



MORTGAGE BANKERS ASSOCIATION

February 7, 2024

Federal Trade Commission
Office of the Secretary
600 Pennsylvania Avenue, NW
Washington, DC 20580
Via regulations.gov

Re: Unfair or Deceptive Fees NPRM, R207011

The Mortgage Bankers Association (MBA)¹ and its members appreciate the opportunity to offer comments on the Federal Trade Commission's (FTC's) Notice of Proposed Rulemaking regarding Unfair or Deceptive Fees.² The MBA shares the FTC's commitment to transparent pricing of consumer goods and services, but mortgage lending is already subject to comprehensive disclosure rules, known as Regulation Z, promulgated by the Consumer Financial Protection Bureau (CFPB) under the Truth in Lending Act (TILA),³ as well as a broad regulatory prohibition, in the CFPB's Regulation N, on making misrepresentations in relation to a mortgage transaction.⁴

In light of this existing Federal regulatory regime specifically designed for mortgage transactions, application of the FTC's rule on deceptive or unfair fees to mortgage lending is unnecessary and counterproductive, as it would present irreconcilable conflicts with the existing disclosure regime, undue compliance burdens on the industry, and consumer confusion. Accordingly, the MBA respectfully submits that any final rule should not apply to any mortgage transaction that is subject to regulation under TILA.

¹ The Mortgage Bankers Association (MBA) is the national association representing the real estate finance industry, an industry that employs more than 300,000 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 to 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 more than 2,200 companies includes all elements of real estate finance: independent mortgage banks, commercial banks, mortgage brokers, thrifts, REITs, Wall Street conduits, life insurance companies, credit unions, and others in the mortgage lending field. For additional information, visit MBA's website: www.mba.org.

² See Trade Regulation Rule on Unfair or Deceptive Fees, 88 Fed. Reg. 77420 (Nov. 9, 2023).

³ See 12 CFR pt. 1026.

⁴ 12 CFR § 1014.3.

The FTC’s proposed rule would require anyone subject to its authority to disclose the “Total Price”—a term defined to include “the maximum total of all fees or charges a consumer must pay for a good or service” (excluding shipping or government charges)—more prominently than any other information relating to the amount a consumer may pay for the good or service.⁵ The FTC also proposes to require the clear and conspicuous disclosure of amounts a consumer “may” pay that is not included in the Total Price before obtaining a consumer’s consent to pay that amount.⁶

Information regarding the “amount a consumer must pay” or “may pay” for a mortgage loan is, however, already subject to a detailed disclosure regime that is specifically designed for such transactions. TILA was enacted for the purpose of ensuring “the informed use of [consumer] credit,”⁷ and has been amended numerous times to require the promulgation of regulations specifically designed to fulfill this purpose in the context of mortgage transactions.⁸ As a result, Regulation Z comprehensively governs the disclosure of the cost of mortgage transactions.

For example, under Regulation Z, advertisements for any mortgage transaction must only contain credit terms that are actually available,⁹ and prohibits specific misleading practices.¹⁰ Advertisements for closed-end mortgage transactions that state a simple rate of interest must disclose the “annual percentage rate” (APR).¹¹ In addition, advertisements for closed-end mortgages that contain certain “triggering terms”—the amount of any downpayment, the number of payments or term, the amount of any payment, or the amount of any finance charge—must also include the amount or percentage of any downpayment, the terms of repayment (including any balloon payment), and the APR.¹²

The APR is a defined term intended to express the entire cost of credit as a yearly rate.¹³ It is analogous to the “total price” that would be required under the FTC’s proposed rule, but it is calculated in accordance with detailed and complicated requirements that would not correspond with the FTC’s proposed definition of “total price,” and it is expressed as a rate, not as a dollar figure.¹⁴ Further, Regulation Z requires that the APR must be disclosed at least as conspicuously as the simple rate, but does not require that it be disclosed “more

⁵ See, e.g., Proposed 16 CFR § 464.1, 464.2.

⁶ Proposed 16 CFR § 464.3(b).

⁷ 15 U.S.C. § 1601(a).

⁸ See, e.g., 15 U.S.C. §§ 1604(b); 1637a; 1665b.

⁹ 12 CFR §§ 1026.16(a); 1026.24(a).

¹⁰ 12 CFR § 1026.24(i).

¹¹ 12 CFR § 1026.24(c).

¹² 12 CFR 1026.24(d). Regulation Z contains other requirements concerning the advertisement of mortgage transactions, including in instances when more than one rate will apply during the life of the loan, statements regarding tax implications, statements regarding “fixed” rates and payments, and several other potentially misleading statements. 12 CFR § 1026.24(f)-(i).

¹³ 12 CFR § 1026.22(a)(1).

¹⁴ Compare 12 CFR pt. 1026 App. J with proposed 16 CFR § 464.1(g).

Unfair or Deceptive Fees NPRM, R207011

February 7, 2024

Page 3 of 4

prominently” than the simple rate.¹⁵ Accordingly, the FTC’s proposed rule, if applied to closed-end mortgage advertisements, would subject mortgage lenders (and others who advertise mortgages (e.g., builders)) to conflicting Federal regulatory requirements.¹⁶

In addition, pursuant to regulations promulgated by the CFPB in the wake of the 2007-08 financial crisis, closed-end mortgage lenders must provide a detailed and highly regimented disclosure, known as the Loan Estimate, within days of receiving a consumer’s application for a mortgage and another detailed disclosure, known as the Closing Disclosure, in advance of the consummation of the mortgage transaction.¹⁷ Model forms for these disclosures, which span several pages, are set forth in Appendix H to Regulation Z.¹⁸ The CFPB developed these disclosures after extensive consumer testing,¹⁹ and has found that they improved consumers’ ability to understand and compare terms of competing mortgage offers while minimizing the potential for information overload which could detract from the consumer decision-making processes.²⁰

These disclosures must contain detailed information regarding the mortgage transaction, including information relating to the amount a consumer will pay for the transaction (e.g., interest rate, interest payments, origination fees, prepayment penalties, closing costs, etc.), but they do not require lenders to disclose a “total price,” let alone to disclose a “total price” more prominently than the other pricing information specifically required by Regulation Z.²¹ In fact, the regulations governing the Loan Estimate and Closing Disclosure specifically prohibit creditors from deviating from the standard model forms or adding any additional disclosures such as a “total price” disclosure.²² Similar conflicts would arise between Regulation Z’s rules governing disclosures for home-equity plans and the FTC’s proposed rule, were it to apply to such transactions.²³ Accordingly, as with advertisements, application of the FTC’s proposed rule to the mortgage application and closing process will likewise produce needless and irreconcilable conflicts with Regulation Z.

The FTC also proposes to identify as an unfair and deceptive practice the misrepresentation by any business of “the nature and amount a consumer may pay” for any good or service.²⁴

¹⁵ Compare 12 CFR § 1026.24(c) with proposed 16 CFR § 464.2(b).

¹⁶ Similar conflicts would arise in the advertisement of home-equity plans (i.e., open-end credit secured by a consumer’s dwelling). See, e.g., 12 CFR § 1026.16.

¹⁷ See 12 CFR §§ 1026.19(e), (f), 1026.37, 1026.38.

¹⁸ See, e.g., 12 CFR pt. 1026 App. H, Model Forms H-24(A)-(G), H-25(A)-(J).

¹⁹ See Integrated Mortgage Disclosures Under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (TILA), 78 Fed. Reg. 79730, 79742-44, 79746-50 (Dec. 31, 2013) (describing extensive qualitative and quantitative consumer testing of these disclosures).

²⁰ See Bureau of Consumer Financial Protection, [Integrated Mortgage Disclosures Under the Real Estate Settlement Procedures Act \(Regulation X\) and the Truth in Lending Act \(Regulation Z\) Rule Assessment](#), at 7 (Oct. 2020); 78 Fed. Reg. at 79742-3.

²¹ 12 CFR §§ 1026.37, 1026.38.

²² 12 CFR §§ 1026.37(o)(1)(ii); 1026.38(t)(1)(ii).

²³ Compare 12 CFR § 1026.40 & App. G-14 with proposed 16 CFR § 464.2.

²⁴ Proposed 16 CFR § 464.3(a).

Unfair or Deceptive Fees NPRM, R207011

February 7, 2024

Page 4 of 4

But, as the FTC acknowledged in the preamble to the proposed rule,²⁵ Regulation N already prohibits “any material misrepresentation, expressly or by implication, in any commercial communication, regarding any term of any mortgage credit product.”²⁶ It is unnecessary, therefore, to extend the FTC’s proposed rule to consumer mortgage transactions as the conduct the FTC proposes to regulate is already subject to an existing rule imposing the same obligations.²⁷

Finally, the FTC does not need to include mortgage transactions in the scope of the rule to facilitate its enforcement of the existing regulatory regime that applies specifically to mortgage transactions.²⁸ The FTC already has authority to enforce both Regulation Z and Regulation N and violations of Regulation N (and certain violations of Regulation Z) are already deemed violations of a rule (like the proposed rule) promulgated under section 18 of the Federal Trade Commission Act.²⁹

The mortgage industry is committed to transparency in the pricing of mortgage products, and has invested (and continually invests) significant resources to come into compliance with the comprehensive regulatory regime applicable to the disclosure of the cost of mortgage transactions for consumers. To avoid unnecessary conflict with this regime, unnecessary compliance burdens for lenders, and unnecessary confusion for consumers, we respectfully urge the FTC to exclude mortgage transactions from the scope of any final Trade Regulation Rule on Unfair or Deceptive Fees. Should you have any questions or wish to discuss further, please contact Justin Wiseman at (202) 557-2854 and jwiseman@mba.org or Alisha Sears, at (202) 557-2930 and asears@mba.org.

Sincerely,



Pete Mills
Senior Vice President
Residential Policy and Strategic Industry Engagement
Mortgage Bankers Association

²⁵ See 88 Fed. Reg. at 77480.

²⁶ 12 CFR § 1014.3

²⁷ Notably, this rule was originally published by the FTC pursuant to authority, subsequently transferred to the CFPB, to issue rules regarding unfair and deceptive practices committed in relation to mortgage loans. See 12 U.S.C. § 5538; 16 CFR § 321.1.

²⁸ See 88 Fed. Reg. at 77438.

²⁹ 12 U.S.C. § 5538(a)(1), (3); 15 U.S.C. §§ 1602(z); 1607(a); 1639(q).