



April 28, 2008

The Honorable Byron Dorgan
Chairman
Subcommittee on Interstate Commerce,
Trade & Tourism
Senate Commerce Committee
254 Russell Senate Building
Washington, DC 20510

The Honorable Jim DeMint
Ranking Member
Subcommittee on Interstate
Commerce, Trade & Tourism
Senate Commerce Committee
254 Russell Senate Building
Washington, DC 20510

Dear Chairman Dorgan and Ranking Member DeMint:

The Mortgage Bankers Association¹ (MBA) greatly appreciates the opportunity to comment on the record for the April 29th hearing at the Senate Committee on Commerce, Science and Transportation's Subcommittee on Interstate Commerce, Trade and Tourism concerning S. 2831, The Federal Trade Commission (FTC) Reauthorization Act of 2008.

MBA supports the FTC's regulatory efforts respecting lenders not regulated by federal financial regulators and the efforts of the FTC and federal financial regulators to stop abusive lending. MBA unequivocally regards abusive lending as a stain on the mortgage industry that should be dealt with effectively in a uniform manner.

MBA is concerned; however, that the provisions in S. 2831 may lead to unnecessarily burdensome and overly costly regulation of the mortgage market that may undermine uniform regulation. MBA strongly believes judicious regulation and a uniform national lending standard are the best means of providing consumers innovative financing choices, increased competition and lower costs. MBA has the following comments on the specific provisions of the bill.

Section 3 would increase the FTC's independent enforcement authority by removing the necessity for the FTC to provide a 45-day opportunity for the Department of Justice to bring a civil money penalties case on behalf of the Government before the FTC brings a case of its own. Under current law, the FTC can already go directly to court for

¹The Mortgage Bankers Association (MBA) is the national association representing the real estate finance industry, an industry that employs more than 370,000 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.

injunctive relief, redress or monetary damages. Actions under the FTC's authority are grounded in its Section 5 "unfair and deceptive acts and practices" (UDAP) authority which is vague and can be applied very broadly. Considering this, MBA believes the provisions under current law, which establishes a "check" for the Department of Justice, further the objective of assuring there is clear and consistent enforcement government-wide.

Section 5 would significantly broaden the FTC's authority to seek civil money penalties including penalties under its UDAP authority. This would pertain even where the FTC may have provided little or no guidance for companies regarding what constitutes a violation. The penalties provided for in this section, up to \$12,000 per violation, may compound rapidly for behavior that may not have been thought to be illegal. MBA believes statutes with vague terms should not have significant penalties. Such statutes increase compliance costs, reduce competition and ultimately result in higher costs to borrowers. Statutes that clearly define and proscribe misbehavior may be coupled with penalties as a deterrent.

Section 8 would provide the FTC the option, by a majority vote of the full Commission, to promulgate rules on any consumer protection matter under the expedited rules of the Administrative Procedures Act (APA), rather than under the procedures of the Magnuson-Moss Act. While other agencies may utilize the APA, they do not have the broad jurisdictional reach of the FTC or its broad, and at times vague, UDAP authority. MBA is concerned, considering the UDAP standards involved coupled with increased civil penalties for violations, that the FTC's powers may be overly increased by this change.

Section 9 would provide the FTC authority to conduct rulemaking proceedings with respect to "subprime mortgage lending and nontraditional mortgage loans." MBA believes assigning the FTC this authority may invite additional rules inconsistent with those of other federal financial regulators. This problem would be further exacerbated by the fact the bill does not define either the term "subprime mortgage lending" or "nontraditional loans." Without further guidance, it would be left to the FTC to define these terms and the scope of its rules, independent of any definitions promulgated by the federal banking regulators now or in the future. The fact that this provision would invite varying regulation coupled with increased penalties and jurisdiction provided elsewhere in the bill, would, in MBA's view, result in unnecessary costs to the industry and ultimately to consumers.

Section 10 would broaden the FTC's authority by making all federal banking agencies, not just the Federal Reserve and the Federal Home Loan Bank Board (now the Office of Thrift Supervision), subject to the FTC Act. Under these provisions, whenever the FTC prescribes a rule concerning an unfair or deceptive practice, the agencies would have to adopt a similar rule within 60 days of the effective date unless the agency finds the practice is not "unfair or deceptive" or there is a finding implementation of similar regulations with respect to banks, savings and loans, or federal credit unions would conflict with essential monetary and payment policies.

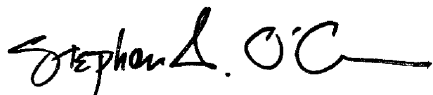
While MBA appreciates the bill would require regulations be prescribed jointly “to the extent practicable,” MBA does not believe the bill would go far enough to ensure consistency or provide sufficient authority for federal financial regulators to determine that an FTC rule should not be implemented.

Section 11 would allow state attorneys general, with 60 days notice, to bring cases under the FTC Act to seek civil penalties, disgorgement or injunctions against bad actors for certain actions. These actions would include enforcement of a violation of a subprime mortgage lending rule or a nontraditional mortgage loan rule, or a violation of the Truth in Lending Act (TILA) or the Home Ownership and Equity Protection Act (HOEPA) with respect to subprime mortgage lending or a nontraditional mortgage loan.

Under current law, state attorneys general regularly work with the FTC and other government regulators to bring a wide range of actions using state consumer protection laws consistent with federal law. MBA does not believe there is a need to provide for a direct action by state attorneys general under federal law and is concerned authorizing such action would simply invite widely diverse and inconsistent theories and interpretations of the law which will countermand efforts at greater uniformity. Adding to this concern is the fact actions may be brought in any district where a lender or related party operates; it is also not clear whether state actions would be able to be brought under these provisions as well. Finally, as a practical matter, the notice provision would allow little “check” to ensure consistency. FTC is unlikely to have the time or resources to regularize lawsuits across the country.

Again, MBA appreciates the opportunity to provide comment to the Subcommittee and welcomes the opportunity to recommend specific changes to improve the bill as it moves through the legislative process.

Sincerely,

A handwritten signature in black ink that reads "Stephen A. O'Connor". The signature is written in a cursive style with a horizontal line extending to the right.

Stephen A. O'Connor
Senior Vice President for Government Affairs