UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Office of the Secretary

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Report), there is a compelling need for this regulatory adjustment. According to that study, with the current 10% trigger HOEPA's protections only apply to a very limited number of subprime mortgage loans.(3)

As the Board observes, lowering the trigger by two percentage points would expand HOEPA's protections from an estimated one percent of subprime loans to five percent,(4) still covering only a very small portion of this market.(5) An expansion of HOEPA's reach by the Board in this manner would provide a modest, yet meaningful benefit by shielding more borrowers of very high-cost loans from the particularly onerous loan terms and unfair practices prohibited by HOEPA. The Commission is aware that some parties argue against expanding HOEPA coverage on the grounds that this would limit the availability of credit to subprime borrowers. Although we recognize the theoretical possibility of such an effect, we see no evidence of it at this time, nor do we have any reason to believe that any effect would be significant.

The Board also solicits comment on whether a two-tiered rate trigger should be adopted, pursuant to which first-lien mortgages would be subject to a new 8% trigger while the trigger for second liens would remain at 10%. The Commission urges the Board to adopt a uniform rate trigger. Home-equity loans secured by second liens pose similar risks of abusive practices as first-lien loans. Moreover, this approach would add unnecessary complexity to both compliance and 6.96 42t ti

The Board proposes to clarify that a loan documented as open-end that has the features and terms of closed-end credit is subject to HOEPA and other regulations, if otherwise applicable, governing closed-end credit. Further, the Board solicits comment on whether it should adopt any specific rules to prevent evasions of HOEPA, including a "rebuttable presumption" that if a borrower seeks a closed-end loan but receives a line of credit or similar open-end loan that is priced above HOEPA's triggers, the creditor intends to avoid HOEPA's obligations.

The Commission has encountered the problem of "spurious open-end credit" in its enforcement of HOEPA. The two cases noted by the Board(11) that were part of the Commission's "Operation Home Equity" involved allegations that a lender had falsely represented to consumers that the credit offered to those consumers was open-end, when in fact it was closed-end credit subject to HOEPA's protections.(12) Although the Commission was able to address these instances of deception under section 5 of the FTC Act, additional clarity with respect to when such credit would be subject to HOEPA would be helpful. The Commission also endorses the adoption of the rebuttable presumption proposed by the Board, because it would facilitate HOEPA enforcement by the Commission and others.

II Limiting or Prohibiting Practices that are Unfair, Deceptive, or Abusive

A. Loan Flipping

The Board proposes a variety of measures designed to limit the ability of a lender to refinance repeatedly its HOEPA loans. This practice, commonly referred to as loan "flipping," can be harmful to borrowers because typically each time a loan is refinanced, or flipped, new points and/or fees are charged, often without regard to the borrower's ability to repay the additional amount. As the Board notes, victims of flipping are typically borrowers who already are having difficulty repaying their original loan.(13) Although these refinancings often result in little, if any, additional cash to the borrower or other significant benefits, points and fees are often imposed on the entire amount of the new loan, not just on the incremental amount added to the loan principal through each successive refinancing.

1. Limitations on the Refinancing of HOEPA Loans

The Commission supports the Board's proposal to restrict the refinancing of HOEPA loans within the first twelve months.(14) The Board would permit such refinancing if it would provide a "tangible benefit" to borrowers. The Commission suggests that the Board provide in the Final Rule, for both compliance and enforcement purposes, additional guidance concerning the "tangible benefit" standard.

2. Limitations on the Refinancing of Certain Low-Rate Loans

The Commission also supports the Board's proposal to prohibit for five years the refinancing of certain low-rate loans with higher-costs loans unless the refinancing is in the interest of the borrower. The prohibition would apply to such loans, regardless of whether they are covered by HOEPA. As the Board observes, abuses have been documented with respect to the refinancing of loans issued through mortgage-assistance programs serving low- or moderate-income borrowers. This is of particular concern because those programs, typically sponsored by government or not-for-profit enti term loans in order to satisfy the demand clauses. As the Board observes, these provisions raise similar concerns as balloon notes, which require lump-sum repayment of the principal at the end of the loan term, and thus warrant comparable protections.(16) This amendment would also be consistent with the TILA's treatment of home-

Moreover, the proposed "clarification" could potentially complicate the Commission's efforts to enforce HOEPA against secondary market purchasers. Assignees might argue that the Board's action suggests that, prior to the "clarification," the law was unclear on this issue and, thus, assignees who previously purchased HOEPA loans should not be held liable.

III Enhancing Disclosures

The Board addresses a number of changes to the disclosure requirements for HOEPA loans set forth in 12 C.F.R. § 226.32 (c). The Commission's comments on these proposals are based on issues that have arisen repeatedly in its

12. See Federal Trade Comm'n v. CLS Fin. Servs., Inc., Civ. No. C99-1215Z (W.D. Wash. 1999); Federal Trade Comm'n v. Wasatch Credit Corp., Civ. No. 2-99 CV579G (D. Utah 1999).

13. 65 Fed. Reg. at 81444.

14. This restriction would not limit a consumer's ability to obtain refinancing of a HOEPA loan from another lender.

15. 12 C.F.R. § 226.32(d)(1)(i).

16. See 65 Fed. Reg. at 81444.

17. See Board Statement, supra note 2, at 16.

18. Id. (citing HUD/Treasury Report, supra note 3, at 49).

19. For example, in conjunction with the United States Departments of Justice and HUD, the Commission brought an action last year against Delta Funding Corporation. In that case, Delta allegedly extended high-cost loans to borrowers based on the borrower's collateral, failing to consider indicia of the borrower's ability to repay the loan, such as current and expected income, other outstanding debts, and employment status. In addition, Delta failed to consider whether the borrower had sufficient residual income after repayment of the obligation to meet ordinary living expenses.See United States v. Delta Funding Corp., Civ. Action No. 00 1982 (E.D.N.Y. filed March 30, 2000).

20. The Commission also agrees with the Board's recommendation to add a comment providing that in evaluating a borrower's ability to repay an adjustable rate mortgage, the creditor may not use initial rates and monthly payments. However, the Commission believes that requiring a creditor to calculate increases to the consumer's payments assuming the maximum possible increases in rates in the shortest amount of time may force lenders to deny credit to consumers who in all likelihood would have the ability to repay their loans. Rather, the Board may want to require creditors to use reasonable assumptions about increases in a borrower's monthly payments when evaluating a borrower's ability to repay the mortgage.

21. See Board Statement, supra note 2, at 17.

22. H.R. Conf. Rep. No. 652, 103rd Cong., 2d Sess., at 367-368 (1994); see also Preservation of Consumers' Claims and Defenses, 16 C.F.R. Part 433.

23. H.R. Conf. Rep. No. 652, 103rd Cong., 2d Sess., at 367-368 (1994).

24. Sections 226.17-.18 of Regulation Z set forth the requirements for disclosures for closed-end credit, including but not limited to HOEPA loans. Pursuant to those provisions, lenders offering closed-end credit must provide written

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