

Supporting Statement
Proposed Mortgage Acts and Practices - Advertising Rule
16 C.F.R. Part 321
OMB Control No. 3084-XXXX

The Federal Trade Commission (FTC or Commission) requests clearance from the Office of Management and Budget (OMB) for recordkeeping requirements in the proposed regulations for the Mortgage Acts and Practices – Advertising Rule (MAP – Advertising Rule or proposed rule). These requirements are pursuant to section 626 of the 2009 Omnibus Appropriations Act, Pub. L. No. 111-8, 123 Stat. 524, 678 (2009) (codified at 15 U.S.C. § 1638 note), as clarified by section 511 of the Credit Card Accountability and Responsibility and Disclosure Act of 2009, Pub. L. No. 111-24 (Credit CARD Act).

(1) Necessity for Collecting the Information

Section 626 of the 2009 Omnibus Appropriations Act, as clarified by Section 511 of the Credit CARD Act, directs the Commission to issue rules that “relate to unfair or deceptive acts or practices” regarding mortgage loans. The proposed rule prohibits misrepresentations about the terms of mortgage credit products in commercial communications and requires that covered persons keep certain related records for a period of twenty-four months from last dissemination. Specifically, covered persons must retain: (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. A failure to keep such records is an independent violation of the proposed rule.¹

The information that must be retained under the proposed rule is needed to ensure efficient and effective law enforcement to address deceptive practices that occur in the mortgage advertising area. To gauge whether covered persons are complying with the proposed rule or making prohibited misrepresentations, the FTC and state enforcement agencies need to review the commercial communications that were disseminated and the information about the mortgage credit products and relevant additional products or services available during the time period in which each commercial communication was disseminated. The Commission’s law enforcement experience establishes the need for strong recordkeeping provisions to foster effective enforcement of the proposed rule.

(2) Use of the Information

¹ Proposed § 321.5(b).

The Commission and state law enforcement agencies will use the required recordkeeping information for enforcement purposes. Without it, the ability of these agencies to enforce the proposed rule's prohibitions on deceptive practices would be significantly impaired.

(3) Consideration of the Use of Improved Information Technology

The proposed recordkeeping provisions do not limit use of available technology to maintain required records. Rather, they allow covered persons to retain them in any legible form, and in the same manner, format, or place as such records are kept in the ordinary course of business. Thus, the proposed rule would be consistent with the aims of the Government Paperwork Elimination Act, 44 U.S.C. 3504 note.

(4) Efforts to Identify Duplication

The proposed recordkeeping provisions do not duplicate any other federal information collection requirements. To the extent that some states require retention of mortgage advertisements and other records that may include evidence of mortgage credit products or relevant additional products or services, covered persons subject to those requirements would already retain this information, and the proposed rule's provisions do not require separate or duplicative storage or collection of such records.

(5) Efforts to Minimize Burden on Small Organizations

The Commission believes that there are no feasible or appropriate exemptions for small entities. Because the population of affected persons likely includes both small and large entities, exemptions based on size would undermine the protective purposes of this rulemaking, which is designed to prevent misrepresentations in commercial communications about mortgage credit products. In any event, the proposed rule seeks to minimize compliance burdens for all entities. For example, covered persons must retain only "materially different" commercial communications disseminated and may do so 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 record retention period to two years.

(6) Consequences of Conducting the Collection Less Frequently

The proposed rule seeks to minimize the frequency and extent of recordkeeping to avoid imposing any unnecessary burden. As noted, covered persons must retain only "materially different" commercial communications disseminated. The records that must be retained are necessary to enable the Commission and state agencies to review the commercial communications for any misrepresentations that violate the rule and to bring enforcement actions as appropriate. In addition, the Commission believes that a two-year record retention period strikes an appropriate balance between ensuring efficient and effective compliance efforts, while avoiding the imposition of unnecessary costs.

(7) Circumstances Requiring Collection Inconsistent with Guidelines

The collection of information in the proposed rule is consistent with all applicable guidelines contained in 5 C.F.R. §1320.5(d)(2).

(8) Consultation Outside the Agency

Pursuant to PRA implementing regulations under 5 C.F.R. Part 1320, the FTC is providing an opportunity for public comment on its burden analysis, contemporaneous with this submission. In addition, on June 1, 2009, the Commission published in the Federal Register an Advance Notice of Proposed Rulemaking (ANPR) addressing unfair and deceptive mortgage acts and practices.² The ANPR sought public comment 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, namely, 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.

In response to the ANPR, the Commission received a total of 55 comments, of which 46 were germane.³ About half of the comments were from individuals, and the rest were from industry trade associations or groups, consumer advocacy groups, credit unions, a government-sponsored enterprise, 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. Several comments, however, indicate that the FTC should focus 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. Nine comments address advertising issues or refer to other federal advertising regulations. Some commenters expressed various degrees of support for FTC rules on mortgage advertising generally or specific aspects of mortgage advertising. Others urged the Commission to incorporate through its rulemaking aspects of Regulation Z,⁴ which implements the Truth in Lending Act,⁵ to enable the Commission to obtain civil penalties for violations of those provisions. Commenters representing banks and credit unions raised questions about the application of the prospective rules to banking subsidiaries or affiliates or to state-chartered credit unions.

² 74 Fed. Reg. 26,118 (June 1, 2009).

³ The comments are available at <http://www.ftc.gov/os/comments/map/index.shtm>. The other nine comments were duplicates, replacements, blank, or “test” submissions. None of the comments raise objections specific to the information collection provisions (recordkeeping) proposed.

⁴ 12 C.F.R. Part 226.

⁵ 15 U.S.C. § 1601 *et seq.*

Because advertising is the initial step and often a crucial part of the mortgage process, the Commission has issued the proposed rule focused exclusively on mortgage advertising practices. It may issue additional proposed rules regarding other aspects of the mortgage process in the future.

In this rulemaking, the Commission has consulted with and will continue to consult with the Federal Reserve Board, and, as appropriate, other federal banking agencies.

(9) Payment and Gifts to Respondents

Not applicable.

(10) & (11) Assurances of Confidentiality/Matters of a Sensitive Nature

Not applicable. To the extent that information covered by a recordkeeping requirement is collected by the FTC for law enforcement purposes, the confidentiality provisions of Section 21 of the FTC Act, 15 U.S.C. § 57b-2, would apply.

(12) Estimated Annual Hours and Labor Cost Burden

Estimated annual hours burden: 3,900,000 hours
Estimated labor cost burden: \$53,157,000

The proposed rule covers numerous persons that may provide commercial communications about mortgage credit products, and there are no clear means to formally ascertain the numbers of all of such persons. Based on law enforcement experience and staff research, FTC staff estimates that the proposed rule’s recordkeeping provisions would affect 1.3 million persons that would not otherwise retain the required records in the ordinary course of business.⁶

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);

⁶ The proposed recordkeeping requirements address documents that FTC staff believes many covered persons, such as mortgage lenders, mortgage brokers, and mortgage servicers, would customarily retain in the ordinary course of business. For those entities, retention of these documents does not constitute a “collection of information,” as defined by OMB’s regulations that implement the PRA. 5 C.F.R. § 1320.3(b)(2). Other covered persons, however – such as real estate agents and brokers, advertising agencies, home builders, lead generators, rate aggregators, and others – might not currently retain these documents in the ordinary course of business. For them, retention of these documents would constitute a “collection of information.”

(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.

As noted above, the proposed rule would require that covered persons would retain copies of materially different commercial communications disseminated, and documents describing or evidencing mortgage credit products available during the period that the commercial communications were disseminated. The Commission staff estimates that retention and filing of these records will require approximately 3 hours per year, per person, for a total of 3.9 million hours, which will be performed by office support file clerks at an hourly rate of \$13.63,⁷ for a total of \$53,157,000.

(13) Estimate of Capital or Other Non-Labor Costs

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.

(14) Estimate of Cost to Federal Government

Commission staff estimates that a representative year's cost to the FTC of administering the recordkeeping requirements of the proposed rule during a prospective 3-year clearance period will be approximately \$39,520. This estimate is based on the assumption that one-third of an attorney work year will be expended in that effort. Clerical and other support services are included in this estimate.

(15) Program Changes or Adjustments

Not applicable; this is a new rulemaking.

(16) Plans for Tabulation and Publication

Not applicable.

⁷ 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>.

(17) Display of Expiration Date for OMB Approval

Not applicable.

(18) Exceptions to Certification

Not applicable.