



December 31, 2009

Mr. Joseph A. Smith, Jr.
North Carolina Commissioner of Banks
316 W. Edenton Street
Raleigh, North Carolina 27603

Dear Commissioner Smith:

The Mortgage Bankers Association¹ (“MBA”) appreciates the opportunity to comment on the proposed changes to the North Carolina Administrative Code, Title 4, Chapter 3, regarding foreclosure prevention, consumer protection, and the implementation of the North Carolina S.A.F.E Act.

MBA supports rigorous uniform national mortgage standards kept up-to-date and enforced by a partnership of state and federal officials. We believe such standards offer the greatest, most consistent protections for consumers nationwide and the best opportunity for free and open competition to lower consumer costs. In contrast, the current patchwork of inconsistent state and federal laws has resulted in uneven, frequently unenforced, protections that have not served consumers well.

Unfortunately, the changes proposed by the Commission in MBA’s view will only further worsen this patchwork by establishing new but differing requirements on the very matters that Congress and federal agencies have either already addressed, or are currently in the process of addressing, through pending legislation or regulation. Of equal concern is the fact that other requirements embodied in the proposed rules have recently been carefully considered and rejected by the federal government in the legislative and regulatory process, and for good reason.

¹ The Mortgage Bankers Association (MBA) is the national association representing the real estate finance industry, an industry that employs more than 280,000 people in virtually every community in the country. Headquartered in Washington, D.C., the association works to ensure the continued strength of the nation's residential and commercial real estate markets; to expand homeownership and extend access to affordable housing to all Americans. MBA promotes fair and ethical lending practices and fosters professional excellence among real estate finance employees through a wide range of educational programs and a variety of publications. Its membership of over 2,400 companies includes all elements of real estate finance: mortgage companies, mortgage brokers, commercial banks, thrifts, Wall Street conduits, life insurance companies and others in the mortgage lending field. For additional information, visit MBA's Web site: www.mortgagebankers.org.

Whether a new provision of state law adds a new or slightly varying or even duplicative requirement, it will result in additional large, unnecessary, compliance costs to lenders that will ultimately be borne by consumers. We, therefore, respectfully request that the Commission suspend action on these rules for the near term as the Congress and the agencies complete their work. Later, it should only proceed after carefully balancing the costs and benefits of supplementary standards with clear uniform national standards.

Should the Commission choose to proceed with the proposed rules at this time, notwithstanding, MBA respectfully offers the following comments:

1. Consumer Protection and Functioning of the Mortgage Market

a. Proposed Rule 601 – Prohibited Basis for Compensation to Mortgage Brokers and Mortgage Loan Originators

Proposed 04 NCAC 03M.0601 concerns matters contained in the proposed regulations by the Federal Reserve Board, for disclosures of closed-end credit secured by real property or a consumer's dwelling, which are currently undergoing public review and comment.²

The Federal Reserve Board proposes to amend Regulation Z, implementing the Truth in Lending Act to provide:

12 CFR 226.36(d) "Prohibited payments to loan originators.

(1) Payments based on transaction terms and conditions. In connection with a consumer credit transaction secured by real property or a dwelling, no loan originator shall receive and no person shall pay to a loan originator, directly or indirectly, compensation in an amount that is based on any of the transaction's terms or conditions. For purposes of this paragraph, the principal amount of credit extended is deemed to be a transaction term. This paragraph (d)(1) shall not apply to any transaction in which paragraph (d)(2) of this section applies.

(2) Payments by persons other than consumer. If a loan originator receives compensation directly from the consumer in a transaction secured by real property or a dwelling: (1) the loan originator shall not receive compensation, directly or indirectly, from any person other than the consumer in connection with the transaction; and (ii) No person who knows or has reason to know of the consumer paid compensation to the loan originator, other than the consumer, shall pay any compensation to the loan originator, directly or indirectly, in connection with the transaction."

As detailed in MBA's comment to the Federal Reserve (Attached), MBA strongly opposes broad restrictions against loan officer compensation and

² 74 Fed. Reg. 43,232 (Aug. 26, 2009)

believes a far better approach than restricting such compensation would involve continuing on the path of greatly improving disclosures so consumers could avoid any steering and understand and negotiate the best compensation to serve their lending needs.

If this approach is rejected, MBA believes that any restrictions should be narrowly tailored to protect vulnerable borrowers and to protect against steering to loans with risky features. Moreover, we strongly urge that a variety of practices be exempted from any restriction. These include practices to enable consumers to reduce their upfront closing costs and to provide sustainable credit to those who have been underserved. MBA also favors permitting compensation based on the loan amount.

The comment period for the Federal Reserve's proposal ended on December 24, 2009. Whether or not the Board agrees with MBA, in whole or in part, action at this time is premature. We, therefore, would respectfully request the Commission remove this provision from any final rule until such time as the Federal Reserve is able to conclude its rulemaking process. Thereafter, the Commission should review the record and determine to what extent, if any, additional rulemaking is necessary.

b. Proposed Rule 604 Deceptive Solicitations for Refinance

Proposed 04 NCAC 03M.0604 regarding advertisements for refinancing is an area in which recent federal regulatory developments have already provided consumer protections, rendering additional, largely duplicative efforts at the state level unnecessary. Specifically, newly adopted additions to Regulation Z, the Truth in Lending Act rules, provide:

12 CFR 226.24(i) Prohibited acts or practices in advertisements for credit secured by a dwelling. The following acts or practices are prohibited in advertisements for credit secured by a dwelling:

(3) Misrepresentations about government endorsement. Making any statement in an advertisement that the product offered is a "government loan program", "government-supported loan", or is otherwise endorsed or sponsored by any federal, state, or local government entity, unless the advertisement is for an FHA loan, VA loan, or similar loan program that is, in fact, endorsed or sponsored by a federal, state, or local government entity.

(4) Misleading use of the current lender's name. Using the name of the consumer's current lender in an advertisement that is not sent by or on behalf of the consumer's current lender, unless the advertisement:

(i) Discloses with equal prominence the name of the person or creditor making the advertisement; and

(ii) Includes a clear and conspicuous statement that the person making the advertisement is not associated with, or acting on behalf of, the consumer's current lender.

Considering the scope of the Board's rules, it does not appear that state regulation is warranted. The adoption of a similar, but not identical provision in state regulation will only further serve to increase the regulatory burden faced by lenders, driving up costs to the consumer. In the event the Commission wishes to include language in North Carolina law specific to this issue, we would suggest specifically incorporating the Board's recently adopted rules by reference.

c. Proposed Rule 603 – Mortgage Lenders to Offer Standard Mortgage

Proposed 04 NCAC 03M.0603, requiring mortgage lenders to provide an early disclosure that compares a proposed loan offer to a standard 30-year fixed-rate mortgage loan contemplates the adoption of a concept recently considered, and specifically rejected by federal lawmakers.

Requiring a lender to offer a "standard mortgage" to "qualified applicants" opens a Pandora's box of compliance concerns for lenders, while providing little to no real benefit to consumers. The Financial Services Committee of the U.S. House of Representatives came to a similar conclusion when they chose to reject the concept of a "vanilla mortgage" from the earlier introduced version of H.R. 3216. Issues such as what the definition of what a standard mortgage is and isn't, will almost certainly lead to uncertainty in the market. The uncertainty will stem innovation to help families obtain sustainable low cost credit, and will ultimately have a negative impact on the availability of credit itself. We would urge the Commission, much as the U.S. Congress did, to reject this proposed rule.

2. North Carolina S.A.F.E. Act

While the proposed regulations appear mostly consistent with recently adopted state legislation, they go far beyond the requirements of the federal S.A.F.E. Act, creating a significant, added burden on lenders and servicers that will only serve to increase the overall cost of credit to consumers.

Notably, MBA does not believe servicers were ever intended to be registered under S.A.F.E. and as a general matter we oppose the S.A.F.E. provisions applicable to them as hampering the process of assisting troubled borrowers.

Also, a number of the data fields in the proposed rule present difficult, if not impossible implementation concerns, for lenders and servicers. Furthermore, even if lenders and

servicers are able to provide the identified data, it will take at least a year for systems upgrades to enable accurate reporting. We would urge the Commission reconsider whether this level of reporting is at all necessary considering its cost.

3. Foreclosure Prevention

MBA members have been tireless in their outreach to the citizens of North Carolina in danger of losing their homes, utilizing both an array of internal company modification programs, and federally endorsed initiatives, including the Making Home Affordable Program (“HAMP”)³ nationwide. Experience tells us that in the large number of cases where a lender and a borrower are able to communicate with each other, if there is any available method to modify a loan and avoid foreclosure such a resolution is quickly reached. Borrowers must bear some responsibility for answering the repeated efforts by their servicers to try to help them avoid foreclosure. We offer the following comments with respect to the proposed rules on foreclosure prevention:

a. Proposed Rule 703 – Cessation of Foreclosure Activity During Pendency of Loss Mitigation Request

Proposed 04 NCAC 03M.0703 disregards existing efforts by servicers to work with borrowers, instead mandating all foreclosure activity and associated expense be suspended during the pendency of any loss mitigation request. MBA strongly opposes this proposed rule, and respectfully requests the Commission to reject its adoption. While the proposed rule provides exceptions for requests received from customers within the past twelve months that were previously involved in a loss mitigation plan, or for borrowers that have been previously advised they do not qualify for a loss mitigation plan within the past twelve months, or if the servicing contract or the terms of the loan entered into prior to October 1st, 2009 prohibit such a delay, the requirement that servicers halt efforts to foreclose and merely eliminate all associated expenses with the process is completely unrealistic. Arbitrarily forcing servicers to absorb expenses associated with foreclosure will only ultimately serve to shift this cost to other borrowers who are current on their loan payments.

The MBA is, however, supportive of the suspension of initiation of the filing of a foreclosure action in instances of significant delinquency while a loss mitigation request from a borrower is pending, provided the loss mitigation request from the borrower is sufficiently complete to allow the servicer to make an informed determination as to the viability of the proposed plan. To this end, we would encourage the creation of clear guidelines to allow servicers to be able to deem a request for loss mitigation to be complete and consequently triggering the requirements under this rule. Incomplete applications should not trigger the

³ The Making Home Affordable Program is part of the Obama Administration's broad, comprehensive strategy to get the economy and the housing market back on track. The Making Home Affordable Program offers two different potential solutions for borrowers: (1) refinancing mortgage loans, through the Home Affordable Refinance Program (HARP), and (2) modifying mortgage loans, through the Home Affordable Modification Program (HAMP). <http://www.makinghomeaffordable.gov>

requirements of the proposed rule. This standard will ensure servicer resources can be focused on those borrowers filing legitimate requests for modification before the legal process of foreclosure has begun, and not subject the process to abuse by those seeking to merely delay an inevitable foreclosure. Recent guidance from the U.S. Treasury with respect to the actions by a borrower required to trigger a servicer to evaluate that person's eligibility for the HAMP program, including borrower income and the reason for hardship, may prove instructive.⁴

Limiting the scope of this rule to borrowers in a pre-filing status is critical to ensure the complex foreclosure process is not made even more time consuming and expensive for all by borrowers filing a loss mitigation request after an action is filed. Existing federal loss mitigation programs already provide extensive post filing protections, including requiring participating servicers to evaluate borrowers for potential loan workouts prior to conducting a foreclosure sale, and notification in the event the borrower is not eligible for a modification.⁵ Moreover, once the legal process of foreclosure has begun, the potential for duplicative expense associated with notice, filing and other mandated requirements, is significant. Accordingly, we urge the Commission to amend the proposed rule to narrow the scope of foreclosure suspension efforts to pre-filing circumstances.

b. Proposed Rule 702 - Requirement for Mortgage Servicers to Communicate Effectively with Borrowers Regarding Loss Mitigation

Proposed 04 NCAC 03M.0702 mandates duplication of the many, many efforts of servicers in the current environment, and as a result would unnecessarily force the diversion of scarce resources currently being focused on loan modification to ensure compliance. The proposed rule mandating written acknowledgment of a borrower request for loss mitigation within five business days of receipt, and then further mandating a written response within thirty (30) days of those loss mitigation programs the borrower may qualify for, and provide specific detail in the event the request is denied as to the reasons behind the denial is overly burdensome, and will provide limited value in trying to ensure borrowers are aware of their loss mitigation options.

Servicers are making these contacts and inquiries verbally over the phones, in written form through mail and e-mail, and through any other available method daily in an effort to help borrowers stay in their homes. Unfortunately the primary hurdle to finding viable loss mitigation solutions for borrowers is not an inability to identify what plan a borrower is eligible for, rather it is an inability to get borrowers to respond to their servicer's repeated efforts to contact them. Adoption of the contemplated labor-intensive paper process will unfortunately serve little purpose but to further divert scarce servicer efforts to modify loans.

⁴ U.S. Department of Treasury, Supplemental Directive 09-06,

⁵ U.S. Department of Treasury, Supplemental Directive 09-08, November 3rd, 2009.

Should the Commission decide to adopt this proposed rule in spite of these concerns, at the very least we would strongly urge the adoption of an exemption from the regulation for servicers currently participating in the Making Home Affordable program and those servicing on behalf of Fannie Mae, Freddie Mac or servicers of loans insured or guaranteed by FHA and VA, as these programs already have active and aggressive loss mitigation programs that postpone foreclosure sales when appropriate. While some may claim these administration programs are not effectively addressing the rising rate of foreclosure, the recent joint announcement⁶ by the U.S. Department of Treasury and U.S. Department of Housing and Urban Development that over a half a million loans have now entered into trial modifications since April clearly dispels any doubt as to their success. The industry completed over 5.2 million workout plans, in addition to those modifications performed under the HAMP Program, from July 2007 through August 2009⁷.

MBA also strongly suggests an amendment to exempt servicers from having to issue written responses to borrower requests made more than once in a twelve month period. The proposed rules do contemplate an exemption from the suspension of the foreclosure process and related expenses for repeated requests, but do not provide a similar exemption for responding to an initial request from a borrower. This will ensure that scarce resources available to servicers to modify loans aren't further diverted to the task of writing letters to borrowers attempting to game the system, while still allowing those borrowers who are in legitimate need of loss mitigation efforts are given appropriate attention.

4. Additional Provisions of Concern

MBA would respectfully urge the Commission to reject adoption of proposed 04 NCAC 03M.0503 - Compliance with Government Programs. Read simply, the provision requires compliance with any guideline related to a federal or state program, regardless of content. Taken to an extreme, if the State of North Carolina decided to issue a "guideline" mandating a 12-month foreclosure moratorium, servicers would be denied any opportunity to avail themselves of their right to due process through the administrative rulemaking process. Moreover, we believe this provision is unnecessarily duplicative of recently adopted language at N.C.G.S. §53-244.111(14) – Prohibited Acts, which provides:

"In addition to the activities prohibited under other provisions of this Article, it shall be unlawful for any person in the course of any residential mortgage loan

⁶ OBAMA ADMINISTRATION RELEASES NEW DATA ON MAKING HOME AFFORDABLE PROGRAM, ACHIEVES KEY MILESTONE WEEKS AHEAD OF SCHEDULE.
http://www.makinghomeaffordable.gov/pr_10082009.html

⁷HOPE NOW Data Shows Increase in Workouts for Homeowners.
http://www.hopenow.com/press_release/files/August%20Data%20Release_09_30_09.pdf

transaction: (14) To fail to comply with applicable State and federal laws and regulations related to mortgage lending or mortgage servicing.”

Given this already existing statutory authority we would suggest this proposed rule is unnecessary, and excessively broad, and we would urge the Commission reject its adoption.

MBA also would respectfully urge the Commission to reject adoption of proposed 04 NCAC 03m.0602 which would restrict lenders or mortgage brokers from making loans if the use of the lender or broker was required to obtain a discount from an affiliated seller.

MBA strongly supports both full and free competition among both affiliated and non-affiliated lenders and the ability of lenders to offer consumers true discounts. In MBA’s view, the Commission’s proposal may fail to achieve these objectives. Just as importantly, it is premature and risks inconsistency.

The U.S. Department of Housing and Urban Development recently adopted and then withdrew a rule relevant to this matter concerning “required use” under Regulation X, the Real Estate Settlement Procedures Act (RESPA) rules, following litigation and extensive public comment.⁸ It, has, however, committed to further rulemaking. Accordingly, MBA urges the Commission also to remove provision 04 NCAC 03m.0602 from any final rule and work with HUD to develop consistent, well-tailored, requirements in this area.

We appreciate the opportunity to provide comments to the proposed rule, and look forward to continuing to work with the Commission to develop a final rule that provides an appropriate balance of protection for consumers and keeping people in their homes while avoiding unnecessary costs. If you have any questions, please contact Paul Hilliar at 202-557-2777 or philliar@mortgagebankers.org.

Sincerely,



John A. Courson
President and Chief Executive Officer

⁸ 74 Fed. Reg. 22822 (May 15, 2009)