FTC Act, and thus are already prohibited from such conduct. Nonetheless, to afford affected persons time to adjust to the proposed rule’s new recordkeeping requirements, the Commission proposes an effective date of 30 days following publication of the final rule in the **Federal Register**. Is this time period appropriate? If yes, why? If not, what period would be more appropriate, and why? What would be the costs and benefits of any such modified time period?

2. Advertising Disclosures

The proposed rule does not require affirmative advertising disclosures. Are affirmative advertising disclosures needed to prevent deception related to commercial communications for mortgage credit products? If so, what advertising disclosures are needed, and why is the failure to provide them unfair or deceptive? Should these advertising disclosures be triggered by terms that may be included in the commercial communication, or should they be nontriggered disclosures that are required in all commercial communications for mortgage credit products, regardless of the content of the communication? Should any advertising disclosures vary based on the types of media in which the commercial communication is made, for example, direct mail, newspaper, radio, television, or electronic? If so, how?

Should the rule incorporate any mortgage advertising requirements that the Board promulgated under Section 105 of TILA?¹⁵⁸ If so, which should be incorporated? Should the rule incorporate the requirements that apply to advertisements for open-end credit, closed-end credit, or both?¹⁵⁹ Should the rule incorporate any other requirements from Regulation Z, such as those pertaining to “definitions” or calculations of terms (that may appear in the advertising requirements, among

¹⁵⁴ According to the 2000 Census, at least 18% of the population (47 million people) speak a language other than English at home. See U.S. Census Bureau, *Language Use and English-Speaking Ability: 2000*, at 2 (Oct. 2003), available at (<http://www.census.gov/prod/2003pubs/c2kbr-29.pdf>).

¹⁵⁵ See *supra* note 111.

¹⁵⁶ See *FTC v. Mortgages Para Hispanos.com Corp.*, No. 4:06-cv-19 (E.D. Tex. 2006). GAO is currently studying the relationship between English fluency and financial literacy and whether individuals whose native language is a language other than English are impeded in their financial affairs. See Credit CARD Act § 513.

¹⁵⁷ See Laborers Int’l Union at 4-5.

¹⁵⁸ See *supra* Parts III.C.2 and IV.C.2 and note 28.

¹⁵⁹ See, e.g., 12 CFR 226.16 and 226.24(c), (d), (e), (f), and (g), respectively.

others), such as the “finance charge” and “APR”?¹⁶⁰

Is a mortgage advertiser’s failure to comply with any of Regulation Z’s requirements an unfair or deceptive act or practice under the FTC Act? Would requiring mortgage advertisers to comply with any of Regulation Z’s requirements be reasonably related to the prevention of unfair or deceptive acts or practices? What are the advantages and disadvantages of incorporating disclosure requirements into the rule?

For any advertising disclosures that should be required, how should they be reconciled with the disclosures required in mortgage advertisements under TILA and Regulation Z? In addition, if the rule were to include advertising disclosure requirements, should all the disclosure standards be the same as or different from those in Regulation Z (e.g., “clear and conspicuous”)?¹⁶¹ Should the analysis differ based on the type of medium, for example, print, radio, television, or electronic?

In addition, for any Regulation Z disclosures that should be incorporated into the rule, how should the rule address changes over time that occur in disclosures required by Regulation Z or the Regulation Z Commentary? Would additional requirements be needed to address this issue? What forms of testing or other empirical evidence, if any, would be appropriate to measure the effectiveness of any required advertising disclosures in the rule? What would be the costs and benefits of such testing?

D. Instructions for Submitting Comments

Interested parties are invited to submit written comments electronically or in paper form. Comments should refer to “Mortgage Acts and Practices – Advertising Rulemaking, Rule No. R011013” to facilitate the organization of comments. Please note that your comment – including your name and your state – will be placed on the public record of this proceeding, including on the publicly accessible FTC website, at (<http://www.ftc.gov/os/publiccomments.shtm>).

Because comments will be made public, they should not include any sensitive personal information, such as

any individual’s Social Security number; date of birth; driver’s license number or other state identification number, or foreign country equivalent; passport number; financial account number; or credit or debit card number. Comments also should not include any sensitive health information, such as medical records or other individually identifiable health information. In addition, comments should not include any “[t]rade secrets and commercial or financial information obtained from a person and privileged or confidential . . .,” as provided in Section 6(f) of the FTC Act, 15 U.S.C. 46(f), and Commission Rule 4.10(a)(2), 16 CFR 4.10(a)(2). Comments containing material for which confidential treatment is requested must be filed in paper form, must be clearly labeled “Confidential,” and must comply with FTC Rule 4.9(c), 16 CFR 4.9(c).¹⁶²

Because paper mail addressed to the FTC is subject to delay due to heightened security screening, please consider submitting your comments in electronic form. Comments filed in electronic form should be submitted at (<https://ftcpublic.commentworks.com/ftc/mapadrulenprm>) and following the instructions on the web-based form. To ensure that the Commission considers an electronic comment, you must file it on the web-based form at (<https://ftcpublic.commentworks.com/ftc/mapadrulenprm>). If this Notice appears at (<http://www.regulations.gov/search/Regs/home.html#home>), you may also file an electronic comment through that website. The Commission will consider all comments forwarded to it by regulations.gov. You may also visit the FTC website at (<http://www.ftc.gov>) to read the Notice and the news release describing it.

A comment filed in paper form should include the reference “Mortgage Acts and Practices – Advertising Rulemaking, Rule No. R011013” both in the text of the comment and on the envelope, and should be mailed or delivered to the following address: Federal Trade Commission, Office of the Secretary, Room H-135 (Annex W), 600 Pennsylvania Avenue, NW, Washington, DC 20580. The FTC is requesting that any comment filed in paper form be sent by courier or overnight service, if possible, because U.S. postal mail in the

Washington, DC area and at the Commission is subject to delay due to heightened security precautions.

All comments on any proposed recordkeeping requirements should additionally be sent to the Office of Management and Budget (OMB). Comments may be submitted by U.S. Postal Mail to: Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: Desk Officer for Federal Trade Commission, New Executive Office Building, Docket Library, Room 10102, 725 17th Street, NW, Washington, DC 20503. Comments, however, should be submitted via facsimile to (202) 395-5167 because U.S. Postal Mail is subject to lengthy delays due to heightened security precautions.

The FTC Act and other laws the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. The Commission will consider all timely and responsive public comments it receives, whether filed in paper or electronic form. Comments received will be available to the public on the FTC website, to the extent practicable, at (<http://www.ftc.gov/os/publiccomments.htm>). As a matter of discretion, the Commission makes every effort to remove home contact information of individuals before their comments are placed on the FTC website. More information, including routine uses permitted by the Privacy Act, may be found in the FTC’s privacy policy, at (<http://www.ftc.gov/ftc/privacy.shtm>).

V. Communications by Outside Parties to the Commissioners or Their Advisors

Written communications and summaries or transcripts of oral communications respecting the merits of this proceeding from any outside party to any Commissioner or Commissioner’s advisor will be placed on the public record.¹⁶³

VI. Paperwork Reduction Act

The Commission is submitting this proposed rule and a Supporting Statement to the OMB for review under the Paperwork Reduction Act (PRA), 44 U.S.C. 3501-21. The recordkeeping requirements¹⁶⁴ of the proposed rule constitute a “collection of information” for purposes of the PRA.¹⁶⁵ The proposed rule does not impose a

¹⁶⁰ See, e.g., 12 CFR 226.2 (definitions); 12 CFR 226.4 (finance charge calculation); 12 CFR 226.14 (open-end APR calculation); and 12 CFR 226.22 (closed-end APR calculation).

¹⁶¹ See, e.g., 12 CFR 226.24(b). The Commission is aware that different formulations of the “clear and conspicuous” standard are used in Regulation Z, including, in some instances, requirements for “equally prominent,” “closely proximate,” or “proximate” advertising disclosures. See 12 CFR 226.24(b), Supp. I, and 73 FR 44522.

¹⁶² The comment must be accompanied by an explicit request for confidential treatment, including the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. The request will be granted or denied by the Commission’s General Counsel, consistent with applicable law and the public interest. See 16 CFR 4.9(c).

¹⁶³ See 16 CFR 1.26(b)(5).

¹⁶⁴ Proposed § 321.5 sets forth the recordkeeping requirements.

¹⁶⁵ See 44 U.S.C. 3502(3)(a).

disclosure requirement. The associated PRA burden analysis follows:

A. Recordkeeping Requirements

As discussed in the preamble, the proposed rule requires covered persons to retain copies of materially different commercial communications disseminated and documents describing or evidencing all mortgage credit products available to consumers during the relevant time period and all additional products or services (such as credit insurance or credit disability insurance) that are or may be offered or provided with the mortgage credit products.¹⁶⁶ A failure to keep such records would be an independent violation of the rule.

Commission staff believes these recordkeeping requirements pertain to records that are usual and customary and kept in the ordinary course of business for many covered persons, such as mortgage brokers, lenders, and servicers.¹⁶⁷ As to these persons, the retention of these documents does not constitute a "collection of information," as defined by OMB's regulations that implement the PRA.¹⁶⁸ Other covered persons, however, such as real estate agents and brokers, advertising agencies, home builders, lead generators, rate aggregators, and others, may not currently maintain these records in the ordinary course of business. Thus, the recordkeeping requirements for those persons would constitute a "collection of information."

B. Estimated Hours Burden and Associated Labor Costs

Commission staff estimates that the proposed rule's recordkeeping requirements will affect approximately 1.3 million persons¹⁶⁹ who would not

otherwise retain such records in the ordinary course of business. As noted, this estimate includes real estate agents and brokers, advertising agencies, home builders, lead generators, rate aggregators, and others that may provide commercial communications regarding mortgage credit product terms.¹⁷⁰

Although the Commission cannot estimate with precision the time required to gather and file the required records, it is reasonable to assume that covered persons will each spend approximately 3 hours per year to do these tasks, for a total of 3.9 million hours (1.3 million persons x 3 hours). Staff further assumes that office support file clerks will handle the proposed rule's record retention requirements at an hourly rate of \$13.63.¹⁷¹ Based upon the above estimates and assumptions, the total annual labor cost to retain and file documents is \$53,157,000 (3.9 million hours x \$13.63 per hour).

Absent information to the contrary, staff anticipates that existing storage media and equipment that covered persons use in the ordinary course of business will satisfactorily accommodate incremental recordkeeping under the proposed rule. Accordingly, staff does not anticipate that the proposed rule will require any new capital or other non-labor expenditures.

C. Questions for Comment

The Commission invites comments that will enable it to: (1) evaluate whether the proposed record retention requirements are necessary for the proper performance of the functions of the Commission, including whether the information will have practical utility; (2) evaluate the accuracy of the Commission's estimate of the burden of

the proposed collection of information, including the validity of the methodology and assumptions used; (3) enhance the quality, utility, and clarity of the information to be collected; and (4) minimize the burden of the collection of information on those who must comply, including through the use of appropriate automated, electronic, mechanical, or other technological techniques or other forms of information technology.

VII. Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980¹⁷² requires the Commission to provide an Initial Regulatory Flexibility Analysis with a proposed rule, and a Final Regulatory Flexibility Analysis with a final rule, unless the Commission certifies that it does not anticipate that the proposed rule will have a significant economic impact on a substantial number of small entities.¹⁷³

The Commission anticipates that the proposed Mortgage Acts and Practices – Advertising Rule will have no significant economic impact on a substantial number of small entities. As noted above, the proposed rule will prevent deceptive mortgage advertising practices by prohibiting misrepresentations and imposing a related recordkeeping requirement. The proposed rule's reach is limited to entities that are within the FTC's jurisdiction under the FTC Act. Under the FTC Act, the Commission has jurisdiction over any person,

¹⁷² 5 U.S.C. 601-612.

¹⁷³ 5 U.S.C. 603-605. Covered entities under the proposed rule will be classified as small entities if they satisfy the Small Business Administrator's relevant size standards, as determined by the Small Business Size Standards component of the North American Industry Classification System (NAICS), available at (http://www.sba.gov/idc/groups/public/documents/sba_homepage/serv_sstd_tablepdf.pdf). Because a wide range of individuals and companies may make representations in commercial communications regarding any term of a mortgage product, no one classification is applicable to this rulemaking.

The range in size standard for most of the potentially relevant professional and support services is \$7 million or less in annual receipts. This standard applies to, for example, real estate credit, mortgage and nonmortgage loan brokers, other nondepository credit intermediation, other activities related to credit intermediation (such as servicing), secondary market financing (such as Fannie Mae and Freddie Mac), marketing consulting services, advertising agencies, public relations agencies, display advertising, direct mail advertising, advertising material distribution services, other services related to advertising, and all other professional, scientific and technical services.

The range in size standard varies greatly for the following other types of entities that are potentially covered by the proposed rule: offices of real estate agents and brokers (\$2 million or less); housing construction/builders (\$33.5 million or less); and credit unions (\$175 million or less).

¹⁶⁶ See Proposed § 321.5(a)(1)-(3).

¹⁶⁷ Some covered persons, particularly mortgage brokers and lenders, are subject to state recordkeeping requirements for mortgage advertisements. See, e.g., Fla. Stat. 494.00165 (2009); Ind. Code. Ann. 23-2-5-18 (2009); Minn. Stat. 58.14 (2009); Wash. Rev. Code 19.146.060 (2010). Many mortgage brokers, lenders, and servicers are also subject to state recordkeeping requirements for mortgage transactions and related documents, and these may include descriptions of mortgage credit products. See, e.g., Mich. Comp. Laws Serv. 445.1671 (2009); N.Y. Banking Law 597 (Consol. 2010); Tenn. Code Ann. 45-13-206 (2009).

¹⁶⁸ See 44 U.S.C. 3502(3)(A); 5 CFR 1320.3(b)(2).

¹⁶⁹ No general source provides precise numbers of the various categories of covered persons. Commission staff, therefore, has used the following sources and inputs to arrive at this estimated total: (1) 1.1 million real estate brokers and agents – from the National Association of Realtors, see (<http://www.realtor.org>) (last visited June 28, 2010); (2) 175,000 home builders – from the National Association of Home Builders, see (<http://www.NAHB.org>) (last visited June 28, 2010); (3) 350 finance companies – from the American Financial Services Association, see (<http://>

www.afsaonline.org) (last visited June 28, 2010); (4) 22,170 advertising agencies – from the North American Industry Classification System Association's database of U.S. businesses, see (<http://www.naics.com/naics54.htm>) (last visited June 28, 2010); (5) 1,000 lead generators and rate aggregators – based on staff's administrative experience. These inputs add to 1,298,520; for rounding, and to account further for potentially unspecified other covered persons, however, staff has increased the resulting total to 1.3 million.

¹⁷⁰ The Commission does not know what percentage of these persons are, in fact, engaged in covered conduct under the proposed rule, i.e., providing commercial communications about mortgage credit product terms. For purposes of these estimates, the Commission has assumed all of them are covered by the recordkeeping provisions and are not retaining these records in the ordinary course of business.

¹⁷¹ This estimate is based on mean hourly wages for office file clerks provided by the Bureau of Labor Statistics. See U.S. Bur. of Labor Statistics, *National Compensation Survey: Occupational Earnings in the United States, 2009*, Bulletin 2738, June 2010, at 3-23, tbl. 3, available at (<http://www.bls.gov/ncs/ncswage2009.htm>).

partnership, or corporation that engages in unfair or deceptive acts or practices in or affecting commerce, excepting, among others, banks, savings and loan institutions, federal credit unions, non-profits, and common carriers. Thus, the proposed rule would broadly apply to any covered entity that makes representations in a commercial communication about any term of a mortgage credit product. Although the Commission does not know the precise number of entities that may be subject to the proposed rule, it estimates that the proposed rule will cover approximately 1.35 million entities.¹⁷⁴ This number includes mortgage lenders, mortgage brokers, mortgage servicers, real estate agents and brokers, advertising agencies, home builders, lead generators, rate aggregators, and others under the Commission's jurisdiction. It is not known, however, how many of those entities are small entities, and the Commission welcomes comment on those issues. The Commission nonetheless believes that the proposed rule will not have a significant economic impact on any of the small entities subject to it.

The proposed rule generally prohibits misrepresentations, consistent with the prohibition on deceptive claims that would violate Section 5 of the FTC Act. The proposed rule elaborates on this prohibition by including specific examples of types of misrepresentations covered by the proposed rule, but it does not require affirmative disclosures. The entities subject to the proposed rule are within the Commission's jurisdiction under the FTC Act, and thus are already prohibited from such conduct. The proposed rule imposes a recordkeeping requirement, but it is limited to a specific subset of relevant documents that Commission staff believes many entities covered by the proposed rule already retain in the ordinary course of business. For those entities that may not already do so, staff estimates minimal burden and expense for each entity to comply with the

¹⁷⁴ No general source provides precise numbers of the various categories of covered persons. Commission staff, therefore, has used the following sources and inputs to arrive at this estimated total: (1) 51,000 mortgage lenders and mortgage brokers – from various online state regulatory agency resources and the Nationwide Mortgage Licensing System and Registry Consumer Access, *see* (<http://www.nmlsconsumeraccess.org>) (last visited between May 17 - June 28, 2010); (2) 60 mortgage servicers – from several sources including lists of servicers participating in various federal programs, available at (http://makinghomeaffordable.gov/contact_servicer.html) and (<http://hopenow.com/members.php>) (both last visited June 28, 2010) (excluding lenders who are also servicers under these programs); and (3) 1.3 million others – *see supra* note 169 (explaining estimate).

proposed rule's requirements.¹⁷⁵ For these reasons, the Commission believes that the proposed rule is not likely to have a significant economic impact¹⁷⁶ on a substantial number of small entities. Accordingly, this document serves as notice to the Small Business Administration of the Commission's certification that it does not anticipate the proposed rule will have a significant economic impact on a substantial number of small entities. Nonetheless, the FTC has prepared the following analysis.

A. Description of the Reasons That Action by the Agency is Being Considered

The Commission proposes, and seeks comment on, a proposed rule to implement Section 626 of the Omnibus Appropriations Act, as amended by the Credit CARD Act, which directs the Commission to initiate a rulemaking related to unfair or deceptive acts or practices with respect to mortgage loans. Section 511 of the Credit CARD Act clarified that the rule will cover only those entities over which the FTC has jurisdiction under the FTC Act. Through this document, the Commission proposes, and seeks comment on, prohibited misrepresentations and recordkeeping provisions aimed at mortgage credit product commercial communications in order to prevent deceptive practices that harm consumers, consistent with the goals of the Act.

B. Statement of the Objectives of, and Legal Basis for, the Proposed Rule

The proposed rule is intended to implement Section 626 of the Omnibus Appropriations Act, as amended by the Credit CARD Act, which directs the Commission to initiate a rulemaking related to unfair or deceptive acts or practices with respect to mortgage loans. Through the rulemaking, the Commission seeks to prevent deceptive acts and practices in the mortgage advertising industry, which has been the subject of numerous law enforcement actions under Section 5 of the FTC Act and TILA.

¹⁷⁵ Staff estimates that the annual labor cost for each covered person to file or retain documents under the recordkeeping provisions is \$39.72 (3 hours x \$13.24 per hour). *See supra* Part VI.B.

¹⁷⁶ *Cf.* U.S. Small Bus. Admin. Office of Advocacy, *A Guide for Government Agencies – How to Comply with the Regulatory Flexibility* 19 (2003), available at (<http://www.sba.gov/advo/laws/rfaguide.pdf>) (citing 126 Cong. Rec. S10,938 (Aug. 6, 1980) (identifying 175 annual staff hours for recordkeeping as a "significant impact").

C. Small Entities to Which the Proposed Rule Will Apply

The proposed rule will apply to any person who makes any representation in any commercial communication regarding any term of any mortgage credit product. Based upon its knowledge of the industry, the Commission believes that a variety of individuals and companies under its jurisdiction will be covered by the proposed rule, including but not limited to mortgage lenders, mortgage brokers, mortgage servicers, real estate agents and brokers, advertising agencies, home builders, lead generators, rate aggregators, and others.

In response to a request for comments in the ANPR, the Commission received no empirical data regarding the numbers or revenues of any of these types of entities. On the basis of other available data, however, Commission staff estimates that there are approximately 1.35 million entities subject to the proposed rule.¹⁷⁷ However, staff does not have sufficient data to readily estimate the number of such covered persons, if any, that are small entities. Accordingly, the Commission specifically requests additional comment on: (1) the number of individuals and companies that make commercial communications regarding mortgage credit products; and (2) the number of such entities, if any, that are small entities.

D. Projected Reporting, Recordkeeping, and Other Compliance Requirements

The proposed rule sets forth specific categories of records that covered persons would be required to retain. The Commission believes that these recordkeeping requirements are necessary to ensure that covered entities are complying with the requirements of the proposed rule. They would enable the Commission to review copies of commercial communications for any misrepresentations that violate the rule and to bring law enforcement actions as appropriate. The Commission recognizes that recordkeeping provisions impose compliance costs; however, many covered entities already retain in the ordinary course of business the types of documents that the proposed rule would require be retained. For those entities that may not already do so, staff estimates minimal burden and expense for each entity to comply with the requirements.¹⁷⁸ To

¹⁷⁷ *See supra* note 169.

¹⁷⁸ *See supra* Part VI.B (discussing professional skills and equipment that staff estimates are needed for compliance).

further reduce any burden, the proposed rule would permit covered entities to keep the records in any legible form and in the same manner, format, or place as they keep such records in the ordinary course of business. The proposed rule also attempts to avoid imposing any unnecessary burden by limiting the recordkeeping requirements only to, for example, “materially different” commercial communications. It also limits the timeframe for recordkeeping to 24 months.

E. Duplicative, Overlapping, or Conflicting Federal Rules

As noted above, TILA (including HOEPA) and Regulation Z regulate mortgage advertisements. The states have also enacted various laws or regulations that address aspects of deceptive mortgage advertising practices. None of the federal or state measures duplicates the specificity and breadth of practices, or diversity of entities covered in the proposed rule. In addition, the Commission does not believe that its proposed rule conflicts with any of these other requirements, but it invites comment on this issue.¹⁷⁹

As noted above, the Commission is not proposing any affirmative disclosure requirements, but it is has requested comment on whether any such disclosures are needed to prevent deception related to commercial communications for mortgage credit

products.¹⁸⁰ However, such disclosures could raise substantial conflicts with other mortgage advertising requirements, including those in TILA and Regulation Z. The Commission is interested in receiving comments in this area.¹⁸¹

F. Significant Alternatives to the Proposed Rule Amendments

As previously noted, the proposed rule is intended to prevent deceptive acts and practices in mortgage advertising. The proposed rule is intended to achieve that goal without creating unnecessary compliance costs. Thus, the Commission does not propose to impose any affirmative disclosure requirements for advertisements at this time. Further, as discussed above, Commission staff believes that many covered entities already retain in the ordinary course of business the types of documents that the proposed rule would require be retained. In addition, proposed § 321.5(b) states that entities may keep such records in any legible form and in the same manner, format, or place as they keep such records in the ordinary course of business.

The proposed rule also limits the types of information that must be retained to avoid imposing any unnecessary burden. For example, covered persons must retain only “materially different” versions of commercial communications and

related materials. Finally, the proposed rule calls for a 24-month record retention period, which the Commission believes would strike an appropriate balance between ensuring efficient and effective compliance efforts, while avoiding the imposition of unnecessary costs.

Furthermore, the recordkeeping requirements are format-neutral; they would not preclude the use of electronic methods that might reduce compliance burdens. In addition, the Commission is not aware of any feasible or appropriate exemptions for small entities because the proposed rule attempts to minimize compliance burdens for all entities.

Nonetheless, the Commission seeks additional comment regarding: (1) the existence of small entities for which the proposed rule would have a significant economic impact, and (2) suggested alternatives, including potential exemptions for small entities, that would reduce the economic impact of the proposed rule on such small entities. If the comments filed in response to this document identify any small entities that would be significantly affected by the proposed rule, as well as alternatives that would reduce compliance costs on such entities, the Commission will consider the feasibility of such alternatives and determine whether they should be incorporated into any final rule.

TABLE A - LIST OF COMMENTERS AND SHORT-NAMES/ACRONYMS

| Short-name/Acronym | Commenter |
|----------------------|---|
| Adcock | Adcock |
| ABA | American Bankers Association |
| ASA | American Society of Appraisers |
| Anderson | Anderson, Lisa |
| AG Mass. | Attorney General, Commonwealth of Massachusetts |
| Beasley | Beasley |
| BECU | Boeing Employees' Credit Union |
| Bracco | Bracco, Larry |
| CRL | Center for Responsible Lending |
| Ciavarella | Ciavarella (3 comments) |
| CMC/AFSA | Consumer Mortgage Coalition and American Financial Services Association |
| CUNA | Credit Union National Association |
| Crosby | Crosby, Tracy |
| EJF | Empire Justice Center |
| Freddie Mac | Federal Home Loan Mortgage Corporation |
| Feinman | Feinman, Anita |
| Flaker | Flaker |
| Franciulli | Franciulli, Patricia |
| GCUA | Georgia Credit Union Affiliates |
| Goodman | Goodman, Al |
| Harris | Harris, Kathleen |
| HPC | Housing Policy Council |
| Howard | Howard, Marilyn (2 comments) |
| Kochanski | Kochanski, David |
| Laborers Int'l Union | Laborers International Union of North America |
| MBA | Mortgage Bankers Association |
| MICA | Mortgage Insurance Companies of America |

¹⁷⁹ See *supra* notes 117-118 and accompanying text.

¹⁸⁰ See *supra* Parts III.C.2 and IV.C.2.

¹⁸¹ See *id.*

TABLE A - LIST OF COMMENTERS AND SHORT-NAMES/ACRONYMS—Continued

| Short-name/Acronym | Commenter |
|--------------------|--|
| NAR | National Association of REALTORS |
| NASCUS | National Association of State Credit Union Supervisors |
| NCRC | National Community Reinvestment Coalition |
| NCLC | National Consumer Law Center |
| Norman | Norman |
| Obduskey | Obduskey, Dennis (2 comments) |
| P. | P. (Anonymous) |
| Reid | Reid, Harry (United States Senate) |
| Rice | Rice, Richard |
| Scheu | Scheu, Toni |
| Smith | Smith, J. |
| Tucker | Tucker, James |
| Yachovich | Yackovich, Beverly G. & Edward |
| Yoshida | Yoshida, Gena |
| Zager | Zager, Jeremy (Sterling Van Dyke Credit Union) |

TABLE B - LIST OF FTC MORTGAGE ADVERTISING ENFORCEMENT ACTIONS

- *FTC v. Assocs. First Capital Corp.*, No. 1:01-00606 (N.D. Ga. 2001)
- *FTC v. Capital City Mortg. Corp.*, No. 1:98CV237 (D.D.C. 1998)
- *FTC v. Chase Fin. Funding, Inc.*, No. SACV04-549 GLT (ANx) (C.D. Cal. 2004)
- *FTC v. First Alliance Mortg. Co.*, No. SACV 00-964 DOC (EEx) (C.D. Cal. 2000)
- *FTC v. Mortgages Para Hispanos.com Corp.*, No. 4:06-cv-19 (E.D. Tex. 2006)
- *FTC v. Ranney*, No. 04-F-1065 (MJW) (D. Colo. 2004)
- *FTC v. Ryan*, No. 1:09-cv-00535-HHK (D.D.C. 2009)
- *FTC v. OSI Fin. Servs., Inc.*, No. 02-C-5078 (N.D. Ill. 2002)
- *FTC v. Safe Harbour Found. of Fla., Inc.*, No. 08-C-1185 (N.D. Ill. 2008)
- *FTC v. 30 Minute Mortg., Inc.*, No. 03-60021 (S.D. Fla. 2003)
- *In re Am. Nationwide Mortg. Co., Inc.*, F.T.C. Dkt. No. C-4249 (2009)
- *In re Felson Builders, Inc.*, 119 F.T.C. 642 (1995)
- *In re FirstPlus Fin. Group, Inc.*, F.T.C. Dkt. No. C-3984 (2000)
- *In re Lomas Mortg. U.S.A., Inc.*, 116 F.T.C. 1062 (1993)
- *In re Michael Gendrolis*, F.T.C. Dkt. No. C-4248 (2009)
- *In re Shiva Venture Group, Inc.*, F.T.C. Dkt. No. C-4250 (2009)
- *United States v. Mercantile Mortg. Co.*, No. 02-C-5079 (N.D. Ill. 2002)
- *United States v. Unicor Funding, Inc.*, No. 9901228 (C.D. Cal. 1999)

VIII. Proposed Rule

List of Subjects in 16 CFR part 321

Advertising, Communications, Consumer protection, Credit, Mortgages, Trade practices

■ For the reasons set forth in the preamble, the Federal Trade Commission is proposing to amend title 16, Code of Federal Regulations, by adding a new part 321, to read as follows:

PART 321 – MORTGAGE ACTS AND PRACTICES – ADVERTISING RULE

Section Contents

- 321.1 Scope of regulations in this part.
- 321.2 Definitions.
- 321.3 Prohibited representations.
- 321.4 Waiver not permitted.
- 321.5 Recordkeeping requirements.
- 321.6 Actions by states.
- 321.7 Severability.

Authority: Sec. 626, Pub. L. 111-8, 123 Stat. 524 (15 U.S.C. 1638 note), as amended by sec. 511, Pub. L. 111-24, 123 Stat. 1734 (15 U.S.C. 1638 note).

§ 321.1 Scope of regulations in this part.

This part implements the Omnibus Appropriations Act of 2009, sec. 626, Pub. L. 111-8, 123 Stat. 524 (2009) (15 U.S.C. 1638 note), as amended by the Credit Card Accountability Responsibility and Disclosure Act of 2009, sec. 511, Pub. L. 111-24, 123 Stat. 1734 (2009) (15 U.S.C. 1638 note). This part applies to persons over which the Federal Trade Commission has jurisdiction under the Federal Trade Commission Act.

§ 321.2 Definitions.

(a) “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.

(b) “Consumer” means a natural person to whom a mortgage credit product is offered or extended.

(c) “Credit” means the right to defer payment of debt or to incur debt and defer its payment.

(d) “Dwelling” means a residential structure that contains one to four units, whether or not that structure is attached to real property. The word includes an individual condominium unit, cooperative unit, mobile home, and trailer, if it is used as a residence.

(e) “Mortgage credit product” means any form of credit that is secured by real property or a dwelling and that is offered or extended to a consumer

primarily for personal, family, or household purposes.

(f) "Person" means any individual, group, unincorporated association, limited or general partnership, corporation, or other business entity.

(g) "Term" means any of the fees, costs, obligations, or characteristics of or associated with the product. It also includes any of the conditions on or related to the availability of the product.

§ 321.3 Prohibited representations.

It is a violation of this 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, including but not limited to misrepresentations about:

(a) The interest charged for the mortgage credit product, including but not limited to misrepresentations concerning: (1) the amount of interest that the consumer owes each month that is included in the consumer's payments, loan amount, or total amount due, or (2) whether the difference between the interest owed and the interest paid is added to the total amount due from the consumer;

(b) The annual percentage rate, simple annual rate, periodic rate, or any other rate;

(c) The existence, nature, or amount of fees or costs to the consumer associated with the mortgage credit product, including but not limited to misrepresentations that no fees are charged;

(d) The existence, cost, payment terms, or other terms associated with any additional product or feature that is or may be sold in conjunction with the mortgage credit product, including but not limited to credit insurance or credit disability insurance;

(e) The terms, amounts, payments, or other requirements relating to taxes or insurance associated with the mortgage credit product, including but not limited to misrepresentations about: (1) whether separate payment of taxes or insurance is required, or (2) the extent to which payment for taxes or insurance is included in the loan payments, loan amount, or total amount due from the consumer;

(f) Any prepayment penalty associated with the mortgage credit product, including but not limited to misrepresentations concerning the existence, nature, amount, or terms of such penalty;

(g) The variability of interest, payments, or other terms of the mortgage credit product, including but

not limited to misrepresentations using the word "fixed;"

(h) Any comparison between:

(1) Any rate or payment that will be available for a period less than the full length of the mortgage credit product, and

(2) Any actual or hypothetical rate or payment;

(i) The type of mortgage credit product, including but not limited to misrepresentations that the product is or involves a fully amortizing mortgage;

(j) The amount of the obligation, or the existence, nature, or amount of cash or credit available to the consumer in connection with the mortgage credit product, including but not limited to misrepresentations that the consumer will receive a certain amount of cash or credit as part of a mortgage credit transaction;

(k) The existence, number, amount, or timing of any minimum or required payments, including but not limited to misrepresentations about any payments or that no payments are required in a reverse mortgage or other mortgage credit product;

(l) The potential for default under the mortgage credit product, including but not limited to misrepresentations concerning the circumstances under which the consumer could default for nonpayment of taxes, insurance, or maintenance, or for failure to meet other obligations;

(m) The effectiveness of the mortgage credit product in helping the consumer resolve difficulties in paying debts, including but not limited to misrepresentations that any mortgage credit product can reduce, eliminate, or restructure debt or result in a waiver or forgiveness, in whole or in part, of the consumer's existing obligation with any person;

(n) The association of the mortgage credit product or any provider of such product with any other person or program, including but not limited to misrepresentations that:

(1) The provider is, or is affiliated with, any governmental entity or other organization, or

(2) The product is or relates to a government benefit, or is endorsed, sponsored by, or affiliated with any government or other program, including but not limited to through the use of formats, symbols, or logos that resemble those of such entity, organization, or program;

(o) The source of any commercial communication, including but not limited to misrepresentations that a commercial communication is made by

or on behalf of the consumer's current mortgage lender or servicer;

(p) The right of the consumer to reside in the dwelling that is the subject of the mortgage credit product, or the duration of such right, including but not limited to misrepresentations concerning how long or under what conditions a consumer with a reverse mortgage can stay in the dwelling;

(q) The consumer's ability or likelihood to obtain any mortgage credit product or terms, including but not limited to misrepresentations concerning whether the consumer has been preapproved or guaranteed for any such product or terms;

(r) The consumer's ability or likelihood to obtain a refinancing or modification of any mortgage credit product or terms, including but not limited to misrepresentations concerning whether the consumer has been preapproved or guaranteed for any such refinancing or modification; and

(s) The availability, nature, or substance of counseling services or any other expert advice offered to the consumer regarding any mortgage credit product term, including but not limited to the qualifications of those offering the services or advice.

§ 321.4 Waiver not permitted.

Any attempt by any person to obtain a waiver from any consumer of any protection provided by, or any right of the consumer under, this rule constitutes a violation of this rule.

§ 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 disseminated, including but not limited to sales scripts, training materials, related marketing materials, websites, and weblogs;

(2) Documents describing or evidencing all 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 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 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.

(b) Any person subject to this rule may keep the records required by paragraph (a) of this section in any legible form, and in the same manner, format, or place as they keep such records in the ordinary course of business. Failure to keep all records required under paragraph (a) of this section shall be a violation of this rule.

§ 321.6 Actions by states.

Any attorney general or other officer of a state authorized by the state to bring an action under this part may do so pursuant to Section 626(b) of the Omnibus Appropriations Act of 2009, sec. 626, Pub. L. 111-8, 123 Stat. 524 (2009) (15 U.S.C. 1638 note), as amended by the Credit Card Accountability Responsibility and Disclosure Act of 2009, sec. 511, Pub. L. 111-24, 123 Stat. 1734 (2009) (15 U.S.C. 1638 note).

§ 321.7 Severability.

The provisions of this rule are separate and severable from one another. If any provision is stayed or determined to be invalid, it is the Commission's intention that the remaining provisions shall continue in effect.

By direction of the Commission.

Donald S. Clark,
Secretary.

[FR Doc. 2010-24353 Filed 9-29-10; 8:45 am]

BILLING CODE 6750-01-S

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[REG-119046-10]

RIN 1545-BJ54

Requirements of a Statement Disclosing Uncertain Tax Positions; Correction

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Correction to notice of proposed rulemaking and a notice of public hearing.

SUMMARY: This document contains a correction to a notice of proposed rulemaking and a notice of public hearing that was published in the **Federal Register** on Thursday, September 9, 2010 (75 FR 54802)

allowing the IRS to require corporations to file a schedule disclosing uncertain tax positions related to the tax return as required by the IRS.

FOR FURTHER INFORMATION CONTACT: Kathryn Zuba, (202) 622-3400 (not toll-free number).

SUPPLEMENTARY INFORMATION:

Background

The correction notice that is the subject of this document is under section 6012 of the Internal Revenue Code.

Need for Correction

As published, the notice of proposed rulemaking and notice of public hearing (REG-119046-10) contains an error that may prove to be misleading and is in need of clarification.

Correction of Publication

Accordingly, the publication of the notice of proposed rulemaking and notice of public hearing (REG-119046-10), which was the subject of FR Doc. 2010-22624, is corrected as follows:

On page 54802, column 3, under the caption **DATES**, lines 4 and 5, the language "public hearing scheduled for October 15, 2010, at 10 a.m., must be received" is corrected to read "public hearing scheduled for October 19, 2010, at 10 a.m., must be received"

LaNita Van Dyke,

Chief, Publications and Regulations Branch,
Legal Processing Division, Associate Chief
Counsel, (Procedure and Administration).

[FR Doc. 2010-24488 Filed 9-29-10; 8:45 am]

BILLING CODE 4830-01-P

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 901

[SATS No. AL-075-FOR; Docket ID: OSM-2010-0009]

Alabama Regulatory Program

AGENCY: Office of Surface Mining Reclamation and Enforcement, Interior.

ACTION: Proposed rule; public comment period and opportunity for public hearing on proposed amendment.

SUMMARY: We, the Office of Surface Mining Reclamation and Enforcement (OSM), are announcing receipt of a proposed amendment to the Alabama regulatory program (Alabama program) under the Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act). Alabama proposes revisions to its

Program regarding their Surface Mining Commission, who is eligible to apply for and obtain a mining license, hearing officers, license fees, and several minor editorial changes throughout the document such as changing "him" to "him or her" and "chairman" to "chair". Alabama intends to revise its program to improve operational efficiency.

This document gives the times and locations that the Alabama program and proposed amendment to that program are available for your inspection, the comment period during which you may submit written comments on the amendment, and the procedures that we will follow for the public hearing, if one is requested.

DATES: We will accept written comments on this amendment until 4 p.m., c.d.t., November 1, 2010. If requested, we will hold a public hearing on the amendment on October 25, 2010. We will accept requests to speak at a hearing until 4 p.m., c.d.t. on October 15, 2010.

ADDRESSES: You may submit comments, identified by SATS No. AL-075-FOR by any of the following methods:

- *E-mail:* swilson@osmre.gov. Include "SATS No. AL-075-FOR" in the subject line of the message.

- *Mail/Hand Delivery:* Sherry Wilson, Director, Birmingham Field Office, Office of Surface Mining Reclamation and Enforcement, 135 Gemini Circle, Suite 215, Homewood, Alabama 35209.

- *Fax:* (205) 290-7280.
- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.

Instructions: All submissions received must include the agency name and docket number for this rulemaking. For detailed instructions on submitting comments and additional information on the rulemaking process, see the "Public Comment Procedures" heading of the **SUPPLEMENTARY INFORMATION** section of this document.

Docket: For access to the docket to review copies of the Alabama program, this amendment, a listing of any scheduled public hearings, and all written comments received in response to this document, you must go to the address listed below during normal business hours, Monday through Friday, excluding holidays. You may receive one free copy of the amendment by contacting OSM's Birmingham Field Office or going to <http://www.regulations.gov>.

Sherry Wilson, Director, Birmingham Field Office, Office of Surface Mining Reclamation and Enforcement, 135 Gemini Circle, Suite 215, Homewood, Alabama 35209, *Telephone:* (205) 290-7282, *E-mail:* swilson@osmre.gov.