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FEDERAL TRADE COMMISSION

16 CFR Part 321

Mortgage Acts and Practices—Advertising

AGENCY: Federal Trade Commission (FTC or Commission).

ACTION: Final rule.

SUMMARY: Pursuant to the 2009 Omnibus Appropriations Act (Omnibus Appropriations Act), as clarified by the Credit Card Accountability, Responsibility and Disclosure Act of 2009 (Credit CARD Act), the Commission issues this Final Rule and Statement of Basis and Purpose (SBP) relating to unfair or deceptive acts and practices that may occur with regard to mortgage advertising. This Final Rule, among other things: Prohibits any misrepresentation in any commercial communication regarding any term of any mortgage credit product; and imposes certain recordkeeping requirements.

DATES: This final rule is effective August 19, 2011.

ADDRESSES: Requests for copies of this Rule and this SBP should be sent to: Public Reference Branch, Federal Trade Commission, 600 Pennsylvania Avenue, NW., Room 130, Washington, DC 20580. The complete record of this proceeding is also available at that address. Relevant portions of the proceeding, including the Final Rule and SBP, are available at *http://www.ftc.gov*. On July 21, 2011, the Commission's rulemaking authority under the Omnibus Appropriations Act transfers to the Consumer Financial Protection Bureau (contact information available at *http://www.consumerfinance.gov*).

FOR FURTHER INFORMATION CONTACT: Laura Johnson or Carole Reynolds, Attorneys, Division of Financial Practices, Federal Trade Commission, 600 Pennsylvania Avenue, NW., Washington, DC 20580, (202) 326–3224.

SUPPLEMENTARY INFORMATION:

I. Background

A. Statutory Authority

On March 11, 2009, President Obama signed the Omnibus Appropriations Act.[1] Section 626 of that Act directed the Commission to commence, within 90 days of enactment, a rulemaking proceeding with respect to mortgage loans.[2] Section 626 also directed the FTC to use notice and comment procedures under Section 553 of the Administrative Procedure Act [3] to promulgate these rules.[4]

On May 22, 2009, President Obama signed the Credit CARD Act.[5] Section 511 of this statute clarified the Commission's rulemaking authority under the Omnibus Appropriations Act.[6]

1. Covered Acts and Practices

Section 511 of the Credit CARD Act specified that the FTC rulemaking ''shall relate to unfair or deceptive acts or practices regarding mortgage loans, which may include unfair or deceptive acts or practices involving loan modification and foreclosure rescue services.'' [7] The Omnibus Appropriations Act, as clarified by the Credit CARD Act, does not otherwise specify what the Commission should include in, or exclude from, a rule, but rather directs the FTC to issue mortgage rules that ''relate to'' unfairness or deception.[8]

Section 5 of the FTC Act broadly proscribes unfair or deceptive acts or practices in or affecting commerce. An act or practice is deceptive if there is a representation, omission of information, or practice that is likely to mislead consumers who are acting reasonably under the circumstances, and the representation, omission, or practice is one that is material, *i.e.,* likely to affect consumers' decisions to purchase or use the product or service at issue.[9] Section 5(n) of the FTC Act sets forth a three-part test to determine whether an act or practice is unfair. First, the practice must be one that causes or is likely to cause substantial injury to consumers. Second, the injury must not be outweighed by countervailing benefits to consumers or to competition. Third, the injury must be one that consumers could not reasonably have avoided.[10]

Accordingly, the Commission interprets the Omnibus Appropriations Act, as clarified by the Credit CARD Act, to allow it to issue rules that prohibit or restrict unfair or deceptive conduct or that are reasonably related to the goal of preventing unfair or deceptive practices. The FTC notes, however, that all of the conduct prohibited by the Final Rule is itself deceptive.

2. Covered Entities

Section 511 of the Credit CARD Act also clarified that the Commission's rulemaking authority is limited to entities over which the FTC has jurisdiction under the FTC Act.[11] Under the FTC Act, the Commission has jurisdiction over any person, partnership, or corporation that engages in unfair or deceptive acts or practices in or affecting commerce, except, among others: [12] banks,[13] savings and loan

[1] Omnibus Appropriations Act, 2009, Public Law 111–8, 123 Stat. 524 (Omnibus Appropriations Act).

[2] *Id.* § 626(a), 123 Stat. at 678.

[3] 5 U.S.C. 553.

[4] Omnibus Appropriations Act § 626(a). Because Congress directed the Commission to use APA rulemaking procedures, the FTC did not use the procedures set forth in Section 18 of the Federal Trade Commission Act (FTC Act), 15 U.S.C. 57a.

[5] Credit Card Accountability Responsibility and Disclosure Act of 2009, Public Law 111–24, 123 Stat. 1734 (Credit CARD Act).

[6] *Id.* § 511.

[7] *Id.* § 511(a)(1)(B). In a separate rulemaking, the Commission issued a final rule with respect to mortgage assistance relief services. *See* Mortgage Assistance Relief Services (MARS), Final Rule, 75 FR 75092 (Dec. 1, 2010), *available at http://www.ftc.gov/os/fedreg/2010/december/R911003mars.pdf.*

[8] Credit CARD Act § 511(a)(1)(B).

[9] Federal Trade Commission Policy Statement on Deception, *appended to In re Cliffdale Assocs., Inc.,* 103 F.T.C. 110, 174–84 (1984) (Deception Policy Statement).

[10] 15 U.S.C. 45(n). Additionally, Section 5(n) of the FTC Act provides that ''[i]n determining whether an act or practice is unfair, the Commission may consider established public policies as evidence to be considered with all other evidence. Such public policy considerations may not serve as a primary basis for such determination.''

[11] Credit CARD Act § 511(a)(1)(C).

[12] *See* 15 U.S.C. 44, 45(a)(2).

[13] The FTC Act defines ''banks'' by reference to a listing of certain distinct types of depository institutions. *See* 15 U.S.C. 44, 57a(f)(2). That list includes: National banks, Federal branches of foreign banks, member banks of the Federal Reserve System, branches and agencies of foreign banks, commercial lending companies owned or controlled by foreign banks, banks insured by the Federal Deposit Insurance Corporation (FDIC), and insured state branches of foreign banks. The Commission has jurisdiction over entities that are affiliated with banks, such as parent or subsidiary companies, that are not themselves banks. This jurisdiction is held concurrently with the Federal bank regulatory agencies (the Board of Governors of the Federal Reserve System (Federal Reserve Board or Board), the Office of the Comptroller of the Currency (OCC), the FDIC, and the Office of Thrift Supervision (OTS)) and the National Credit Union Administration (NCUA) as to their respective institutions. *See* Gramm-Leach-Bliley Act, Public Law 106–102, § 133(a), 113 Stat. 1338, 1383 (1999) (codified at 15 U.S.C. 41 note (a)); *Minnesota* v. *Fleet Mortg. Corp.,* 181 F. Supp. 2d 995 (D. Minn. 2001). The FTC also has jurisdiction over non-bank entities that provide services to or on behalf of a bank, such as credit card marketing. *See, e.g., FTC* v. *CompuCredit Corp.,* No. 08–1976, at 6–15 (N.D. Ga. Oct. 8, 2008) (magistrate judge's non-final report and recommendation) (finding that the FTC has jurisdiction under FTC Act against entity that contracted to provide services to a bank); *FTC* v. *Am. Std. Credit Sys.,* 874 F. Supp. 1080, 1086 (C.D. Cal. 1994) (dismissing argument that entity that contracted to perform credit card marketing and

institutions, Federal credit unions,[14] non-profits,[15] and common carriers. The Final Rule does not cover the practices of entities that are excluded from the FTC's jurisdiction.

3. Enforcement

The Omnibus Appropriations Act, as clarified by the Credit CARD Act, also permits both the Commission and the states to enforce the rules the FTC issues.[16] The Commission can use its powers under the FTC Act to investigate and enforce such rules, and the FTC can seek civil penalties under the FTC Act against those who violate them. In addition, states can enforce the rules by bringing civil actions in Federal district court or another court of competent jurisdiction to obtain civil penalties and other relief. Before bringing such an action, however, states must give 60 days advance notice to the Commission or other ''primary federal regulator'' of the proposed defendant,[17] and the regulator has the right to intervene in the action.

4. The Dodd-Frank Act

On July 21, 2010, President Obama signed the Dodd-Frank Wall Street Reform and Consumer Protection Act.[18] The Dodd-Frank Act made substantial changes in the Federal regulatory framework for providers of financial services. Among the changes, the Dodd-Frank Act will transfer the Commission's rulemaking authority under the Omnibus Appropriations Act to a new Bureau of Consumer Financial Protection (CFPB) [19] on July 21, 2011, the ''designated transfer date'' set by the Treasury Department.[20] In addition, on the designated transfer date, the FTC's authority to ''issue guidelines'' under the Omnibus Appropriations Act will transfer to the CFPB.[21] Both the Commission and the CFPB, however, will have authority to bring law enforcement actions and seek civil penalties against specific categories of ''nondepository covered persons'' to enforce the rules promulgated under the Omnibus Appropriations Act, including this Final Rule.[22]

B. The Rulemaking and Public Comments Received

On June 1, 2009, the Commission published in the **Federal Register** an Advance Notice of Proposed Rulemaking (ANPR) soliciting comments 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,[23] *i.e.,* 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. The ANPR described these services generically as ''Mortgage Acts and Practices,'' and the rulemaking proceeding was entitled the Mortgages Acts and Practices (MAP) Rulemaking.[24]

On September 30, 2010, the Commission published in the **Federal Register** a Notice of Proposed Rulemaking (NPRM) relating to unfair or deceptive acts and practices that may occur with regard to mortgage advertising, the MAP B Advertising Rule (proposed rule).[25] Among other things, the proposed rule prohibited any misrepresentation in any commercial communication regarding any term of any mortgage credit product, and it imposed certain recordkeeping requirements.

In response to the NPRM, the Commission received a total of 22 comments.[26] Commenters included industry trade associations or groups, credit unions, state credit union regulators, a not-for-profit law firm, a real estate settlement services firm, and a group of state banking and consumer credit regulators. The Commission also received five comments from individuals. Most of the comments expressed support for FTC regulatory action or particular aspects of the proposed rule. These comments are discussed below.[27]

II. Mortgage Advertising Practices

A. Overview

As discussed in the ANPR and NPRM, the mortgage life-cycle begins when a consumer initially shops for a mortgage, whether to purchase a home or real property,[28] refinance an existing mortgage, or obtain a home equity loan or line of credit (known as a HELOC) based on the consumer's equity in the home.[29] Consumers may consider obtaining diverse types of mortgage products. The loan may be a forward mortgage, the most prevalent type of loan, in which the homeowner borrows funds and remits payments for principal, interest, and, in some cases, other charges. Alternatively, the loan may be a reverse mortgage, in which senior citizens borrow funds secured by their homes. With a reverse mortgage, the borrower is not required to repay the debt as long as he or she remains in the home; and the loan is not due until the homeowner moves out of or sells the home, dies, or fails to satisfy certain loan conditions.[30] Forward mortgages may be traditional, such as fully amortizing 30-year fixed-rate or

other services for a bank is not subject to FTC Act). Effective July 21, 2011, the FTC and the Bureau of Consumer Financial Protection (CFPB) will share concurrent enforcement authority over specific categories of ''nondepository covered persons.'' *See infra* Part I.A.4.

[14] The exclusion is limited to Federal credit unions; thus, the FTC has jurisdiction over state-chartered credit unions (whether or not they have Federal insurance), among others. *See infra* note 127 and accompanying text.

[15] Section 4 of the FTC Act, 15 U.S.C. 44, specifies that the Commission's jurisdiction over ''corporations'' is limited to entities that are organized to carry on business for their own profit or that of their members. Thus, the non-profit exemption does not apply to ostensible non-profits that operate for the profit of their members. *See, e.g., Am. Med. Ass'n* v. *FTC,* 638 F.2d 443 (2d Cir. 1980), *aff'd by an equally divided court,* 445 U.S. 676 (1982); *FTC* v. *AmeriDebt, Inc.,* 343 F. Supp. 2d 451 (D. Md. 2004).

[16] Omnibus Appropriations Act § 626(b); Credit CARD Act § 511(a)(1)(B).

[17] Effective July 21, 2011, states must provide the advance notice to the CFPB or Commission, as appropriate. *See infra* Part. I.A.4.

[18] Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203, 124 Stat. 1376 (2010) (Dodd-Frank Act).

[19] *Id.* § 1061.

[20] *See* CFPB, Designated Transfer Date, 75 FR 57252, 57253 (Sept. 20, 2010); *see also* Dodd-Frank Act § 1062.

[21] Dodd-Frank Act § 1061.

[22] *See* Dodd-Frank Act §§ 1024, 1061, 1097.

[23] The Omnibus Appropriations Act and the Credit CARD Act use the term ''loan'' in referring to mortgage credit generally and do not limit that term in any way. Accordingly, this SBP and Final Rule use the term ''loan'' to refer to any form of mortgage credit.

[24] Mortgage Acts and Practices (MAP), ANPR, 74 FR 26118 (June 1, 2009).

[25] *See* MAP B Advertising, NPRM, 75 FR 60352 (Sept. 30, 2010).

[26] The comments submitted in response to the NPRM are available at *http://www.ftc.gov/os/comments/mapadrule/index.shtm.* A list of those who submitted comments appears following Part V of this SBP.

[27] *See infra* Part III.

[28] Traditional mortgages are considered ''closed-end credit,'' generally consisting of installment financing where the amount borrowed and repayment schedule are set at the transaction's outset. The Truth in Lending Act (TILA), 15 U.S.C. 1601–1666j, and its implementing Regulation Z, 12 CFR part 226, set various advertising and other requirements for closed-end credit. *See, e.g.,* 12 CFR 226.17–.24.

[29] HELOCs typically are ''open-end credit,'' which TILA defines as credit extended to a consumer under a plan in which: (1) The consumer reasonably contemplates repeated transactions; (2) the creditor may impose a finance charge from time to time on the outstanding unpaid balance; and (3) the amount of credit that may be extended to the consumer during the plan's term is generally made available to the extent that any unpaid balance is repaid. *See* 15 U.S.C. 1602(i); 12 CFR 226.2(a)(10) and (20).

[30] *See generally* 12 CFR 226.33 (reverse mortgages under Regulation Z) and U.S. Department of Housing and Urban Development (HUD), Glossary, definition of ''reverse mortgage,'' *available at http://www.hud.gov/offices/hsg/sfh/buying/glossary.cfm.*

adjustable rate mortgages (ARMs),[31] or nontraditional.[32]

Consumers receive information about mortgages through many different channels of communication. Some consumers seek out mortgage information on their own, for example, on the Internet or by contacting a real estate broker, mortgage lender, mortgage broker, or others. Marketers and advertisers widely disseminate mortgage advertisements to consumers through print media (such as newspapers and magazines), television, radio, the Internet, billboards, and other methods. Marketers and advertisers also send targeted information to particular consumers through direct mail or electronic communications such as e-mail or text messages.

Many types of entities market and advertise mortgage products. Mortgage lenders, mortgage brokers, mortgage servicers, and real estate brokers advertise and market mortgage products. In addition, advertising agencies, home builders, lead generators,[33] rate aggregators,[34] and others also may market and advertise mortgage products to consumers. Mortgage lenders and servicers are particularly likely to market products to their current customers, in addition to prospective customers.

B. Deception in Mortgage Advertising

Advertising and marketing can provide consumers with valuable information about mortgage options, costs, and features. This information is critical to the decisions consumers make throughout the mortgage origination process, especially because mortgage products are typically complex.[35] Information is useful for decision making, however, only if it is truthful and non-misleading.[36] Preventing and deterring deception in advertisements for mortgages, therefore, is a primary objective of FTC law enforcement and of the Final Rule.

The elements of deception are set forth in the FTC's Deception Policy Statement of 1984. An act or practice is deceptive if: (1) There is a representation, omission of information, or practice that is likely to mislead consumers acting reasonably under the circumstances; and (2) that representation, omission, or practice is material to consumers.[37]

A representation may be express or implied. ''Express claims directly represent the fact at issue, while implied claims do so in an oblique or indirect way.'' [38] Whether an implied claim is made depends on the overall net impression that consumers take away from an advertisement, based on all of its elements (language, pictures, graphics, *etc.*).[39] The FTC evaluates whether consumers' impressions or interpretations of a representation or omission are reasonable. Reasonableness is evaluated based on the sophistication and understanding of consumers in the group to which the representation is targeted, which may be a general audience or a specific group, such as children or the elderly.[40] A claim may be susceptible to more than one reasonable interpretation, and if one such interpretation is misleading, then the advertisement is deceptive, even if other, non-deceptive interpretations are possible.[41]

A disclaimer or qualifying statement may correct a misleading impression, but only if it is sufficiently clear and prominent to convey the qualifying information effectively, *i.e.,* it is both noticed and understood by consumers. ''[I]n many circumstances, reasonable consumers do not read the entirety of an ad or are directed away from the importance of the qualifying phrase by the acts or statements of the seller;'' [42] thus, a fine print disclosure at the bottom of a print advertisement or a brief video superscript in a television advertisement is unlikely to qualify a claim effectively.[43] Similarly, because consumers ''may glance only at the headline'' of an advertisement, ''accurate information in the text may not remedy a false headline.'' [44]

A representation, omission, or practice is material if it is likely to affect a consumer's choice of or conduct regarding a product.[45] If consumers are likely to have chosen differently but for the claim, the claim is likely to have caused consumer injury.[46] Express claims are presumed material.[47] Similarly, information regarding the cost of a product or service is presumed material.[48] Intentional implied claims,[49] and claims about the purpose and

[31] In a fully amortizing loan, the borrower pays principal and the full amount of interest that is due each month throughout the life of the loan.

[32] Nontraditional mortgages have included, for example, interest-only (I/O) loans and payment option ARMs (option ARMs). I/O loans involve an initial loan period in which the borrower pays only the interest accruing on the loan balance; after the initial period, the borrower either makes increased payments of principal and interest or remits a large payment, sometimes referred to as a ''balloon payment.'' Option ARMs offer borrowers several choices each month during the loan's introductory period, including a minimum payment that is smaller than the interest accruing on the principal. After the introductory period, the loan is recast, and the borrower's payments increase to amortize and repay principal and the adjustable interest rate over the remaining loan term. *See generally* FTC, Comment to Jennifer L. Johnson, Secretary, Board of Governors of the Federal Reserve System (Sept. 14, 2006), at 5–13 (providing comments on the home equity lending market and summarizing the Commission's May 2006 alternative mortgage workshop, Protecting Consumers in the New Mortgage Marketplace), *available at http://www.ftc.gov/opa/2006/09/fyi0661.shtm* (FTC Comment on Home Equity Lending and Alternative Mortgage Workshop).

[33] Lead generators are business entities that provide, in exchange for consideration, consumer information to a seller or telemarketer for use in the marketing of goods or services. *See, e.g., Quik Payday, Inc.* v. *Stork,* 549 F.3d 1302, 1304 (10th Cir. 2008); *FTC* v. *Connelly,* No. SA CV 06–701 DOC (RNBx), 2006 U.S. Dist. LEXIS 98263, at *11 (C.D. Cal. Dec. 20, 2006); *United States* v. *Ameriquest Mortg. Co.,* No. 8:07-cv-01304 CJC–MLG (C.D. Cal. 2007) (stipulated judgment and order).

[34] Rate aggregators regularly collect and publish rates and other information from numerous mortgage lenders, mortgage brokers, or other sources. Consumers typically can compare mortgage credit product terms for free by searching or viewing this information sorted by rate, loan amount, mortgage credit product, or other criteria. Rate aggregators may supply the lenders' or brokers' contact information, so the consumer can reach lenders or brokers directly, or they may act as lead generators and provide the consumer's information to lenders or brokers.

[35] This is particularly true for nontraditional mortgages, the terms of which are often unfamiliar to consumers. *See generally* FTC Comment on Home Equity Lending and Alternative Mortgage Workshop, *supra* note 32.

[36] *See* Deception Policy Statement, *supra* note 9, at 176–77.

[37] *See id.* at 175–183; *see also FTC* v. *Tashman,* 318 F.3d 1273, 1277 (11th Cir. 2003); *FTC* v. *Gill,* 265 F.3d 944, 950 (9th Cir. 2001); *FTC* v. *QT, Inc.,* 448 F. Supp. 2d 908, 957 (N.D. Ill. 2006), *aff'd,* 512 F.3d 858 (7th Cir. 2008); *FTC* v. *Think Achievement Corp.,* 144 F. Supp. 2d 993, 1009 (N.D. Ind. 2000); *FTC* v. *Minuteman Press,* 53 F. Supp. 2d 248, 258 (E.D.N.Y. 1998).

[38] *FTC* v. *QT, Inc.,* 448 F. Supp. 2d at 957.

[39] *See FTC* v. *Cyberspace.com, LLC,* 453 F.3d 1196, 1200 (9th Cir. 2006) (''A solicitation may be likely to mislead by virtue of the net impression it creates even though the solicitation also contains truthful disclosures.''); *FTC* v. *Gill,* 265 F.3d at 956 (affirming deception finding based on ''overall 'net impression' '' of statements); *Removatron Int'l Corp.* v. *FTC,* 884 F.2d 1489, 1497 (1st Cir. 1989) (advertisement was deceptive despite written qualification); *Thompson Med. Co.* v. *FTC,* 791 F.2d 189, 197 (DC Cir. 1986) (literally true statements may nonetheless be deceptive); *FTC* v. *QT, Inc.,* 448 F. Supp. 2d at 958.

[40] *See* Deception Policy Statement, *supra* note 9, at 177–79.

[41] *See id.* at 178.

[42] *Id.* at 181.

[43] *See, e.g., id.* at 180; *see also In re Stouffer Food Corp.,* 118 F.T.C. 746 (1994); *In re Kraft, Inc.,* 114 F.T.C. 40, 124 (1991), *aff'd,* 970 F.2d 311 (7th Cir. 1992).

[44] Deception Policy Statement, *supra* note 9, at 180.

[45] *See Kraft, Inc.* v. *FTC,* 970 F.2d 311, 322 (7th Cir. 1992); *In re Cliffdale Assocs., Inc.,* 103 F.T.C. 110, 165 (1984); *see also FTC* v. *SlimAmerica, Inc.,* 77 F. Supp. 2d 1263, 1272 (S.D. Fla. 1999).

[46] *See* Deception Policy Statement, *supra* note 9, at 183.

[47] *See FTC* v. *Pantron I Corp.,* 33 F.3d 1088, 1095–96 (9th Cir. 1994).

[48] *See In re Peacock Buick,* 86 F.T.C. 1532, 1562 (1975), *aff'd,* 553 F.2d 97 (4th Cir. 1977); Deception Policy Statement, *supra* note 9, at 182–83.

[49] *See In re Thompson Med. Co., Inc.,* 104 F.T.C. 648, 816 (1984), *aff'd,* 791 F.2d 189 (DC Cir. 1986).

efficacy of a product or service,[50] are also presumed to be material.

C. Other Mortgage Advertising Requirements [51]

In addition to the FTC Act, mortgage advertisers and marketers are subject to TILA (including the Home Ownership and Equity Protection Act (HOEPA) [52]) and Regulation Z, among other legal requirements.[53] In July 2008, the Federal Reserve Board issued many new mortgage advertising rules under Regulation Z; these rules took effect on October 1, 2009.[54]

The states also have enacted various laws or regulations that address aspects of deceptive mortgage advertising practices,[55] including laws implementing the Federal Secure and Fair Enforcement for Mortgage Licensing Act of 2008 (SAFE Act), which requires a nationwide licensing and/or registration system for mortgage loan originators.[56]

None of these Federal or state statutes or regulations duplicates the specificity and breadth of practices, and diversity of entities,[57] covered in the Final Rule.

D. Consumer Protection Problems in Mortgage Advertising

The FTC has substantial law enforcement experience with mortgage advertising practices. Since 1995, the Commission has brought 18 law enforcement actions against individuals or companies that allegedly engaged in unfair or deceptive practices or violations of TILA in mortgage advertising.[58] These actions have targeted large and small mortgage lenders, mortgage brokers, and others throughout the country.[59] The cases have involved advertisements and marketing materials in various media, including print advertisements,[60] unsolicited e-mails,[61] direct mail marketing,[62] Internet advertisements and Web sites,[63] telemarketing,[64] and in-person sales presentations.[65] The alleged violations have included deceptive claims—often made to subprime borrowers—about key terms and other aspects of the loans, such as:

- Misrepresentations of the loan amount or the amount of cash disbursed; [66]
- Claims for loans with specified terms, when no loans with those terms were available from the advertiser; [67]
- Claims of low ''teaser'' rates and payment amounts, without disclosing that the rates and payments would increase substantially after a limited period of time; [68]
- Misrepresentations that rates were fixed for the full term of the loan; [69]
- Misrepresentations about, or failure to adequately disclose, the existence of a prepayment penalty [70] or large balloon payment due at the end of the loan; [71]
- Claims about the monthly payment amounts that the borrower would owe, without disclosing the existence, cost, and terms of credit insurance products ''packed'' into the loan; [72]

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[50] *Novartis Corp.* v. *FTC,* 223 F.3d 783, 786–87 (DC Cir. 2000).

[51] This discussion is not intended as a comprehensive list of all potentially applicable mortgage advertising and marketing laws.

[52] 15 U.S.C. 1639.

[53] For a brief summary of the advertising requirements under TILA and Regulation Z, see MAP—Advertising, NPRM, 75 FR 60352, 60356–57 (Sept. 30, 2010). Other requirements include mortgage advertising mandates under the Helping Families Save Their Homes Act of 2009, Public Law 111–22, § 203, 123 Stat. 1632, 1643 (codified at 12 U.S.C. 5201 note), which HUD enforces, and advertising regulations and guidance for Federal Housing Administration (FHA) programs, which HUD has issued. For example, FHA-approved lenders or mortgagees must use their HUD-registered business names in advertisements and promotional materials for FHA programs and maintain copies of their materials for two years. *See* 75 FR 20718 (Apr. 20, 2010) (codified at 24 CFR 202). Lenders and others are permitted to distribute the FHA and fair housing logos in marketing materials to prospective FHA borrowers. HUD-approved mortgagees are required to establish procedures for compliance with FHA program requirements, including to avoid engaging in false or misrepresentative advertising. *See* HUD Mortgagee Letters 2009–02 and 2009–12, *available at http://www.hud.gov/offices/adm/hudclips/letters/mortgagee/2009ml.cfm; see also infra* note 124 (discussing NCUA advertising regulations).

[54] *See* 73 FR 44522, 44599–602 (July 30, 2008) (codified generally at 12 CFR 226.16, 226.24). The Board promulgated some of these rules under Section 129(*l*)(2) of TILA, 15 U.S.C. 1639(*l*)(2), and others under Section 105 of TILA, 15 U.S.C. 1604. The Commission has authority to obtain civil penalties for violations of rules that the Board promulgates under Section 129(*l*)(2), but does not have specific authority to obtain civil penalties for violations of rules that the Board promulgates under Section 105.

On August 16, 2010, the Board proposed additional protections and disclosure requirements for mortgage advertisements. *See* Press Release, Board, *Federal Reserve Board Proposes Enhanced Consumer Protections and Disclosures for Home Mortgage Transactions, available at http://www.federalreserve.gov/newsevents/press/bcreg/20100816e.htm* (Aug. 16, 2010). The Board subsequently announced that it does not expect to finalize this proposal prior to the July 2011 date for transfer of rulemaking authority to the CFPB. *See* Press Release, Board, *available at http://www.federalreserve.gov/newsevents/press/bcreg/20110201a.htm* (Feb. 1, 2010).

[55] State advertising requirements differ from one another in the practices, types of credit, and entities covered. *See, e.g.,* Me. Rev. Stat. Ann. tit. 9–A, 9–301 (2010); Md. Code Regs. 09.03.06.05 (2010); Nev. Rev. Stat. Ann. 645B.196 (2010); N.Y. Bank. Law 595–a (Consol. 2010).

[56] Title V of the Housing and Economic Recovery Act of 2008, Public Law 110–289 (2008) (codified at 12 U.S.C. 5101). After the SAFE Act's enactment on July 30, 2008, the states moved to enact or amend laws to license mortgage loan originators. *See generally http://www.csbs.org; see also* HUD SAFE Mortgage Licensing Act, *available at http://hud.gov/offices/hsg/rmra/safe/sfea.cfm.* State SAFE laws address advertising in different ways. *See, e.g.,* S.B. 948, 2009 Gen. Assem., Reg. Sess. (Conn. 2009); S.B. 1218, 25th Leg., 1st Spec. Sess. (Haw. 2009); H.B. 4011, 96th Gen. Assem., Reg. Sess. (Ill. 2009); A.B. 3816, 213th Leg., 2nd Ann. Sess. (N.J. 2009). The Federal banking agencies and Farm Credit Administration have also implemented a registration system and other requirements for mortgage loan originators, in connection with the SAFE Act. *See* 75 FR 51623 (Aug. 23, 2010); *see also* 76 FR 6185 (Feb. 3, 2011).

[57] *See infra* Part III.B.4.

[58] *See* Table B—List of FTC Mortgage Advertising Enforcement Actions, *infra.*

[59] *See, e.g., FTC* v. *Mortgages Para Hispanos.com Corp.,* No. 4:06-cv-19 (E.D. Tex. 2006); *FTC* v. *Ranney,* No. 04–F–1065 (MJW) (D. Colo. 2004); *FTC* v. *Chase Fin. Funding, Inc.,* No. SACV04–549 GLT (ANx) (C.D. Cal. 2004); *FTC* v. *OSI Fin. Servs., Inc.,* No. 02–C–5078 (N.D. Ill. 2002); *United States* v. *Mercantile Mortg. Co.,* No. 02–C–5079 (N.D. Ill. 2002); *FTC* v. *Assocs. First Capital Corp.,* No. 1:01–00606 JTC (N.D. Ga. 2001); *FTC* v. *First Alliance Mortg. Co.,* No. SACV 00–964 DOC (EEx) (C.D. Cal. 2000).

[60] *See, e.g., FTC* v. *Safe Harbour Found. of Fla., Inc.,* No. 08–C–1185 (N.D. Ill. 2008); *FTC* v. *Ranney,* No. 04–F–1065 (MJW) (D. Colo. 2004).

[61] *See, e.g., FTC* v. *30 Minute Mortg., Inc.,* No. 03–60021 (S.D. Fla. 2003); *FTC* v. *Chase Fin. Funding, Inc.,* No. SACV04–549 GLT (ANx) (C.D. Cal. 2004).

[62] *See, e.g., In re Am. Nationwide Mortg. Co.,* F.T.C. Dkt. No. C–4249 (2009); *In re Michael Gendrolis,* F.T.C. Dkt. No. C–4248 (2009); *FTC* v. *Chase Fin. Funding, Inc.,* No. SACV04–549 GLT (ANx) (C.D. Cal. 2004); *FTC* v. *First Alliance Mortg. Co.,* No. SACV 00–964 DOC (EEx) (C.D. Cal. 2000); *United States* v. *Unicor Funding, Inc.,* No. SACV99–1228 (C.D. Cal. 1999); *FTC* v. *Assocs. First Capital Corp.,* No. 1:01–00606 JTC (N.D. Ga. 2001); *FTC* v. *Safe Harbour Found. of Fla., Inc.,* No. 08–C–1185 (N.D. Ill. 2008); *In re FirstPlus Fin. Group, Inc.,* F.T.C. Dkt. No. C–3984 (2000).

[63] *See, e.g., In re Shiva Venture Group, Inc.,* F.T.C. Dkt. No. C–4250 (2009); *FTC* v. *Ranney,* No. 04–F–1065 (MJW) (D. Colo. 2004).

[64] *See, e.g., FTC* v. *First Alliance Mortg. Co.,* No. SACV 00–964 DOC (EEx) (C.D. Cal. 2000).

[65] *See, e.g., id.; FTC* v. *Assocs. First Capital Corp.,* No. 1:01–00606 JTC (N.D. Ga. 2001).

[66] *See, e.g., id.; FTC* v. *OSI Fin. Servs., Inc.,* No. 02–C–5078 (N.D. Ill. 2002); *United States* v. *Mercantile Mortg. Co.,* No. 02–C–5079 (N.D. Ill. 2002); *In re FirstPlus Fin. Group, Inc.,* F.T.C. Dkt. No. C–3984 (2000).

[67] *See, e.g., FTC* v. *30 Minute Mortg., Inc.,* No. 03–60021 (S.D. Fla. 2003).

[68] *See, e.g., In re Am. Nationwide Mortg. Co.,* F.T.C. Dkt. No. C–4249 (2009); *In re Shiva Venture Group, Inc.,* F.T.C. Dkt. No. C–4250 (2009); *In re Michael Gendrolis,* F.T.C. Dkt. No. C–4248 (2009). The FTC also sent over 200 warning letters in 2007 to mortgage lenders, mortgage brokers, and media outlets regarding mortgage advertising claims, including teaser rates, that could be deceptive or violate TILA. *See* Press Release, FTC, *FTC Warns Mortgage Advertisers and Media That Ads May Be Deceptive* (Sept. 11, 2007), *available at http://www.ftc.gov/opa/2007/09/mortsurf.shtm.*

[69] *See, e.g., In re Am. Nationwide Mortg. Co.,* F.T.C. Dkt. No. C–4249 (2009).

[70] *See, e.g., FTC* v. *Chase Fin. Funding, Inc.,* No. SACV04–549 (GLT (ANx) C.D. Cal. 2004); *FTC* v. *OSI Fin. Servs., Inc.,* No. 02–C–5078 (N.D. Ill. 2002).

[71] *See, e.g., FTC* v. *OSI Fin. Servs., Inc.,* No. 02–C–5078 (N.D. Ill. 2002).

[72] *See, e.g., FTC* v. *Assocs. First Capital Corp.,* No. 1:01–00606 JTC (N.D. Ga. 2001). The complaint in that case alleged, among other things, that the defendants included credit insurance products in the loan package without the borrower's knowledge.

• Claims that the loans were amortizing, when, in fact, they involved interest-only transactions; [73]
• Claims of mortgage payment amounts that failed to include loan fees and closing costs of the kind typically included in loan amounts; [74]
• False or misleading savings claims in high loan-to-value loans; [75]
• False or misleading claims regarding the terms or nature of interest rate lock-ins; [76]
• False claims that an entity was a national mortgage lender; [77]
• Failure to disclose adequately that the advertiser, not the consumer's current lender, was offering the mortgage; [78] and
• False or misleading claims that consumers were ''pre-approved'' for mortgage loans.[79]

Numerous states also have brought enforcement actions under state laws alleging deceptive mortgage advertising and marketing, challenging misrepresentations about: (1) The lack of closing costs; [80] (2) low fixed or teaser rates or payments; [81] (3) the advertiser's affiliation with the consumer's current lender; [82] (4) the availability of government grants for home repairs; [83] (5) the savings available by refinancing; [84] (6) reverse mortgage terms and government affiliation; [85] (7) the availability of rates compared to competitors; [86] and (8) the advertiser's self-description as a ''bank.'' [87]

III. Discussion of the Rule

The Commission's law enforcement experience, state law enforcement activities, and the comments received in response to the ANPR and NPRM demonstrate that deceptive claims in mortgage advertising and marketing pose a risk of significant harm to consumers. The FTC believes that this Final Rule prohibiting misrepresentations in mortgage advertising will enable the agency to protect prospective borrowers by establishing clearer standards, increasing the efficiency of law enforcement, and deterring unlawful behavior. In particular, as noted above, the Commission and CFPB will be able to seek civil penalties for violations of the Final Rule, thereby enhancing the deterrent effect of law enforcement actions.[88] Civil penalties may be an especially useful deterrent in cases in which consumer redress or disgorgement is not available or not feasible. States also will be able to enforce the Rule and seek civil penalties, which will further help deter deception in mortgage advertising and marketing.

A. Section 321.1: Scope

Section 321.1 states that the Final Rule implements the mandate of the Omnibus Appropriations Act, as clarified by the Credit CARD Act.[89] These statutes direct the Commission to commence a rulemaking proceeding to issue rules that ''relate to unfair or deceptive acts or practices regarding mortgage loans''.[90] The Credit CARD Act limits the Commission's rulemaking authority to persons over whom the FTC has jurisdiction under the FTC Act, as discussed above.

B. Section 321.2: Definitions

1. Sections 321.2(e): ''Mortgage Credit Product;'' 321.2(c): ''Credit;'' 321.2(d): ''Dwelling;'' and 321.2(b): ''Consumer''

The Final Rule, like the proposed rule, prohibits any person from ''making any material misrepresentation * * * in any commercial communication, regarding any term of any mortgage credit product'' Section 321.2(e) of the Rule adopts the proposed rule's definition of ''mortgage credit product.'' To fall within that definition, the product must meet three criteria. First, it must be a form of ''credit.'' The term ''credit'' is defined in § 321.2(c) as ''the right to defer payment of debt or to incur debt and defer its payment.'' [91] Second, the credit must be secured by either real property or a dwelling.[92] The proposed rule defined ''dwellin'' as ''a

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[73] *See, e.g., FTC* v. *Capital City Mortg. Corp.,* No. 1:98CV237 (D.D.C. 1998).

[74] *See, e.g., FTC* v. *Assocs. First Capital Corp.,* No. 1:01–00606 JTC (N.D. Ga. 2001). In addition, in making these statements, the lender allegedly did not reveal that the loans were interest-only and that borrowers would owe the entire principal amount in a large balloon payment at the end of the loan term.

[75] *See, e.g., In re FirstPlus Fin. Group, Inc.,* F.T.C. Dkt. No. C–3984 (2000).

[76] *See, e.g., In re Lomas Mortg. U.S.A., Inc.,* 116 F.T.C. 1062 (1993).

[77] *See, e.g., FTC* v. *30 Minute Mortg. Inc.,* No. 03–60021 (S.D. Fla. 2003).

[78] *See, e.g., In re Michael Gendrolis,* F.T.C. Dkt. No. C–4248 (2009).

[79] *See, e.g., United States* v. *Unicor Funding, Inc.,* No. SACV99–1228 (C.D. Cal. 1999).

[80] *See, e.g., In re Lenox Fin. Mortg., LLC,* No. 2007–017383 (Ariz. Sup. Ct. 2007) (assurance of discontinuance), *available at http://www.azag.gov/press_releases/sept/2007/LenoxFinancialAssurance&Approval.pdf.*

[81] *See, e.g., State* v. *Lifetime Fin., Inc.,* No. LC080829 (Cal. Super. Ct. 2008), *available at http://www.ag.ca.gov/cms_attachments/press/pdfs/n1533_complaint_for_civil_penalties.pdf; State* v. *Green River Mortg.,* No. 2009CV89 (Colo. Dist. Ct. 2009), press release *available at http://www.coloradoattorneygeneral.gov/press/news/2009/05/12/attorney_general_announces_settlement_barring_mortgage_broker_operating_inside; State* v. *One Source Mortg., Inc.,* No. 07CH34450 (Ill. Cir. Ct. 2007), press release *available at http://www.ag.state.il.us/pressroom/2007_11/20071126.html; In re Paramount Equity Mortg., Inc.,* No. C–07–405–08–SC01 (Wash. Dept of Fin. Inst. 2008), *available at http://www.dfi.wa.gov/CS%20Orders/C-07-405-08-SC01.pdf.*

[82] *See, e.g., State* v. *Sroka,* No. 2007–16–61 (Idaho Dept of Fin. 2007), *available at http://finance.idaho.gov/ConsumerFinance//Actions/Administrative/2007-16-61_Sroka_Terrazas_Order_Cease_and_/Desist.pdf; State* v. *Sage,* No. 2007–8–45 (Idaho Dept of Fin. 2007), press release *available at http://finance.idaho.gov/PR/2007/PressRel_Sage_CDOrder.pdf; State* v. *Goldstar Home Mortg.,* No. 09AB–CV02310 (Mo. Cir. Ct. 2009) press release *available at http://ago.mo.gov/newsreleases/2009/AG_Koster_files_lawsuits_after_mortgage_fraud/.*

[83] *See, e.g., State* v. *Ellis,* No. 07CH34451 (Ill. Cir. Ct. 2007), press release *available at http://www.ag.state.il.us/pressroom/2007_11/20071126.html.*

[84] *See, e.g., State* v. *Advantage Mortg. Serv., Inc.,* No. C107 (Neb. Dist. Ct. 2007), *available at http://www.ndbf.ne.gov/forms//Advantage_Mortgage_/Complaint.pdf.*

[85] *See, e.g., State* v. *Upstate Capital, Inc.,* No. 08–036 (N.Y. Office of Att'y Gen. 2008), press release *available at http://www.ag.ny.gov/media_center/2008/apr/apr24a_08.html.* Other cases have charged other entities with deceptive advertising, including using the words ''United States of America'' or an image of the Statute of Liberty, when the advertiser had no affiliation with the government (*see State* v. *Island Equity Mortg., Inc.,* (N.Y. Banking Dept 2007), *available at http://www.banking./state.ny.us//ea070412.htm*), and falsely representing that the advertisers were affiliated with a government program (*see In re Assurity Fin. Servs., LLC,* No. C–07–320–08–SC01 (Wash. Dept of Fin. Inst. 2008), *available at http://www.dfi.wa.gov/CS%20Orders/C-07-fxsp0;320-08-SC01.pdf*); *see also State* v. *Am. Advisors Group, Inc.,* No. 2010CH00158 (Ill. Cir. Ct. filed Feb. 8, 2010), *available at http://www.scribd.com/doc/33748621/People-Illinois-v-American-Advisors-Group-Complaint; State* v. *Hartland Mortg. Ctrs., Inc.,* No. 10CH05339 (Ill. Cir. Ct. filed Feb. 8, 2010), press release *available at http://www.ag.state.il.us/pressroom/2010_02/20100208.html*). HUD also has taken action against two lenders for deceptive advertising of HUD-insured reverse mortgages. *See* Press Release, HUD, *FHA Withdraws Three Lenders, Suspends a Fourth* (Feb. 25, 2010), *available at http://portal.hud.gov/portal/page/portal/HUD/press/press_releases_media_advisories/2010/HUDNo.10–019.*

[86] *See, e.g., In re Paramount Equity Mortg., Inc.,* No. C–07–405–08–SC01 (Wash. Dept of Fin. Inst. 2008), *available at http://www.dfi.wa.gov/CS%20Orders/C-07-405-08-SC01.pdf.*

[87] *See, e.g., id.*

[88] *See supra* Part I.A.4.

[89] Section 321.1 of the Final Rule merely simplifies the language that was used in this section of the proposed rule.

[90] *See* Omnibus Appropriations Act § 626(a); Credit CARD Act § 511(a)(1)(B).

[91] Final Rule § 321.2(c). This definition is largely based on that in Regulation Z. *See* 12 CFR 226.2(a)(14). One difference, however, is that the Final Rule covers all shared equity and shared appreciation mortgages offered to consumers, whereas certain types of such mortgages may not be considered ''credit'' under Regulation Z. *See* Regulation Z Commentary, 12 CFR 226.2(a)(14)–1 and 226.17(c)(1)–11, Supp. I. In shared equity and shared appreciation mortgages, the consumer receives cash, a lower interest rate, or other favorable terms in exchange for agreeing to share with the lender or other company all or part of the consumer's total equity or the appreciation in the consumer's equity when the loan comes due, or at some other point during the loan.

[92] Note that some aspects of the Regulation Z advertising rules apply to credit secured by a dwelling but not credit secured by real property. *See* 12 CFR 226.16(d); 12 CFR 226.24(f) and (i).

residential structure that contains one to four units, whether or not that structure is attached to real property'' and includes ''an individual condominium unit, cooperative unit, mobile home, and trailer, if it is used as a residence''.[93] The Final Rule adds the term ''manufactured home'' to the definition to ensure that the Rule's protections extend to consumers whose homes are constructed at a site (*e.g.,* factory floor) other than the final location of the structure.[94] Third, the credit must be ''offered or extended to a consumer primarily for personal, family, or household purposes.'' ''Consumer'' is defined in § 321.2(b) as a ''natural person to whom a mortgage credit product is offered or extended''.[95] ''Personal, family, or household purposes'' includes, for example, home purchase or improvement loans, debt consolidation or home equity transactions, credit for medical or dental expenses, and educational loans. Credit offered or extended primarily for a business purpose would not be covered, even if a lien on a dwelling secures the loan. The determination of whether the credit is ''primarily'' for personal, family, or household use rather than ''primarily'' for business use requires an assessment of all of the facts of a particular transaction.

''Mortgage credit product'' is defined to include ''credit'' that is either closed-end (*e.g.,* installment financing)[96] or open-end (*e.g.,* HELOCs).[97] The term includes traditional, fully amortizing loans and nontraditional or alternative financing.[98] ''Mortgage credit product'' further includes both forward and reverse mortgages.[99] The Commission did not receive any comments on the above-defined terms or concepts.

2. Section 321.2(g): ''Term''

The Final Rule applies to commercial communications regarding any ''term'' of any mortgage credit product. It adopts, without change, the proposed rule's broad definition of ''term,'' which means ''any of the fees, costs, obligations, or characteristics of, or associated with, the product.'' The definition also ''includes any of the conditions on or related to the availability of the product.'' ''Term'' is intended to cover all aspects of a mortgage credit product without exception. The Commission did not receive any comments on this definition.

3. Section 321.2(a): ''Commercial Communication''

As discussed above, the Rule applies to claims made in any ''commercial communication.'' The definition of that term in the Final Rule, which includes only non-substantive modifications to the proposed rule's definition, provides that a ''commercial communication'' is:

> any written or oral statement, illustration, or depiction, whether in English or any other language, that is designed to effect or create interest in purchasing goods or services, whether it appears on or in a label, package, package insert, radio, television, cable television, brochure, newspaper, magazine, pamphlet, leaflet, circular, mailer, book insert, free standing insert, letter, catalogue, poster, chart, billboard, public transit card, point of purchase display, film, slide, audio program transmitted over a telephone system, telemarketing script, onhold script, upsell script, training materials provided to telemarketing firms, program-length commercial (''infomercial''), the Internet, cellular network, or any other medium. Promotional materials and items and Web pages are included in the term ''commercial communication''.[100]

This definition encompasses commercial communications[101] in any medium and in any language.[102]

The Commission received a few comments relating to the proposed definition of ''commercial communication.''[103] One commenter suggested that the Rule provide a safe harbor or alternative disclosure mechanism for commercial communications delivered by radio.[104] The commenter expressed concern that any disclosures that may be required to comply with the Rule would require airtime in addition to that used for the advertisement itself.[105] The Commission declines to make this change because the Final Rule does not impose any affirmative disclosure requirements but rather prohibits misrepresentations.

Another commenter stated that the combination of the risk of liability and the recordkeeping requirements under the proposed rule would discourage real estate agents and brokers from providing general mortgage-related information to clients or prospective clients.[106] This commenter suggested revising the definition of ''commercial communication'' to address this issue, or in the alternative, narrowing the recordkeeping requirements and adding a ''good-faith exception''.[107] Specifically, the commenter stated that the definition of ''commercial communication'' is overbroad because it goes beyond mortgage advertising to encompass communications about any goods or services.[108] Thus, according to the commenter, the Commission should narrow the definition by replacing the phrase ''purchasing goods or services'' with ''obtaining a particular mortgage credit product''.[109] The Commission declines to revise the definition as suggested. The definition is not overbroad when viewed in the context of the Final Rule. The prohibition against misrepresentations in § 321.3 does not apply to all commercial communications; rather, it applies to any commercial communication ''regarding any term of any mortgage

[93] Final Rule § 321.2(d). Both primary and secondary (or vacation) homes are covered if they are used as collateral for the loan. The term ''dwelling'' is based on that used in TILA and Regulation Z. *See* 15 U.S.C. 1602(v) and 12 CFR 226.2(a)(19).

[94] The Final Rule also includes a non-substantive revision to the last sentence of the proposed definition. These changes conform the Rule's definition of ''dwelling'' more closely with the definition of the same term used in the Commission's MARS Rule. *See* 12 CFR 322.2(e).

[95] Final Rule § 321.2(b). Thus, credit offered or extended to an organization or governmental entity is not covered.

[96] Construction financing and other forms of credit in which multiple advances may be common are also covered. In these transactions, some or all of the advances may be estimates (as to their dollar amount or the date on which they will occur)

[97] The Rule applies the same standards to closed-end and open-end credit. In contrast, the Regulation Z advertising provisions (including restrictions on deceptive claims) are different for closed-end and open-end credit. *See, e.g.,* 12 CFR 226.24(i) and 12 CFR 226.16(d)(5) and (f).

[98] Covered alternative loans include, for example, hybrid ARMs, teaser rate or teaser payment loans with low rates or payments that expire after a short period, interest-only and balloon mortgages, negative amortization mortgages, shared equity and shared appreciation mortgages, buydowns, and payment option ARMs.

[99] *See supra* note 30 and accompanying text.

[100] Proposed § 321.2(a) used the term ''verbal'' where the Final Rule uses the term ''oral.'' The Final Rule also includes non-substantive revisions to the last sentence of the proposed definition. These changes conform the Rule's definition of ''commercial communication'' more closely with the definition of the same term used in the Commission's MARS Rule. *See* 16 CFR 322.2(c).

[101] Based on this definition, the Rule has broader applicability than the Board's advertising rules in Regulation Z, which specifically exempt personal contacts, communications about existing accounts, and certain educational materials. *See* Regulation Z Commentary, 12 CFR 226.2(a)(2), Supp. I.

[102] *See also infra* Part III.C.5.

[103] CMC/MBA at 5–6; HSA at 2–6; NRMLA at 4. The Commission notes that one commenter suggested a ''Good Housekeeping Seal of Approval'' concept for online mortgage calculators, generally commenting that the Federal Government should make certain HUD-certified mortgage evaluation technology widely available to consumers on Federal agency Web sites. CMC/MBA at 5–6. This commenter also requested that the Commission postpone this rulemaking and, instead, engage in a coordinated rulemaking with the CFPB. *Id.* at 1.

[104] NRMLA at 4.

[105] *Id.*

[106] HSA at 2–6.

[107] *See infra* Part III.E.2.

[108] HSA at 3.

[109] *Id.* at 5

credit product.'' [110] Thus, the Rule is appropriately limited to mortgage-related communications.

The commenter also suggested adding an exception at the end of the definition for certain informational or educational statements that real estate brokers and agents may make.[111] With respect to this suggestion, the Commission notes that a communication is not ''commercial'' unless it ''is designed to effect or create interest in purchasing goods or services.'' Thus, a statement that is purely informational and is not designed to effect or create interest in purchasing goods or services would not be covered by the Rule.[112] The Commission believes that the language in the definition of ''commercial communication,'' which also appears in the Commission's MARS Rule [113] and several advertising-related orders,[114] provides an appropriate dividing line between commercial and noncommercial communications.

4. Section 321.2(f): ''Person''

The Final Rule adopts the proposed rule's definition of ''person,'' which means ''any individual, group, unincorporated association, limited or general partnership, corporation, or other business entity''.[115] Thus, any individual or entity that makes representations in a commercial communication about a mortgage credit product is a ''person'' for purposes of the Rule. The types of entities the Rule covers generally include mortgage lenders, mortgage brokers, mortgage servicers, real estate agents and brokers, advertising agencies, home builders, lead generators, rate aggregators, and others within the Commission's jurisdiction who engage in commercial communications concerning mortgage credit products.[116] As mandated by the Omnibus Appropriations Act, the Rule does not cover individuals and entities that are excluded from the FTC's jurisdiction.

The Commission received numerous comments regarding whom the Final Rule should cover. One commenter representing several groups of state financial institution regulators supported broad coverage without exemptions for any non-depository institutions beyond those that are exempt under the FTC Act. In particular, this commenter advocated for coverage of subsidiaries or affiliates of banks and thrifts.[117] Another commenter requested an exemption for advertising agencies, stating that the responsibility for compliance with the Rule should fall on the lenders, brokers, or agents promoting the products.[118] Another commenter similarly requested an exemption from the Rule for real estate agents and brokers, stating that they provide incidental or *de minimis* advice about mortgage lending simply to inform consumers of their options and not to market any particular mortgage credit product.[119] The commenter stated, however, that the Rule should apply to a real estate professional that is compensated as a loan originator or by a loan originator for this service.[120] Another commenter, raising concerns about the Rule's impact on real estate agents and brokers, requested other specific amendments to the Rule that would effectively exempt such persons from the Rule.[121]

The Commission declines to exempt advertising agencies or real estate professionals from the Final Rule. These types of individuals and entities, as well as others, can make direct or indirect misrepresentations to consumers about mortgage credit products, causing consumers harm.[122] Accordingly, the Final Rule must cover misrepresentations by each of these categories of persons to protect consumers from deception. In addition, the Commission notes that the Rule covers any person, including an advertising agency [123] or real estate professional, who makes representations to consumers about a mortgage credit product only to the same extent that the person would be covered and subject to liability under Section 5 of the FTC Act.

Most of the submitted comments advocating particular exemptions from the Rule were from or on behalf of state-chartered credit unions. Some of these commenters urged the Commission to exclude state-chartered credit unions because existing regulations already cover them [124] or because Federally-chartered credit unions would not be covered by the Rule.[125] Some commenters suggested, in the alternative, that the Commission include state-chartered credit unions under the Rule but ''deem'' them in compliance if, for example, they comply with other current and future mortgage regulations.[126]

Because of the importance of protecting consumers from deceptive mortgage advertising, regardless of the type of entity engaged in the deception, the Final Rule does not grant any exemptions for institutions within the FTC's jurisdiction under the FTC Act. Consistent with the FTC's jurisdiction, the Final Rule covers all credit unions except Federally-chartered credit unions.[127] The Rule simply prohibits

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[110] To provide clarity and guidance, §§ 321.3(a)–(s) of the Final Rule set forth a non-exclusive list of such misrepresentations.

[111] HSA at 5. Specifically, the commenter suggested adding the following language: ''Informational or educational statements made by real estate brokers and agents in an effort to explain or illustrate concepts relating to mortgage credit products generally, and not designed to advertise a particular mortgage credit product, are not included in the phrase 'commercial communication.' '' *Id.*

[112] Note that commercial communications include promotional materials even if they are portrayed as educational in nature. For example, the term encompasses program-length commercials (''infomercials'') and other promotional items. *See* Final Rule § 321.2(a); *see also supra* note 101.

[113] *See* 12 CFR 322.2(c).

[114] *See, e.g., FTC* v. *Xacta 3000, Inc.,* No. 09–CV–0399 (D. N.J. 2010); *In re Novartis Corp.,* F.T.C. Dkt No. 9279 (1999).

[115] Final Rule § 321.2(f). This definition is based on that used in Regulation Z. *See* 12 CFR 226.2(a)(22).

[116] *See supra* notes 33–34 and accompanying text.

[117] CSBS/ACSSS/NACCA at 1.

[118] Gorbey at 1.

[119] NAR at 1–2.

[120] *Id.* at 2.

[121] *See generally* HSA; *see also supra* Part III.B.3 and *infra* Part III.E.2.

[122] For example, a company may make a representation indirectly to consumers by providing another with materials containing deceptive claims that the recipient, in turn, provides to consumers. The Commission has held companies that provide others with such deceptive ''means and instrumentalities'' liable under Section 5 of the FTC Act. *See, e.g., In re Castrol N. Am., Inc.,* 128 F.T.C. 689 (1999); *In re Shell Chem. Co.,* 128 F.T.C. 749 (1999); *Waltham Watch Co.* v. *FTC,* 318 F.2d 28, 32 (7th Cir. 1963) (''Those who put into the hands of others the means by which they may mislead the public, are themselves guilty of a violation of Section 5.* * *'').

[123] Under the FTC Act, an advertising agency is liable for the claims it made to consumers if it was ''an active participant in preparing the violative advertisements'' and ''must have known or had reason to know'' the advertisements were deceptive. *See, e.g., In re Bristol-Myers Co.,* 102 F.T.C. 21, 364 (1983). The Commission, for example, has brought cases alleging that advertising agencies violated Section 5 of the FTC Act by making deceptive representations of automobile lease or credit terms in advertisements. *See In re Bozell Worldwide, Inc.,* 127 F.T.C. 1 (1999); *In re Martin Adver., Inc.,* 127 F.T.C. 10 (1999); *In re Foote, Cone & Belding Adver., Inc.,* 125 F.T.C. 528 (1998); *In re Grey Adver., Inc.,* 125 F.T.C. 548 (1998); *In re Rubin Postaer and Assocs., Inc.,* 125 F.T.C. 572 (1998).

[124] *See* CUAO at 1; PCUA at 1; WCUL at 1; *see also* NASCUS at 1; CUNA at 1; OMNI at 1. Federally-insured credit unions are prohibited generally by NCUA's regulations from using advertising or promotional material that contains inaccurate, misleading, or deceptive claims concerning their products, services, or financial condition. *See* 12 CFR 740.2. Some commenters noted that the advertising practices of state-chartered credit unions that are Federally insured are subject to existing NCUA advertising regulations. *See* NASCUS at 2; CUNA at 2; *see generally* BECU.

[125] *See* BECU at 3; PCUA at 2.

[126] *See, e.g.,* CUAO at 1; WCUL at 1; CUNA at 1.

[127] The Commission's jurisdiction excludes Federally-chartered credit unions but includes all state-chartered credit unions and nonfederally-chartered credit unions in Puerto Rico and other U.S. territories (whether or not they have Federal insurance). *See* 15 U.S.C. 45(a)(2), 57a(f)(4); 12 U.S.C. 1766, 1786; *see also* FTC, Disclosures for Non-Federally Insured Depository Institutions

material misrepresentations and does not conflict with the regulations of other Federal agencies.[128] Nor does the Commission believe that prohibiting any person, including nonfederally-chartered credit unions, real estate professionals, advertising agencies, and others, from making deceptive claims would put them at a competitive disadvantage. Many entities not covered by the Final Rule are subject to general Federal and state truth-in-advertising laws, including state ''little FTC Acts'' that reflect the prohibition against unfair or deceptive acts or practices found in Section 5 of the FTC Act. Moreover, compliance with the Final Rule's recordkeeping obligations should not be overly burdensome, because it requires the retention of documents that many covered persons already retain in the ordinary course of business.[129]

C. Section 321.3: Prohibited Representations

1. Final Rule

The Final Rule adopts, without change, proposed § 321.3, which prohibits *any* material misrepresentation, whether made expressly or by implication, in any commercial communication, regarding any term of any mortgage credit product.[130] The Commission concludes that this provision is necessary and appropriate to protect consumers from deceptive practices.

To provide clarity and guidance, §§ 321.3(a)–(s) also set forth a non-exclusive list of misrepresentations that would violate the Final Rule.[131] The list includes the most common misrepresentations that have been challenged in Federal and state enforcement actions over the past several years. The list is intended to provide illustrative guidance about the kinds of claims that are prohibited, thereby promoting compliance.

Section 321.3(a) covers misrepresentations about interest charged for the product, including, but not limited to, misrepresentations about (1) the amount of interest owed each month that is included in the consumer's payments, loan amount, or total amount due; or (2) the interest owed each month that is not included in the payments but is instead added to the total amount due.[132]

Section 321.3(b) bars misrepresentations about the APR, simple annual rate, periodic rate, or any other rate, including, but not limited to, a payment rate.[133] The Commission has challenged deceptive rate claims in many cases, some of which included allegations that originators understated the true rate by more than 100 percent.[134]

Section 321.3(c) bars misrepresentations about the existence, nature, or amount of fees or costs associated with any mortgage credit product. It also prohibits false or misleading claims that no fees are charged, for example, if the fees and costs in fact are incorporated in the loan amount or total amount due from the consumer.[135] This provision covers fees and costs imposed at any point during the life of the loan.

Section 321.3(d) covers misrepresentations about terms associated with additional products or features that may be sold in conjunction with a mortgage credit product.[136] Thus, this provision covers claims made in cross-selling other products or features in mortgage credit product offers, including, but not limited to, credit insurance, credit disability insurance, car clubs, or other ''add-ons'' to the loan.[137]

Section 321.3(e) covers misrepresentations relating to the taxes or insurance associated with a mortgage credit product, for example, claims about whether tax or insurance charges are included in the overall monthly payment or must be paid separately.[138]

Section 321.3(f) bars misrepresentations about the existence or amount of any penalty for making prepayments on the mortgage.[139]

Section 321.3(g) prohibits misrepresentations pertaining to the variability of interest, payments, or other terms of mortgage credit products, including, but not limited to, misrepresentations using the word ''fixed'' when terms are, in fact, variable or limited in duration.[140]

Under the Federal Deposit Insurance Corporation Improvement Act (FDICIA), Final Rule, 75 FR 31682, 31683 (June 4, 2010); NCUA, Frequently Asked Questions, *http://www.ncua.gov/About/FAQ.aspx* (last visited Apr. 4, 2011); NASCUS, State Credit Union Facts & Figures, *http://www.nascus.org/facts-figures/index.php* (last visited Apr. 4, 2011).

[128] In other words, nothing in the other agencies' regulations would require entities to make deceptive claims that the Final Rule prohibits.

[129] *See infra* Part III.E.

[130] As noted above, a claim is deceptive under Section 5 of the FTC Act if there is a ''representation, omission, or practice that * * * is likely to mislead consumers acting reasonably under the circumstances, and * * * the representation, omission, or practice is material.'' *Cliffdale,* 103 F.T.C. at 165. Information is ''material'' if it is ''likely to affect [a consumer's] choice of, or conduct regarding, a product.'' *Id.; see also Novartis,* 223 F.3d. at 786; *supra* notes 45–50 and accompanying text. The types of information in the representations specified in § 321.3 of the Rule involve matters central to consumers' decisions about mortgage credit products. Thus, the types of misrepresentations the Rule prohibits are ''material.''

[131] In the NPRM, the Commission informally grouped the list of misrepresentations into three broad categories to facilitate discussion. Neither the SBP nor the Final Rule uses the three categories.

[132] In the NPRM, the Commission also addressed negative amortization products in connection with § 321.3(a). After further reflection, the Commission believes it is more appropriate to address this topic in connection with § 321.3(i). *See infra* note 144 and accompanying text.

[133] A payment rate is the rate used to calculate the consumer's monthly payment amount and is not necessarily the same as the interest rate. If the payment rate is less than the interest rate, the consumer's monthly payment amount does not include the full interest owed each month; the difference between the amount the consumer pays and the amount the consumer owes is added to the total amount due from the consumer.

The Rule prohibits misrepresentations about payment rates and any other rate, for both closed-end and open-end credit. In comparison, Regulation Z bans advertising of payment rates, effective rates, and qualifying rates for closed-end credit, *see* Regulation Z Commentary, 12 CFR 226.24(c)–2, Supp. I, but does not ban advertising of such rates for open-end credit.

[134] *See FTC* v. *Safe Harbour Found. of Fla., Inc.,* No. 08–C–1185 (N.D. Ill. 2008) (severely understated APR); *see also In re Am. Nationwide Mortg. Co.,* F.T.C. Dkt. No. C–4249 (2009); *In re Shiva Venture Group, Inc.,* F.T.C. Dkt. No. C–4250 (2009); *In re Michael Gendrolis,* F.T.C. Dkt. No. C–4248 (2009).

In the NPRM, the Commission addressed savings rates in connection with § 321.3(b). After further reflection, the Commission believes it is more appropriate address this topic in connection with § 321.3(h). *See infra* notes 141–43 and accompanying text.

[135] *See, e.g., FTC* v. *Ranney,* No. 04–F–1065 (MJW) (D. Colo. 2004); *FTC* v. *Chase Fin. Funding, Inc.,* No. SACV04–549 GLT (ANx) (C.D. Cal. 2004) (allegedly promoting ''NO COSTS * * * NO KIDDING'' and ''no-fee'' loans, when in fact, the loans included such charges); *see also FTC* v. *Assocs. First Capital Corp.,* No. 1:01–00606 JTC (N.D. Ga. 2001); *FTC* v. *First Alliance Mortg. Co.,* No. SACV 00–964 DOC (EEx) (C.D. Cal. 2000).

[136] The Commission has challenged such misrepresentations in its law enforcement actions. *See, e.g., FTC* v. *Assocs. First Capital Corp.,* No. 1:01–00606 JTC (N.D. Ga. 2001).

[137] The Commission has alleged deceptive practices involving add-ons to non-mortgage personal loans as well. *See FTC* v. *Stewart Fin. Co. Holdings,* Civ. No. 1:03–CV–2648–JTC (N.D. Ga. 2003).

[138] Commission enforcement actions have challenged deceptive claims that the advertised monthly payment included tax and insurance charges, when in fact it did not. *See, e.g., United States* v. *Mercantile Mortg. Co.,* No. 02–C–5079 (N.D. Ill. 2002); *FTC* v. *OSI Fin. Servs., Inc.,* No. 02–C–5078 (N.D. Ill. 2002); *FTC* v. *Assocs. First Capital Corp.,* No. 1:01–00606 JTC (N.D. Ga. 2001).

[139] The Commission has brought several cases against entities that allegedly deceived consumers about prepayment penalties. *See, e.g., United States* v. *Mercantile Mortg. Co.,* No. 02–C–5079 (N.D. Ill. 2002); *FTC* v. *OSI Fin. Servs.,* Inc., No. 02–C–5078 (N.D. Ill. 2002); *FTC* v. *Chase Fin. Funding Inc.,* No. SACV 04–549 GLT (ANx) (C.D. Cal. 2004); *see also* FTC Bureau of Consumer Protection, Bureau of Economics, and Office of Policy Planning, Comments before Board of Governors of Federal Reserve System on Truth in Lending 4 n.11 (Apr. 8, 2008), *available at http://www.ftc.gov/os/2008/04/V080008frb.pdf.*

[140] The Commission has charged mortgage brokers and other entities with falsely promising

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Section 321.3(h) bars false or misleading comparisons between rates or payments,[141] including, but not limited to, comparisons involving savings. It also is intended to cover false or misleading savings rate claims in financing promotions. The Commission has challenged, for example, deceptive claims that consumers will save money (such as at a particular rate of savings) by accepting a credit offer.[142] This provision also bars false or misleading comparisons between rates or payments available for different parts of the loan term.[143]

Section 321.3(i) prohibits misrepresentations about the type of mortgage credit product being offered, *e.g.,* false claims that a mortgage is fully amortizing.[144]

Section 321.3(j) bars misrepresentations about the amount of the obligation or the existence, nature, or amount of cash or credit the consumer could receive from the loan.[145] This would include, for example, false claims that the consumer will receive a certain amount of cash by obtaining a home equity loan, or will receive a certain amount of credit through a purchase money loan.

Section 321.3(k) prohibits misrepresentations about the existence, number, amount, or timing of any minimum or required payments.[146] One commenter, focusing on reverse mortgages, suggested revising the Rule to clarify that it is not a violation of § 321.3(k) if the advertisement makes clear that the borrower has no regular monthly repayment installment obligations under the loan but must pay the real estate taxes and hazard insurance.[147] Although no revision of the Rule text is necessary on this point, the Commission emphasizes that the Final Rule does not prohibit a person from including in an advertisement truthful, non-misleading information about the borrower's responsibility to pay real estate taxes and hazard insurance. The Commission notes, however, that the determination of whether an advertisement is deceptive is based on the net impression of the advertisement as a whole. Thus, a fine print disclosure about the borrower's need to pay taxes and insurance often would not be sufficient to qualify a more prominent claim that the borrower need not make monthly payments.[148]

Section 321.3(*l*) prohibits misrepresentations about the potential for default on the mortgage credit product, including, but not limited to, misrepresentations about the circumstances under which the consumer could default for nonpayment of taxes or insurance, failure to maintain the property, or non-compliance with other obligations.[149]

Section 321.3(m) bars misrepresentations about the effectiveness of the mortgage credit product in helping consumers resolve problems in paying debts.[150] This section covers false or misleading claims that the lender's or servicer's product (through a waiver, forgiveness, or otherwise) can reduce, eliminate, or restructure a debt or any other obligation of any person.[151]

Section 321.3(n) prohibits misrepresentations about the association between a mortgage credit product or a provider of such product and any other person or program, including, but not limited to, any affiliation with an organizational or governmental program, benefit, or entity.[152]

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consumers low fixed payments and rates on their mortgage loans, including promising ''30 year fixed. 1.95%,'' ''3.5% fixed payment loan,''; and other rates that were not, in fact, fixed. *See, e.g., In re Am. Nationwide Mortg. Co.,* F.T.C. Dkt. No. C–4249 (2009); *FTC* v. *Chase Fin. Funding, Inc.,* No. SACV 04–549 GLT (ANx) (C.D. Cal. 2004); *see also FTC* v. *30 Minute Mortg., Inc.,* No. 03–60021 (S.D. Fla. 2003); *Andrews* v. *Chevy Chase Bank,* 240 F.R.D. 612 (E.D. Wis. 2007) (describing payment option ARM sold as ''fixed rate'' when interest was only fixed for one month, although payments were fixed for a year).

Section 321.3(g) of the Final Rule is broader than a similar provision in Regulation Z that applies only to closed-end dwelling-secured credit and requires specific advertising disclosures. *See* 12 CFR 226.24(i)(1).

[141] Section 321.3(h) of the Final Rule is broader than a similar provision in Regulation Z that applies only to closed-end dwelling-secured credit and requires specific advertising disclosures. *See* 12 CFR 226.24(i)(2).

[142] The Commission has challenged deceptive savings rate claims in non-mortgage contexts. *See In re Automatic Data Processing, Inc.,* 115 F.T.C. 841 (1992) (alleged deceptive comparisons in automobile financing). Section 321.3(h) of the Final Rule would prohibit these types of promotions when used in the mortgage context. In the NPRM, the Commission addressed savings rates in connection with § 321.3(b).

[143] *See, e.g., In re FirstPlus Fin. Group, Inc.,* F.T.C. Dkt. No. C–3984 (2000).

[144] The Commission has challenged such misrepresentations in its law enforcement actions. *See, e.g., In re Shiva Venture Group, Inc.,* F.T.C. Dkt. No. C–4250 (2009); *In re Michael Gendrolis,* F.T.C. Dkt. No. C–4248 (2009); *In re Am. Nationwide Mortg. Co.,* F.T.C. Dkt. No. C–4249 (2009); *FTC* v. *OSI Fin. Servs., Inc.,* No. 02–C–5078 (N.D. Ill. 2002); *United States* v. *Mercantile Mortg. Co.,* No. 02–C–5029 (N.D. Ill. 2002); *FTC* v. *Capital City Mortg. Corp.,* No. 1:98CV237 (D.D.C. 1998).

[145] *See FTC* v. *Assocs. First Capital Corp.,* No. 1:01–00606 JTC (N.D. Ga. 2001) (alleging deceptive representations about loan amounts in home equity mortgages); *FTC* v. *First Alliance Mortg. Co.,* No. SACV 00–964 DOC (EEx) (C.D. Cal. 2000) (same); *see also United States* v. *Mercantile Mortg. Co.,* No. 02–C–5079 (N.D. Ill. 2002) (alleging deceptive representations about cash dispersal amounts in home equity loans or refinances); *FTC* v. *OSI Fin. Servs., Inc.,* No. 02–C–5078 (N.D. Ill. 2002) (same).

[146] This provision covers, for example: (1) Misrepresentations about whether certain payments are part of the loan, *see, e.g., FTC* v. *OSI Fin. Servs., Inc.,* No. 02–C–5078 (N.D. Ill. 2002); *United States v. Mercantile Mortg. Co.,* No. 02–C–5079 (N.D. Ill. 2002); (2) false claims that an aspect of the loan would cover the payments due, *see FTC* v. *Ranney,* No. 04–F–1065 (MJW) (D. Colo. 2004); and (3) false or misleading claims as to the obligation to repay, or make other payments associated with, a reverse mortgage, *see* Federal Financial Institutions Examination Council (FFIEC), *Reverse Mortgage Products: Guidance for Managing Compliance and Reputation Risks* (*FFIEC Reverse Mortgage Guidance*), 75 FR 50801, 50809 (Aug. 17, 2010) (guidance issued by Federal and state bank regulatory agencies on need for adequate information and other consumer protections regarding reverse mortgage products). The Commission notes that reverse mortgages are also subject to other Federal requirements. *See, e.g.,* 24 CFR 206 (HUD regulations on HECMs). *See generally* 12 CFR 226 (Regulation Z).

[147] *See* NRMLA at 4.

[148] ''Fine print disclosures generally may not cure a misimpression created by the text of an advertisement.'' *In re Stouffer Foods Corp.,* 118 F.T.C. 746, 786 (citation omitted); *see also In re Am. Nationwide Mortg. Co.,* F.T.C. Docket No. C–4249 (2009); *In re Michael Gendrolis,* F.T.C. Dkt. No. C–4248 (2009).

[149] For example, it would violate this section for a reverse mortgage lender to make the false or misleading claim that ''no matter what, you can stay in your home for life,'' when the lender can force the sale of the property if the consumer does not adequately maintain the property.

[150] The Commission notes that the MARS Rule prohibits mortgage assistance relief service providers from: (1) Misrepresenting the amount of money or percentage of the debt amount that a consumer may save by using the mortgage assistance relief service; and (2) making a representation about the efficacy of any such service unless the provider can substantiate the representation. *See* 16 CFR 322.3(b)(10), (c). In contrast, the MAP—Advertising Final Rule prohibits any person from misrepresenting the effectiveness of the mortgage credit product in helping the consumer resolve problems paying debts. While the Final Rule is intended to address communications from lenders, servicers, and other advertisers primarily, it also is worded broadly enough to cover misrepresentations about mortgage credit products that may not be covered by the MARS Rule.

Section 321.3(m) of the Final Rule is broader than a similar provision in Regulation Z that applies only to closed-end dwelling-secured credit. *See* 12 CFR 226.24(i)(5).

[151] Thus, this provision covers false or misleading claims of debt elimination, debt forgiveness, or savings associated with mortgage credit products. *See, e.g., In re FirstPlus Fin. Group, Inc.,* F.T.C. Dkt. No. C–3984 (2000); *FTC v. Safe Harbour Found. of Fla., Inc.,* No. 08–C–1185 (DC Ill. 2008).

[152] The FTC has challenged many of these types of claims in its loan modification cases, including where the defendants allegedly claimed, in part through the use of names, seals, or symbols, that the mortgage credit product was a government benefit or that the lender was affiliated with the government. *See, e.g., FTC* v. *Ryan,* No. 1:09–cv–00535–HHK (D.D.C. 2009). In some contexts, such misrepresentations may also violate the MARS Rule. *See* 16 CFR 322.3(b)(3). The MAP—Advertising Final Rule is worded broadly enough to cover misrepresentations about mortgage credit products that may not be covered by the MARS Rule.

Section 321.3(n) of the Final Rule is broader than a similar provision in Regulation Z that applies only to closed-end dwelling-secured credit and is limited to claims about the loan program advertised. *See* 12 CFR 226.24(i)(3). In comparison,

One commenter suggested revising the Rule to clarify that § 321.3(n)(2) does not prohibit a person from advertising that it offers FHA-insured home equity conversion mortgages (HECM loans) if the person, in fact, does so.[153] While no revision of the Rule text is warranted on this point, the Commission notes that the Final Rule does not prohibit advertisers from making truthful, non-misleading claims as to the products they offer, including HECMs.

The same commenter also suggested making clear that the Rule permits advertisers to use symbols or logos that resemble those of a government entity, organization, or program, when their use is required or allowed, such as the Equal Housing lender logo.[154] The Final Rule generally permits the use of symbols and logos when required or allowed by the government.[155] Nevertheless, an advertisement including such a symbol or logo may be misleading, depending on the circumstances. For example, if an Internet advertisement, which is accessible by consumers located in any state, included such logos, but the advertiser had recently lost certain of its state licenses or certifications to offer mortgages in those jurisdictions, the advertisement could be deceptive and violate the Rule. Thus, the Commission agrees that the Rule permits the use of such symbols or logos in a truthful, non-misleading manner, but it does not believe that it is necessary to revise the language of the Rule to address the commenter's concern.

Section 321.3(o) covers misrepresentations about the source of the mortgage credit product and the commercial communications for it, including, but not limited to, claims that the communication is made by or on behalf of the consumer's current mortgage lender or servicer.[156]

Section 321.3(p) prohibits misrepresentations about the consumer's right to reside in the dwelling that is the subject of the mortgage credit product, including, but not limited to, false or misleading claims about how long or under what conditions a consumer can stay in the dwelling.[157] One commenter, focusing on reverse mortgages, suggested revising the Rule to clarify that it is not a violation of § 321.3(p) if the advertisement makes clear that the borrower must maintain the collateral property, satisfy any occupancy requirements, and timely pay the real estate taxes and hazard insurance, if such are required and applicable under the loan agreement.[158] While no revision of the Rule text is necessary on this point, the Commission emphasizes that the Final Rule does not prohibit a person from including in an advertisement truthful, non-misleading information about the obligations the borrower must meet to stay in the dwelling.

Sections 321.3(q) and 321.3(r) bar misrepresentations about the consumer's ability or likelihood to obtain any mortgage credit product or term, or a refinancing or modification of any mortgage credit product or term. This includes false or misleading claims about whether the consumer has been preapproved or guaranteed for any such product or term.[159]

Section 321.3(s) bars misrepresentations about the availability, nature, or substance of counseling services or any other expert advice offered to the consumer regarding any mortgage credit product or term, including, but not limited to, the qualifications of those offering the services or advice.[160] One commenter suggested clarifying whether, with respect to reverse mortgages, § 321.3(s) applies primarily to counselors and counseling agencies, or also applies to lenders and loan originators.[161] Because § 321.3(s) in the Final Rule applies to any ''person,'' as defined in § 321.2(f), it applies to all of these types of individuals or entities. The same commenter also suggested clarifying that advertisements may include valid professional designations, such as a Better Business Bureau indication or reference to status as a Certified Reverse Mortgage Professional for a loan originator.[162] The Final Rule does not prohibit truthful, non-deceptive references to valid professional designations.[163]

2. Advertising Disclosures

The proposed rule did not include any affirmative advertising disclosure requirements, and the Final Rule does not adopt any such requirements for the reasons discussed further below. In the NPRM, the Commission tentatively concluded that it was unnecessary to mandate advertising disclosures. The Commission also tentatively concluded that not doing so would avoid possible inconsistencies with other Federally- or state-mandated disclosure requirements for mortgage advertising, thereby lowering the likelihood of consumer confusion while making compliance easier. Nevertheless, the NPRM specifically requested comment on whether there are any disclosure

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the Commission's Rule applies to both closed-end and open-end credit secured either by real property or a dwelling, covers claims about the loan program as well as the provider of the advertisement, and expressly references use of symbolic representations.

[153] *See* NRMLA at 4.

[154] *See id.* For example, HUD regulations implementing the Fair Housing Act, 42 U.S.C. 3601–3631, generally require the Equal Housing Opportunity logo on fair housing posters. *See* 24 CFR 110.

[155] *See, e.g.,* 42 U.S.C. 3605; 24 CFR 110.

[156] *See, e.g., In re Michael Gendrolis,* F.T.C. Dkt. No. C–4248 (2009) (alleging the failure to disclosure adequately that the advertiser, not the consumer's current lender, was offering the mortgage). This section also covers false or misleading ''trigger lead'' solicitations, in which entities: (1) Obtain information about the consumer from sources such as prescreened lists sold by consumer reporting agencies; (2) based on that information, contact the consumer to promote a mortgage credit product or term; and (3) misrepresent their identity as the consumer's current lender or servicer.

Section 321.3(o) of the Final Rule is broader than a similar provision in Regulation Z that applies only to closed-end dwelling-secured credit and is limited to representations about lenders. *See* 12 CFR 226.24(i)(4). In comparison, the Commission's Rule applies to both closed-end and open-end credit secured either by real property or a dwelling and bars misrepresentations about both servicers and lenders.

[157] Issues concerning the consumer's right to reside in the dwelling have frequently arisen in the sale of reverse mortgages. *See generally* U.S. Gov't Accountability Office (GAO), GAO–09–606, *Reverse Mortgages: Product Complexity and Consumer Protection Issues Underscore Need for Improved Controls over Counseling for Borrowers* (2009) (*GAO Reverse Mortgage Report*).

[158] NRMLA at 4.

[159] The Commission has challenged similar claims in prior law enforcement actions. *See, e.g., United States* v. *Unicor Funding, Inc.,* No. 99–1228 (C.D. Cal. 1999); *In re Lomas Mortg. U.S.A., Inc.,* 116 F.T.C. 1062 (1993); *FTC* v. *Safe Harbour Found. of Fla., Inc.,* No. 08–C–1185 (DC Ill. 2008); *FTC* v. *Assocs. First Capital Corp.,* No. 1:01–00606 JTC (N.D. Ga. 2001).

[160] Such misrepresentations have been identified as problematic in the offering of reverse mortgages, *see, e.g., FFIEC Reverse Mortgage Guidance, supra* note 146, and *GAO Reverse Mortgage Report, supra* note 157, and of loan modifications, *see generally* MARS, Final Rule, 75 FR 75092. In some contexts, such misrepresentations may also violate the MARS Rule. *See* 16 CFR 322.3(b)(1). The MAP—Advertising Final Rule is worded broadly enough to cover misrepresentations about mortgage credit products that may not be covered by the MARS Rule.

Section 321.3(s) of the Final Rule is broader than a similar provision in Regulation Z that applies only to closed-end dwelling-secured credit and addresses advertisements that use the term ''counselor'' to refer to a for-profit mortgage broker or creditor, its employees, or others working for the broker or creditor in offering, originating, or selling mortgages. *See* 12 CFR 226.24(i)(6). In comparison, the Commission's Rule applies to both closed-end and open-end credit secured either by real property or a dwelling and bans misrepresentations regardless of the type of for-profit entity involved.

[161] NRMLA at 4.

[162] *Id.*

[163] A literally true claim about a professional designation could nonetheless be misleading. For example, if an advertisement included a reference to ''Better Business Bureau approval,'' when certain Better Business Bureau offices approved the lender but others had issued a cautionary rating, this advertisement could be deceptive and violate the Rule.

requirements that the Commission should include in the Final Rule. The Commission received several comments addressing this issue—some discussing disclosures generally and others recommending specific disclosure requirements.

a. Comments Discussing Disclosures Generally

A comment from a group of state banking and consumer credit regulators generally recommended against requiring disclosures because other Federal rules require specific advertising disclosures and imposing additional requirements could create inconsistencies and confusion.[164] This commenter suggested, however, that the Rule should prohibit advertising that obscures significant risks to the consumer. The commenter stated that advertisements promoting a particular mortgage product or feature should give clear and prominent information alerting consumers to any potentially negative aspects of the loan, such as negative amortization.[165] To achieve this result, the commenter suggested that the Rule require mortgage advertisements to disclose any qualifying information, the omission of which would likely mislead reasonable consumers in a material way.[166] The Commission declines to adopt any affirmative disclosure requirements in the Final Rule but notes that § 321.3 broadly prohibits misrepresentations about any term of any mortgage credit product and that the omission of qualifying information may cause a representation to be misleading in violation of § 321.3.[167]

In addition, as noted in the NPRM and in several comments the Commission received, there are already substantial Federal and state regulations applicable to mortgage advertisements, including those that mandate disclosures. Mandating advertising disclosures in this Rule would create potential conflicts and inconsistencies with the disclosure provisions of the other requirements to which covered entities are also subject, particularly TILA and Regulation Z. For example, under TILA and Regulation Z, the APR must be calculated following certain methods, and it must be disclosed in mortgage advertisements in some circumstances.[168] If the Commission were to require a disclosure of the APR, it would either duplicate the TILA requirements or, if the APR was calculated using different costs and procedures than those established by TILA and Regulation Z, would result in inconsistent Federal requirements and inconsistent disclosures, leading to potential consumer confusion and increased burden on business. Similarly, if the Commission were to require a specific disclosure in all mortgage advertisements that state a monthly payment amount, this disclosure would either duplicate or potentially conflict with numerous other requirements under Regulation Z.[169]

Thus, the Commission has determined not to require any affirmative advertising disclosure requirements in the Final Rule. It concludes that the Final Rule's prohibitions on misrepresentations in commercial communications regarding mortgage credit products will provide sufficient protection to consumers. Finally, the Commission is cognizant of the important interplay between existing Federal and state advertising and disclosure requirements and designed the Rule to avoid conflict or inconsistency with those other requirements.

b. Comments Recommending Specific Disclosures

One commenter suggested requiring that any commercial communication about a reverse mortgage loan state that it relates to a reverse mortgage loan.[170] The commenter indicated that this would allow consumers at the outset to identify the product being marketed as a reverse mortgage, which, the commenter stated, is important because reverse mortgages are a unique subset of mortgage credit products.[171] As noted above, the Commission generally declines to adopt any affirmative disclosure requirements in the Final Rule to avoid conflict and inconsistency with other Federal and state disclosure requirements. Moreover, depending on the circumstances, if advertisements offering reverse mortgages misrepresent that they are offering another type of mortgage, or if advertisements offering other mortgage products misrepresent that they are offering reverse mortgages, such false or misleading claims would violate § 321.3(i).

The same commenter also recommended requiring that any commercial communication offering a reverse mortgage loan state whether the entity making the communication is the lender for the loan, and if not, state the role of the entity and its purpose in collecting information about the prospective borrower.[172] An individual commenter similarly suggested that the Commission require mortgage companies to disclose in their advertising the name and state under which they are licensed.[173] Another commenter proposed requiring mortgage brokers to disclose they are not mortgage lenders and do not fund loans.[174] As noted above, the Commission generally declines to adopt any affirmative disclosure requirements in the Final Rule to avoid conflict and inconsistency with other Federal and

[164] *See* CSBS/ACSS/NACCA at 1.

[165] *See id.*

[166] *See id.*

[167] Under Section 5 of the FTC Act, it is a deceptive practice to omit qualifying information when making a literally truthful claim if the omission of that information is likely to mislead reasonable consumers in a material way. *See* Deception Policy Statement, *supra* note 9, at 176–77. For example, a closed-end mortgage advertisement likely would be deceptive if it represented that a loan has a very low interest rate, but failed to disclose that the rate would substantially increase after a few months. Such claims often are referred to as ''half truths.'' Mortgage advertisements that include half truths in most cases also would be considered to have made implied misrepresentations that would fit into the specific categories of misrepresentations in the Rule. Continuing with the above example, a claim that a loan has a very low interest rate, in the absence of any qualifying information, is likely to imply to reasonable consumers that the rate lasts at least for longer than a few months. Thus, the Final Rule's prohibition on misrepresentations likely will cover the sorts of half truths that can arise when mortgage advertisers fail to make material disclosures.

[168] *See, e.g.,*12 CFR 226.4; 226.14; 226.16(b) and (d)(1), (2) and (6); 226.22; and 226.24(d) and (f)(2).

[169] For example, it is not clear that requiring disclosure of suggested ''take-home income'' applicable to an advertised mortgage credit product would be consistent with other Regulation Z requirements. *See infra* notes 175–76 and accompanying text; *see also, e.g.,* 12 CFR 226.24(f)(3) (requiring various disclosures with equal prominence and in close proximity, in certain mortgage advertisements, when a monthly payment amount is stated); 12 CFR 226.24(a) (providing that an advertisement for credit must state only those terms that actually are or will be arranged or offered).

[170] *See* NRMLA at 3.

[171] *Id.*

[172] *Id.*

[173] *See* Coe at 1. The Commission notes that some states restrict companies from disseminating mortgage advertisements unless they have, and display, such license information. *See* Kan. Stat. Ann. 9–2208 (2010); Or. Admin. R. 441–870–0080 (2010); 7 Pa. Cons. Stat. 6121, 6135 (2010); 10 Va. Admin. Code 5–160–60 (2010); *see also supra* note 56 (SAFE Act requirements). The Commission also notes that lenders and mortgagees approved by the FHA must use their HUD-registered business names in all advertisements and promotional materials related to FHA programs. *See supra* note 53.

[174] *See* CSBS/ACSS/NACCA at 2. This commenter also indicated that while various states require this information to be provided after application, few rules exist requiring brokers to make this distinction in advertising. *Id.* The Commission notes that some states require disclosures in advertisements (or provide that it is deceptive not to include certain information) indicating that the entity is a mortgage broker only and not a mortgage lender or that it does not make or fund loans. *See* Conn. Gen. Stat. 36a–497 (2010); N.J. Admin. Code 3:2–1.4 (2010); N.Y. Banking Law 595–a; N.Y. Comp. Codes R. & Regs. tit. 3, 38.2 (2010); 209 Mass. Code Regs. 42.12A (2010).

state disclosure requirements. Nonetheless, it is a violation of §§ 321.3(n) or (o) if the advertisement misrepresents, respectively: (1) The association of the mortgage credit product or any provider of the product with any other person of program, or (2) the source of any commercial communication, such as whether it is made by on behalf of the consumer's current lender or servicer.

One individual commenter expressed concern that advertisements quoting a monthly payment amount do not offer guidance on how much a household should earn to afford that payment.[175] The commenter proposed requiring that any home loan advertisement quoting a ''monthly price'' (presumably, a monthly payment amount) also must include a suggested ''take home income'' (after tax) needed for the consumer to afford that ''monthly price,'' to clarify to the consumer the connection between ''how much it will cost'' and ''how much I can spend.'' [176] Again, the Commission generally declines to adopt any affirmative disclosure requirements in the Final Rule to avoid conflict and inconsistency with other Federal and state disclosure requirements. Nonetheless, § 321.3 broadly prohibits misrepresentations about any term of any mortgage credit product, which would include misrepresentations about monthly payment amounts and other costs to the consumer.

3. Dodd-Frank Act and CFPB Considerations

As noted above, the Dodd-Frank Act made substantial changes in the Federal regulatory framework for providers of financial products or services, including transferring to the CFPB, on the transfer date designated as July 21, 2011, the Commission's rulemaking authority under the Omnibus Appropriations Act, as clarified by the Credit CARD Act.[177] The Commission received two comments that focus primarily on the Dodd-Frank Act and suggest that the Commission defer issuing a final rule in view of the upcoming transfer of rulemaking authority.[178] These commenters suggested that the Federal banking agencies and the FTC should coordinate with the CFPB to implement one set of mortgage rules, or that these entities should engage in a coordinated review of regulatory initiatives and reevaluation of the goals and methods of financial regulation.[179] According to the commenters, the fact that the CFPB does not assume rulemaking authority under the Omnibus Appropriations Act until the designated transfer date is merely a technicality.[180] Another commenter representing a group of state-chartered credit unions suggested that the Commission issue a final rule but coordinate with the CFPB and defer mandatory compliance with the FTC's Final Rule until Titles X and XIV of the Dodd-Frank Act take effect.[181]

The Commission declines to adopt any of these recommendations. The Dodd-Frank Act did not remove or revise the Commission's rulemaking authority prior to the July 21, 2011 transfer date, and the Commission concludes that it is in the public interest to implement this Rule now.[182] The Final Rule essentially codifies existing deception law under Section 5 of the FTC Act, and thus does not pose a significant additional burden on covered entities. At the same time, the Final Rule will enhance consumer protection and deter deception because the Commission, the CFPB, and the states will be able to enforce it and obtain civil penalties for violations.[183] The Commission will continue its coordination with the CFPB on mortgage-related issues to avoid the imposition of inconsistent standards.

4. Substantial Assistance or Support

The proposed rule did not include a ''substantial assistance'' provision. Some FTC rules prohibit a person from giving substantial assistance or support to others who violate the rule if that person knows or consciously avoids knowing of the violations. In the NPRM, the Commission asked what evidence exists of individuals or entities knowingly providing substantial assistance to those engaged in deceptive mortgage advertising and whether the Final Rule should specifically prohibit this conduct.

The Commission received two comments opposing a substantial assistance provision.[184] One of the commenters stated that the prohibition may create a disincentive for real estate professionals to provide advice and unintentionally result in consumers having less access to information.[185] The other commenter suggested that, if the FTC did include such a prohibition, it should not hold lenders liable for violations committed by third parties, such as lead generators or brokers, that provided the substantial assistance or support.[186]

The Commission received one comment supporting the inclusion in the Final Rule of a substantial assistance or support provision.[187] The commenter stated that this prohibition would prevent mortgage loan originators from evading the Rule by contracting their advertising to third parties.[188] Another commenter generally stated that the Rule should cover third parties on whom companies rely for ''guidance'' regarding whether representations are prohibited by the Rule.[189]

The Commission declines to add a substantial assistance provision to the Rule. Neither the Commission's law enforcement experience nor the public comments received indicate that the provision of knowing substantial assistance to those engaged in deceptive mortgage advertising is prevalent or poses significant risks to consumers. More specifically, the record does not identify any classes of persons that may provide substantial assistance or support to mortgage advertisers that would not already be subject to the Rule. To the extent that there are others who provide such assistance and support and are not covered by the Rule, they may be liable under Section 5 of the FTC Act,[190] or the CFPB could

[175] Swider at 1.

[176] *See id.* This commenter suggested that the required disclosure should be calculated by multiplying the advertised monthly payment by five. Thus, if the advertised monthly payment were $500, this would trigger disclosure of a ''suggested take home income'' (after tax) of $2,500. As indicated above, such a disclosure could conflict with Federal or other requirements. *See supra* note 169.

[177] *See supra* Part I.A.4. The FTC retains enforcement authority for these rules concurrently with the CFPB. *See* Dodd-Frank Act §§ 1024, 1061.

[178] *See generally* ABA and CMC/MBA.

[179] *See* ABA at 1–2; CMC/MBA at 1. The commenters reference various provisions of the Dodd-Frank Act, including the requirement that the CFPB and FTC negotiate an agreement to facilitate coordination on rulemaking. *See, e.g.,* CMC/MBA at 3; *see also* Dodd-Frank Act § 1061(b)(5)(D); *see* ABA at 2–3; *see also* Dodd-Frank Act § 1097.

[180] *See* ABA at 3; CMC/MBA at 4.

[181] *See* PCUA at 1–2.

[182] Indeed, after the enactment of the Dodd-Frank Act, the Commission issued another final rule consistent with the directive under the Omnibus Appropriations Act. *See supra* note 7.

[183] *See supra* Parts I.A.3 and I.A.4.

[184] AFSA at 2; NAR at 2. Neither comment specifically addressed the ''knows or consciously avoids knowing'' standard.

[185] NAR at 2.

[186] AFSA at 2.

[187] CSBS/ACSSS/NAACA at 1. This comment did not specifically address the ''knows or consciously avoids knowing'' standard.

[188] *Id.* The Commission notes that the Rule covers any person who ''make[s]'' a material misrepresentation in a commercial communication about any term of a mortgage credit product. Whether or not a lender or a third party is considered to have ''made'' the misrepresentation for purposes of the Rule, however, depends on the circumstances. *See supra* Part III.B.4.

[189] OMNI at 1.

[190] For example, assume that a mortgage lender runs deceptive advertisements in violation of the Rule and submits the resulting charges through a payment processor who knows or should know of

Continued

amend the Rule to bring them within its scope.

5. Multiple Languages

The proposed rule broadly prohibited material misrepresentations in commercial communications regardless of the language or languages through which the claim is made.[191] In the NPRM, the Commission sought comment on several questions regarding the use of commercial communications that ''mix languages'' in connection with mortgage products, including whether such practices are unfair or deceptive, whether they are prevalent, and whether the Final Rule should address this conduct by adding disclosure requirements.

The Commission received several comments on this issue, most of which indicated that the Commission should not address multiple language issues in the Final Rule, beyond the general prohibition on misrepresentations in any language or combination of languages.[192] One commenter stated that no additional protections are needed and that ''only English should be used to keep costs down for institutions.'' [193] Another commenter noted that the multiple languages issue relates to mortgage loan disclosures in general and recommended that the Commission coordinate with the CFPB to ensure a consistent approach.[194] Specifically, to the extent that regulations may require disclosures in languages other than English, the commenter recommended that regulators provide model disclosure forms.[195]

Two commenters noted the benefits to consumers of advertising and communicating in languages other than English and were concerned about the disincentives that would result from requiring disclosures in those languages.[196] These commenters emphasized that the proposed rule already covers bait and switch tactics (*i.e.,* making claims about a product in an advertisement to encourage expression of consumer interest but then substituting a different product for the advertised product) and misrepresentations, regardless of the language used.[197] These commenters opposed requiring disclosures in the consumer's preferred language, stating that the costs to business of maintaining all of the various disclosures and contracts in all of the different languages that consumers potentially use would outweigh the benefits to consumers, and would cause companies not to advertise in languages other than English to avoid the burdens of the Rule.[198] According to one of the two commenters, lenders likely would not advertise in any languages other than English to avoid the risk of liability under state unfair trade practices statutes.[199] The commenter indicated that providing any required contracts in a language other than English would falsely raise consumers' expectations that they will be provided support in that language throughout the rest of their relationship with the lender.[200] The other commenter questioned whether transaction documents that states require to be publicly filed would be legally permitted in various county recorders' offices if they were in languages other than English.[201]

In contrast, one commenter stated that a company that advertises in a language other than English should provide disclosure and other mortgage documents, including the loan contract, in that other language as well as in English.[202] Another commenter described seeing several instances where borrowers with limited English proficiency were told one thing in their native language, but the written contract said something else.[203] This commenter requested that the Commission ''make it clear that anything that is deceptive when either or both languages or a 'mix' of languages is considered should be prohibited by rule.'' [204]

As noted above, the Final Rule prohibits misleading claims in any language or any combination of languages.[205] The Commission believes that, based on the record, it is not necessary to add a specific provision requiring disclosures in languages other than English, or to add other such related requirements to the Final Rule. For example, the Final Rule already addresses the concern that arises where a mortgage advertiser represents a key feature in a print advertisement in a language other than English but makes an inconsistent representation elsewhere in the advertisement in English. Such an advertisement could be deceptive and thus prohibited by the Final Rule. It is also well-established that the ''net impression'' to the consumer is a touchstone of FTC deception analysis, and that, consequently, a fine print or otherwise ineffective disclaimer may not cure an otherwise misleading advertisement.[206] This principle, as applied to advertising that uses multiple languages, means that, in advertising targeting consumers in a language other than English, a disclaimer in English may not cure misleading claims in that other language.[207]

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the lender's Rule violations. Having not incorporated a ''substantial assistance or support'' provision into the Rule, the Commission could not challenge the payment processor's conduct as a Rule violation. However, depending on the facts and circumstances, the Commission might be able to take law enforcement action against the payment processor's conduct as an unfair act or practice in violation of Section 5 of the FTC Act. *See, e.g., FTC* v. *Your Money Access, LLC,* No. 2:07–5147 (E.D. Pa. 2007).

[191] The Commission has taken law enforcement action against those who have used a language other than English or multiple languages in deceiving consumers. These include actions against mortgage companies that allegedly deceptively offered loans to consumers whose primary language was a language other than English. One action challenged as deceptive a mortgage company's alleged practice of stating loan terms orally to Spanish-speaking consumers in Spanish, only to provide loan documents with different and less favorable terms in English. *See FTC* v. *Mortgages Para Hispanos.com Corp.,* No. 4:06-cv19 (E.D. Tex. 2006). In another case, the company allegedly offered certain mortgage terms in both Chinese and English advertisements, but failed to disclose a large balloon payment. *See In re Felson Builders, Inc.,* 119 F.T.C. 652 (1995).

[192] *See* AFSA at 2–3; HPC at 1–3; CMC/MBA at 6; OMNI at 2. Commenters acknowledged that the proposed rule already prohibited misleading claims in any language or combination of languages.

[193] OMNI at 2.

[194] CMC/MBA at 6.

[195] *Id.*

[196] AFSA at 2–3; HPC at 2.

[197] AFSA at 2; HPC at 2–3 (''Whether that misrepresentation is found in the foreign language, whether it is found in the English language or whether it is found in the mingling of the two languages is irrelevant; it is the misrepresentation that is significant and that is prohibited . * * *'').

[198] AFSA at 2–3; HPC at 2.

[199] AFSA at 2.

[200] *Id.*

[201] HPC at 2.

[202] CSBS/ACSSS/NACCA at 2.

[203] ABLE at 6.

[204] *Id.*

[205] *See* Final Rule § 321.2(a). In comparison, for closed-end credit, Regulation Z specifically bans providing information about some trigger terms or required disclosures only in a foreign language in the advertisement but, at the same time, providing information about other trigger terms or required disclosures only in English in that advertisement. *See* 12 CFR 226.24(i)(7).

[206] *See, e.g., FTC* v. *Cyberspace.com, LLC,* 453 F.3d 1196, 1200 (9th Cir. 2006).

[207] *See, e.g.,* 16 CFR 14.9 (under FTC rules, cease-and-desist orders, and guides that require ''clear and conspicuous'' disclosure of information, such disclosures must be made in the language of the target audience); 16 CFR 610.4(a)(3)(ii) (in marketing free credit reports, mandatory disclosures must be made in the same language as that principally used in the advertisement); 16 CFR 429.1(a) (in door-to-door sales, failure to furnish a completed receipt or contract in the same language as the oral sales presentation is an unfair and deceptive act or practice); 16 CFR 455.5 (where used car sales are conducted in Spanish, mandatory disclosures must be made in Spanish); 16 CFR 308.3(a)(1) (mandatory disclosures about pay-per-call services must be made in the same language as that principally used in the advertisement); *see also* FTC, Free Annual File Disclosures, Final Rule, 75 FR 9726, 9733 (Mar. 3, 2010) (noting ''the Commission's belief that a disclosure in a language different from that which is principally used in an advertisement would be deceptive'').

The Rule generally focuses on misrepresentations, regardless of the language or languages used, rather than requiring affirmative mortgage advertising disclosures or regulating mortgage-related transaction documents. In addition, Congress recently directed the CFPB to develop streamlined mortgage disclosures,[208] and the CFPB may be better situated to address non-English language disclosure issues in a more comprehensive fashion.

D. Section 321.4: Waiver Not Permitted

Section 321.4 of the Final Rule, which includes only non-substantive modifications to the proposed rule, provides that ''[i]t is a violation of this rule for any person to obtain, or attempt to obtain, a waiver from any consumer of any protection provided by or any right of the consumer under this rule.'' [209] The Commission received one comment strongly supporting this prohibition, stating that ''[t]here is never a justification for waivers of misrepresentations.'' [210] The Commission did not receive any other comments addressing this provision. The Commission therefore confirms that a non-waiver provision is necessary to protect consumers from being deceived in making decisions about the most important financial product most of them will obtain in their lifetimes. The Commission is unaware of any circumstances under which it should condone material misrepresentations by allowing advertisers of mortgage loans to include purported waivers in their contracts or other agreements with consumers.[211]

E. Section 321.5: Recordkeeping Requirements

1. Final Recordkeeping Requirements

Section 321.5 of the proposed rule set forth specific categories of records that persons covered by the proposed rule would be required to retain. A failure to keep such records would be an independent violation of the rule.[212]

The Final Rule's recordkeeping provision is the same as the proposed rule's provision except for minor clarifying changes.[213] Specifically, for a period of 24 months from the last date the person made or disseminated the applicable commercial communication regarding any term of any mortgage credit product, covered persons must retain the following information:

(1) Copies of all materially different commercial communications as well as sales scripts, training materials, and marketing materials, regarding any term of any mortgage credit product, that the person made or disseminated during the relevant time period; [214]

(2) Documents describing or evidencing all mortgage credit products available to consumers during the time period in which the person made or disseminated each commercial communication regarding any term of any mortgage credit product, 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 the person made or disseminated each commercial communication regarding any term of any mortgage credit product, including but not limited to the names and terms of each such additional product or service available to consumers.

The Rule permits entities to keep the records in any legible form and in the same manner, format, or place as they keep such records in the ordinary course of business.

2. Comments Received

The Commission received several comments addressing different aspects of the proposed recordkeeping requirements. Two commenters supported the 24-month record retention period.[215] Another commenter representing several groups of state financial institution regulators suggested that the Commission impose a three to four year requirement, stating that many states require that timeframe and that a longer period is more appropriate for ''such important records.'' [216] The Final Rule retains the 24-month record retention period because it requires mortgage advertisers to retain sufficient documentation for efficient and effective compliance monitoring, while avoiding the imposition of unnecessary costs on advertisers.

One commenter stated that the recordkeeping provision describes the required categories of records adequately, but expressed concern that the proposed rule did not clarify whether the required records must be saved as hard copies or electronically. This commenter asserted that retaining records electronically would save money and storage space.[217] Section 321.5(b) of the Final Rule adopts the language in the proposed rule permitting entities to keep the records in any legible form and in the same manner, format, or place as they keep such records in the ordinary course of business. This language permits electronic or hard copies.

One commenter suggested that brokers who advertise rates and terms of loans purportedly offered by lenders should retain evidence that the rates and terms actually were being offered by specific lenders at the time of the advertisement.[218] Section 321.5(a)(2) of the Final Rule, which is unchanged from the proposed rule, requires the retention of such documents.

Several commenters discussed the overall costs and burdens associated with recordkeeping requirements, particularly with respect to advertising agencies, real estate brokers, and real

[208] *See, e.g.,* Dodd-Frank Act, § 1100A; *see also* Press Release TG–864, Dep't of the Treasury, *Treasury Convenes Mortgage Disclosure Forum, Event Brings Together Stakeholders to Discuss Path Forward to Simplify Mortgages Disclosure Forms, Empower Consumers with Better, Easy-to-Understand Information* (Sept. 21, 2010), *available at http://www.treasury.gov/press-center/press-releases/Pages/tg864.aspx.*

[209] The modifications are designed to make this provision clearer and easier to understand. The changes also align this provision with the same provision used in the Commission's MARS Rule. *See* 16 CFR 322.8. The proposed provision stated that ''[a]ny attempt by any person to obtain a waiver from any consumer of any protection provided by or any right of the consumer under this rule constitutes a violation of this rule.'' MAP B—Advertising, NPRM, 75 FR at 60370.

[210] ABLE at 5.

[211] Other consumer protection laws and regulations include prohibitions on requiring consumers to waive their statutory rights. *See, e.g.,* 15 U.S.C. 1693*l* (Electronic Fund Transfer Act); 16 CFR 322.8 (MARS).

[212] Final Rule § 321.5(b); *see also* 16 CFR 322.9(d) (MARS); 16 CFR 310.5(b) (TSR).

[213] This provision is similar in many respects to the recordkeeping requirements set forth in the FTC's MARS Rule and Telemarketing Sales Rule (TSR), including the mandate to retain scripts, advertisements, and promotional materials. *See* 16 CFR 322.9 (MARS); 16 CFR 310.5 (TSR). The Telemarketing and Consumer Fraud and Abuse Prevention Act expressly authorized the Commission to impose recordkeeping requirements. 15 U.S.C. 6102(a)(3). Although the Omnibus Appropriations Act, as clarified by the Credit CARD Act, does not contain a specific provision on recordkeeping, the recordkeeping requirements here are reasonably related to the prevention of deception.

[214] The Final Rule omits the phrase ''websites and weblogs,'' because that language is included in the definition of ''commercial communication.'' *See* Final Rule § 321.2(a). This change is to provide clarity; no substantive change is intended.

[215] AFSA at 3; OMNI at 2.

[216] CSBS/ACSSS/NACCA at 2.

[217] OMNI at 2.

[218] CSBS/ACSSS/NACCA at 2.

estate agents.[219] One commenter advocated for an exemption from the Rule for advertising agencies,[220] stating that agencies create and place commercial communications for a wide variety of clients, making it burdensome to retain and keep track of all communications that the Rule covers.[221] Another commenter, requesting an exemption from the Rule for real estate brokers and agents,[222] stated that the recordkeeping requirement would be an ''onerous burden'' on such persons, because they would need to track weekly changes in mortgage rates even though they are not acting as or on behalf of loan originators.[223]

Another commenter stated that the combination of the risk of liability under § 321.3 for providing mortgage-related information that proves to be inaccurate and the recordkeeping requirements under § 321.5 would discourage real estate agents and brokers from providing general mortgage-related information to clients or prospective clients.[224] This commenter suggested revising the definition of ''commercial communication'' to address this issue[225] or, in the alternative, narrowing the recordkeeping requirements[226] and adding a safe harbor'' or ''good-faith exception'' from the rule for an ''unintentional inaccuracy.'' [227]

With respect to overall burden, the Commission believes that the record retention requirement is necessary to ensure that covered persons are complying with the requirements of the Final Rule.[228] Specifically, the requirement that covered persons retain copies of their commercial communications will enable the FTC to review those communications for any misrepresentations that violate the Rule and to bring law enforcement actions as appropriate. Covered persons may offer consumers many different mortgage credit products and may also offer or provide additional products or services with the mortgage credit products, making it difficult for enforcement agencies to evaluate the veracity of claims in advertising for those products absent a recordkeeping requirement.

The Commission recognizes that recordkeeping provisions impose compliance costs; however, many covered persons in the ordinary course of their business already retain the types of documents that the Final Rule requires be retained. As noted above, to further reduce burden, the Rule permits entities to keep the records in any legible form and in the same manner, format, or place as they keep such records in the ordinary course of business. The Final Rule also limits the retention requirements to avoid imposing any unnecessary burden. For example, covered entities need retain only commercial communications that are ''materially different'' from each other.

In response to commenters' concerns about the scope of the recordkeeping requirements, the Commission's Final Rule adds clarifying language throughout § 321.5(a) that does not substantively change the provision. The Final Rule clarifies that the recordkeeping requirements, like the prohibition in § 321.3, do not apply to all commercial communications; rather, they apply to any commercial communication ''regarding any term of any mortgage credit product.'' It also clarifies that the requirements apply only to commercial communications that the covered person ''made or disseminated.'' The Commission declines to make additional changes to the recordkeeping requirements, and specifically requires that records be retained by mortgage lenders and brokers, real estate brokers and agents, advertising agencies, and others that make representations about mortgage credit product terms in commercial communications. As noted above, the Rule is intended to be broad enough to cover commercial communications about mortgage credit products that are not necessarily offered or extended by the person who is making or disseminating the commercial communication.

Similarly, the Commission has determined not to narrow the recordkeeping requirement by providing a good faith exception for unintentional deceptive claims.[229] As explained above, the Final Rule generally requires retention of only a narrow class of records that, for the most part, advertisers are likely to keep in the ordinary course of business. In addition, an exemption for unintentional deception is contrary to the longstanding principle that a claim can be deceptive even though it was not the advertiser's intent to deceive.[230] Finally, the challenges of proving an absence of good faith would frustrate Commission efforts to ensure compliance with the Final Rule.

F. Section 321.6: Actions by States

The Omnibus Appropriations Act, as clarified by the Credit CARD Act, permits states to enforce the rules issued in connection with this rulemaking.[231] States may enforce the rules, subject to the notice requirements of the Omnibus Appropriations Act, by bringing civil actions in Federal district court or another court of competent jurisdiction. Section 321.6 tracks the statute, indicating that states have the authority to file actions against those who violate the Rule. One commenter expressed appreciation for the Commission's recognition of the states' role in combating deceptive practices by including this provision in the proposed rule.[232] Section 321.6 of the Final Rule includes only non-substantive modifications to the language that was used in this section of the proposed rule.

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[219] Gorbey at 1; HSA at 2–6; NAR at 2.

[220] *See supra* Part III.B.4.

[221] Gorbey at 1.

[222] *See supra* Part III.B.4.

[223] NAR at 2.

[224] HSA at 2–6.

[225] *See supra* Part III.B.3.

[226] Specifically, the commenter suggested the Commission add the following italicized language to the recordkeeping requirements: (1) § 321.5(a)(1) would apply to ''commercial communications *that advertise the availability of any specified mortgage credit product and are* disseminated *by such covered person*'' (2) § 321.5(a)(2) would apply to ''mortgage credit products *advertised by such covered person*''; and (3) § 321.5(a)(3) would apply to ''additional products or services * * * that are or may be offered or provided *by such covered person* with the mortgage credit products.'' HSA at 5–6. As discussed *infra,* the Commission has added clarifying language to the Final Rule to address concerns about the scope of the recordkeeping requirement.

[227] HSA at 4–6. The commenter's proposed ''good-faith exception'' states: ''The provisions of this rule [§ 321.3] shall not apply to any unintentional inaccuracy in a commercial communication, provided that such inaccuracy is the product of a diligently maintained system or process that is reasonably calculated to provide accurate information in commercial communications.'' *Id.* at 6.

[228] As noted in Part I.A.3, *supra,* the Omnibus Appropriations Act, as clarified by the Credit CARD Act, permits both the Commission and states to enforce the rules issued in connection with this rulemaking. *See* Credit CARD Act § 511(a)(1)(C) and (a)(2). As noted in Part I.A.4, *supra,* effective July 21, 2011, both the Commission and the CFPB will have the authority to enforce these rules against specific categories of ''nondepository covered persons.'' *See* Dodd-Frank Act'' 1024, 1061, 1097.

[229] *See supra* notes 226–27 and accompanying text.

[230] The law is well-established that good faith is not a defense to liability under the FTC Act. *See, e.g., FTC* v. *Cyberspace.com, LLC,* 453 F.3d 1196, 1202 (9th Cir. 2006); *FTC* v. *Freecom Communications, Inc.,* 401 F.3d 1192, 1202 (10th Cir. 2005) (''Because the primary purpose of § 5 is to protect the consumer public rather than to punish the wrongdoer, the intent to deceive consumers is not an element of a § 5 violation.''); *Removatron Int'l Corp.* v. *FTC,* 884 F.2d 1489, 1495 (1st Cir. 1989); *FTC* v. *World Travel Vacation Brokers, Inc.,* 861 F.2d 1020, 1029 (7th Cir. 1988) (''To be actionable under Section 5, these misrepresentations or practices need not be made with an intent to deceive.''); *Chrysler Corp.* v. *FTC,* 561 F.2d 357, 363 (DC Cir. 1977) (''An advertiser's good faith does not immunize it from responsibility for its misrepresentations.'').

[231] Credit CARD Act § 511(a)(2).

[232] CSBS/ACSSS/NACCA at 1.

G. Section 321.7: Severability

Section 321.7 states that the provisions of the Rule are separate and severable from one another. This provision, which is modeled after a similar provision in the TSR,[233] also states that if a court stays or invalidates any provisions in the Rule, the Commission intends the remaining provisions to continue in effect. The Commission included this provision in the proposed rule, and it did not receive any comments addressing it. The Commission has adopted the proposed provision as the Final Rule.

H. Effective Date

The Final Rule becomes effective on August 19, 2011. This 30-day timeframe was included in the proposed rule. The Commission received two comments regarding the proposed effective date. One commenter supported this timeframe, provided the Final Rule is substantially the same as the proposed rule and does not include affirmative disclosure requirements.[234] Another commenter suggested 60 days would be more appropriate to allow time to set up internal procedures to retain documents.[235]

The Commission concludes that the August 19, 2011 effective date is appropriate. The Commission has adopted a Final Rule that is substantially the same as the proposed rule and prohibits deceptive claims that are already unlawful. The Commission recognizes that some covered persons may need time to implement new recordkeeping procedures but believes that 30 days, which is the same compliance period permitted in recent Commission rulemakings,[236] will give covered persons sufficient time to modify their business practices to comply with the Rule.[237]

IV. Paperwork Reduction Act[238]

The Commission is submitting this Final Rule and a Supplemental Supporting Statement to the OMB for review under the Paperwork Reduction Act (PRA), 44 U.S.C. 3501–21. The recordkeeping requirements[239] of the Rule constitute a ''collection of information'' for purposes of the PRA.[240] The Rule does not impose a disclosure requirement. The associated PRA burden analysis follows.

A. Recordkeeping Requirements

As discussed above, the Final Rule requires covered persons to retain: (1) Copies of materially different commercial communications and related materials, regarding any term of any mortgage credit product, that the person made or disseminated during the relevant time period; (2) documents describing or evidencing all mortgage credit products available to consumers during the relevant time period; 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 relevant time period.[241] A failure to keep such records would be an independent violation of the Rule.

Commission staff believes these recordkeeping requirements pertain to records that are usual and customary and kept in the ordinary course of business for many covered persons, such as mortgage brokers, lenders, and servicers.[242] As to these persons, the retention of these documents does not constitute a ''collection of information,'' as defined by OMB's regulations that implement the PRA.[243] Other covered persons, however, such as real estate agents and brokers, advertising agencies, home builders, lead generators, rate aggregators, and others, may not currently maintain these records in the ordinary course of business. Thus, the recordkeeping requirements for those persons would constitute a ''collection of information.''

B. Estimated Hours Burden and Associated Labor Costs

Commission staff estimates that the Final Rule's recordkeeping requirements will affect approximately 1.3 million persons[244] who would not otherwise retain such records in the ordinary course of business. As noted, this estimate includes real estate agents and brokers, advertising agencies, home builders, lead generators, rate aggregators, and others that may provide commercial communications regarding mortgage credit product terms.[245]

No comments specifically addressed or refuted this estimate or staff's associated PRA burden assumptions and calculations. Apart from revisiting data sources and including those updates in its information,[246] staff retains its previously published estimates without modification.

Although the Commission cannot estimate with precision the time required to gather and file the required records, it is reasonable to assume that covered persons will each spend approximately 3 hours per year to do these tasks, for a total of 3.9 million hours (1.3 million persons × 3 hours). Staff further assumes that office support file clerks will handle the Rule's record retention requirements at an hourly rate of $14.19.[247] Based upon the above

[233] *See* 16 CFR 310.9.

[234] AFSA at 3.

[235] OMNI at 2.

[236] *See* 75 FR 75092 (MARS); 75 FR 48458 (TSR).

[237] *See also supra* Part III.E (discussing limitations on recordkeeping requirements).

[238] OMB Control Number: 3084–0156. The Commission is required to display the OMB Control Number assigned, and affected persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

[239] Section 321.5 of the Final Rule sets forth the recordkeeping requirements.

[240] *See* 44 U.S.C. 3502(3)(A).

[241] *See* Final Rule § 321.5(a)(1)–(3). The Final Rule's recordkeeping provision is substantially the same as the proposed rule's provision and merely adds clarifying language. *See supra* Part III.E.2.

[242] Some covered persons, particularly mortgage brokers and lenders, are subject to state recordkeeping requirements for mortgage advertisements. *See, e.g.,* Fla. Stat. 494.00165 (2010); Ind. Code. Ann. 23–2–5–18 (2010); Kan. Stat. Ann. 9–2208 (2010); Minn. Stat. 58.14 (2010); Wash. Rev. Code 19.146.060 (2010). Many mortgage brokers, lenders, and servicers are also subject to state recordkeeping requirements for mortgage transactions and related documents, and these may include descriptions of mortgage credit products. *See, e.g.,* Mich. Comp. Laws Serv. 445.1671 (2010); N.Y. Banking Law 597 (Consol. 2010); Tenn. Code Ann. 45–13–206 (2010). In addition, lenders and mortgagees approved by the FHA must retain copies of all print and electronic advertisements and promotional materials for a period of two years from the date the materials are circulated or used to advertise. *See supra* note 53.

[243] *See* 44 U.S.C. 3502(3)(A); 5 CFR 1320.3(b)(2).

[244] 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 Feb. 17, 2011); (2) 160,000 home builders (this number is 15,000 less than the estimate in the NPRM)—from the National Association of Home Builders, *see http://www.NAHB.org* (last visited Feb. 17, 2011); (3) 350 finance companies—from the American Financial Services Association, *see http://www.afsaonline.org* (last visited Feb. 17, 2011); (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 Feb. 17, 2011); (5) 1,000 lead generators and rate aggregators—based on staff's administrative experience. These inputs add to 1,283,520 (this number is 15,000 less than the estimate in the NPRM; for rounding, and to account further for potentially unspecified other covered persons, however, staff has increased the resulting total to 1.3 million, which is the same as the estimate in the NPRM.

[245] The Commission does not know what percentage of these persons are, in fact, engaged in covered conduct under the Rule, *i.e.,* providing commercial communications about mortgage credit product terms. For purposes of these estimates, the Commission has assumed all of them are covered by the recordkeeping provisions and are not retaining these records in the ordinary course of business.

[246] *See supra* note 244.

[247] 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*

Continued

estimates and assumptions, the total annual labor cost to retain and file documents is $55,341,000 (3.9 million hours × $14.19 per hour).

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 Rule. Accordingly, staff does not anticipate that the Rule will require any new capital or other non-labor expenditures.

V. Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 [248] requires the Commission to provide an Initial Regulatory Flexibility Analysis (IRFA) with a proposed rule, and a Final Regulatory Flexibility Analysis (FRFA) with a Final Rule, if any, unless the Commission certifies that the Rule will not have a significant economic impact on a substantial number of small entities.[249]

As of the date of the NPRM, the Commission anticipated that the proposed Mortgage Acts and Practices—Advertising Rule would not have a significant economic impact on a substantial number of small entities.[250] Nonetheless, the FTC published an IRFA and requested public comment on the impact on small businesses of its proposed Rule.

In response to the IRFA and questions in the NPRM, the Commission did not receive any comprehensive empirical data regarding the revenues of covered entities or the Rule's impact on small businesses. The Final Rule is substantially the same as the proposed rule. The number of entities that the Commission estimates the Final Rule will cover is 1.325 million, which is about 25,000 less than the estimate provided in the NPRM.[251] Staff's estimated minimal burden and expense for each entity's compliance is the same as it was in the NPRM.[252] Thus, the Commission does not anticipate that the Final Rule will have a significant economic impact on a substantial number of small entities. Although the Commission certified under the RFA that the Final Rule will not have a significant impact on a substantial number of small entities, the Commission has determined, nonetheless, that it is appropriate to publish an FRFA in order to explain the impact of the Rule on small entities as follows:

A. Need for and Objectives of the Rule

The Final Rule is intended to implement Section 626 of the Omnibus Appropriations Act, as amended by the Credit CARD Act, which directs the Commission to initiate a rulemaking related to unfair or deceptive acts or practices with respect to mortgage loans. As described in Parts II and III, above, the Commission seeks to prevent deceptive acts and practices in the mortgage advertising industry, which has been the subject of numerous law enforcement actions under Section 5 of the FTC Act and TILA.

B. Significant Issues Raised by Public Comments, Summary of the Agency's Assessment of These Issues, and Changes, If Any, Made in Response to Such Comments

As discussed in Part III, above, comments to the NPRM raised concerns about burden primarily in connection with two issues: (1) Disclosures or other requirements concerning the use of multiple languages in offering mortgage credit products; and (2) recordkeeping requirements. For the reasons set forth below, the Final Rule is substantively the same as the proposed rule, with a few non-substantive clarifying edits.

1. Multiple Language Disclosures and Restrictions

In the NPRM, the Commission sought comment on several questions regarding the use of commercial communications that ''mix languages'' in connection with mortgage products, including whether the Final Rule should address this conduct by adding disclosure requirements. The Commission received several comments addressing the burdens of potential multiple language disclosure requirements.[253] One commenter stated that ''only English should be used to keep costs down for institutions.''[254] Two commenters noted the benefits to consumers of advertising and communicating in non-English languages and were concerned about the disincentives that would result from a non-English disclosure requirement.[255] These commenters opposed requiring disclosures in the consumer's preferred language, stating that the costs to business of maintaining all of the various disclosures and contracts in all of the potentially different languages that consumers use would outweigh the benefits to consumers, and would cause companies not to advertise in languages other than English to avoid the burdens of the Rule.[256] According to one of the two commenters, lenders likely would not advertise in non-English languages to avoid the risk of liability under state unfair trade practices statutes.[257] The commenter indicated that providing any required contracts in non-English languages would falsely raise consumers' expectations that they will be provided non-English language support throughout the rest of their relationship with the lender.[258]

As noted above, the Final Rule prohibits misleading claims in any language or any combination of languages.[259] The Commission did not add a specific non-English language

Earnings in the United States, 2010, Bulletin 2753, May 2011, at 3–23, tbl. 3, *available at http://www.bls.gov/ncs/ncswage2010.htm.*

[248] 5 U.S.C. 601–612.

[249] 5 U.S.C. 603–605. The definition of ''small entity'' refers to the definition provided in the Small Business Act, which defines a ''small-business concern'' as a business that is ''independently owned and operated and which is not dominant in its field of operation.'' 5 U.S.C. 601(3); 15 U.S.C. 632(a)(1).

[250] In the NPRM, the Commission estimated that the proposed rule would cover approximately 1.35 million entities. It was not known, however, how many of those entities were small entities. Nonetheless, staff estimated minimal burden and expense for each entity to comply with the proposed rule's requirements. *See* MAP—Advertising, NPRM, 75 FR at 60367 & nn.174–175.

[251] 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) 25,400 mortgage lenders and mortgage brokers (this number is 25,600 less than the 51,000 estimate in the NPRM)—from various online state regulatory agency resources and the Nationwide Mortgage Licensing System and Registry Consumer Access, *see http://www.nmlsconsumeraccess.org* (last visited between Mar. 2–Mar. 25, 2011); (2) 80 mortgage servicers (this number is 20 more than the estimate in the NPRM)—from several sources, including lists of servicers participating in various Federal programs available at *http://makinghomeaffordable.gov/contact_servicer.html* and *http://hopenow.com/members.php* (both last visited Feb. 15, 2011) (excluding lenders who are also servicers under these programs); and (3) 1.3 million others—*see supra* note 244 (explaining estimate).

[252] Staff estimates that the annual labor cost for each covered person to file or retain documents under the recordkeeping provisions was $42.57 (3 hours × $14.19 per hour). *See supra* Part IV.B (discussing labor and equipment that staff estimates are needed for compliance). *Cf.* U.S. Small Bus. Admin. Office of Advocacy, *A Guide for Government Agencies—How to Comply with the Regulatory Flexibility Act* 19 (June 2010), *available at http://www.sba.gov/advo/laws/rfaguide.pdf* (citing 126 Cong. Rec. S10,938 (Aug. 6, 1980) (identifying 175 annual staff hours for recordkeeping as a ''significant impact'')).

[253] This FRFA discusses only those comments that addressed burden concerns. For a full discussion of the multiple languages issue, see *supra* Part III.C.5.

[254] OMNI at 2.

[255] AFSA at 2–3; HPC at 2.

[256] AFSA at 2–3; HPC at 2.

[257] AFSA at 2.

[258] *Id.*

[259] *See* Final Rule § 321.2(a). In comparison, for closed-end credit, Regulation Z specifically bans providing information about some trigger terms or required disclosures only in a foreign language in the advertisement but, at the same time, providing information about other trigger terms or required disclosures only in English in that advertisement. *See* 12 CFR 226.24(i)(7).

disclosure or other related requirements to the Final Rule. Thus, the Final Rule does not increase the economic burden in connection with the multiple language issue for any covered persons, including small entities.

2. Recordkeeping Requirements

The Commission received several comments addressing burden concerns in connection with different aspects of the proposed recordkeeping requirements.[260] Two commenters supported the 24-month record retention period,[261] while another commenter suggested that the Commission impose a three to four year requirement.[262] The Final Rule retains the 24-month record retention period because it requires mortgage advertisers to retain sufficient documentation for efficient and effective compliance monitoring, while avoiding the imposition of unnecessary costs on advertisers.

One commenter expressed concern that the proposed rule did not clarify whether the records must be saved as hard or electronic copies and asserted that electronic records would save money and storage space.[263] Section 321.5(b) of the Final Rule adopts the language in the proposed rule and permits electronic or hard copies, which will limit the recordkeeping burden on all covered persons, including small entities.

Several commenters discussed the overall costs and burden associated with recordkeeping requirements, particularly with respect to advertising agencies, real estate brokers, and real estate agents.[264] One commenter advocated for an exemption from the Rule for advertising agencies, stating that agencies create and place commercial communications for a wide variety of clients, making it burdensome to retain and keep track of all communications that the Rule covers.[265] Another commenter, requesting an exemption for real estate brokers and agents, stated that the recordkeeping requirement would be an ''onerous burden'' on such persons, because they would need to track weekly changes in mortgage rates even though they are not acting as or on behalf of loan originators.[266]

Another commenter stated that the combination of the risk of liability under § 321.3 for providing mortgage-related information that proves to be inaccurate and the recordkeeping requirements under § 321.5 would discourage real estate agents and brokers from providing general mortgage-related information to clients or prospective clients.[267] This commenter suggested revising the definition of ''commercial communication'' to address this issue or, in the alternative, narrowing the recordkeeping requirements and adding a ''safe harbor'' or ''good-faith exception'' from the rule for an ''unintentional inaccuracy.'' [268]

With respect to overall burden, the Commission believes that the record retention requirement is necessary to ensure that covered persons are complying with the requirements of the Final Rule. Specifically, the requirement that covered persons retain copies of their commercial communications will enable the FTC, the CFPB, and the states to review those communications for any misrepresentations that violate the Rule and to bring law enforcement actions as appropriate. The Commission recognizes that recordkeeping provisions impose compliance costs; however, many covered persons in the ordinary course of their business already retain the types of documents that the Final Rule requires be retained. As noted above, to further reduce burden, the Rule permits entities to keep the records in any legible form and in the same manner, format, or place as they keep such records in the ordinary course of business. The Final Rule also limits the retention requirements to avoid imposing any unnecessary burden. For example, covered entities need retain only commercial communications that are ''materially different'' from each other.

In response to commenters' concerns about the scope of the recordkeeping requirements, the Commission's Final Rule adds clarifying language throughout § 321.5(a) that does not substantively change the provision. The Final Rule clarifies that the recordkeeping requirements, like the prohibition in § 321.3, do not apply to all commercial communications; rather, they apply to any commercial communication ''regarding any term of any mortgage credit product.'' It also clarifies that the requirements apply only to commercial communications that the covered person ''made or disseminated.'' The Commission did not make substantive changes to the recordkeeping requirements.[269] Thus, the Final Rule does not increase the economic burden in connection with recordkeeping for any covered persons, including small entities.

C. Description and Estimate of Number of Small Entities Subject to the Final Rule or Explanation Why No Estimate Is Available

The Final Rule applies to any person who makes any representation in any commercial communication regarding any term of any mortgage credit product. Based upon its knowledge of the industry, the Commission believes that a variety of individuals and companies under its jurisdiction will be covered by the Rule, including but not limited to mortgage lenders, mortgage brokers, mortgage servicers, real estate agents and brokers, advertising agencies, home builders, lead generators, and rate aggregators.

In response to the IRFA and a request for comments in the ANPR, the Commission received no empirical data regarding the numbers or revenues of any of these types of entities. On the basis of other available data, however, Commission staff estimates that there are approximately 1.325 million entities subject to the proposed rule.[270] Determining a precise estimate of how many of these, if any, are small entities is not readily feasible because of the lack of available data.[271]

[260] This FRFA discusses only those comments that addressed burden concerns. For a full discussion of the recordkeeping issue, see *supra* Part III.E.

[261] AFSA at 3; OMNI at 2.

[262] CSBS/ACSSS/NACCA at 2.

[263] OMNI at 2.

[264] Gorbey at 1; HSA at 2–6; NAR at 2.

[265] Gorbey at 1.

[266] NAR at 2.

[267] HSA at 2–6.

[268] *See supra* notes 226–27.

[269] The Commission did not add a good faith exception for unintentional deceptive claims. *See supra* note 230. The Commission's changes to the recordkeeping requirements are clarifying edits.

[270] *See supra* note 251.

[271] Covered entities are classified as small entities if they satisfy the Small Business Administrator's relevant size standards, as determined by the Small Business Size Standards component of the North American Industry Classification System (NAICS), *available at http://www.sba.gov/idc/groups/public/documents/sba_homepage/serv_sstd_tablepdf.pdf.* Because a wide range of individuals and companies may make representations in commercial communications regarding any term of a mortgage product, no one classification is applicable to this Rule.

The range in size standard for most of the relevant professional and support services is $7 million or less in annual receipts. This standard applies to, for example, real estate credit, mortgage and nonmortgage loan brokers, other nondepository credit intermediation, other activities related to credit intermediation (such as servicing), secondary market financing (such as Fannie Mae and Freddie Mac), marketing consulting services, advertising agencies, public relations agencies, display advertising, direct mail advertising, advertising material distribution services, other services related to advertising, and all other professional, scientific and technical services.

The range in size standard varies greatly for the following other types of entities that are covered by the Rule: Offices of real estate agents and brokers ($2 million or less); housing construction/builders ($33.5 million or less); and credit unions ($175 million or less).

D. Description of the Projected Reporting, Recordkeeping, and Other Compliance Requirements of the Rule, Including an Estimate of the Classes of Small Entities Which Will Be Subject to the Rule and the Type of Professional Skills That Will Be Necessary To Comply

The Final Rule generally prohibits misrepresentations, consistent with the prohibition on deceptive claims that would violate Section 5 of the FTC Act. The Rule elaborates on this prohibition by including specific examples of types of misrepresentations covered by the Rule, but it does not require affirmative disclosures. The entities subject to the Rule are within the Commission's jurisdiction under the FTC Act, and thus are already prohibited from such conduct. The classes of small entities covered by the rule are discussed in Part V.C, above.

The Final Rule sets forth specific categories of records that covered persons are required to retain. The Commission believes that these recordkeeping requirements are necessary to ensure that covered entities are complying with the requirements of the Rule. They will enable the Commission, the CFPB, and the states to review copies of commercial communications for any misrepresentations that violate the Rule and to bring law enforcement actions as appropriate. The Commission recognizes that recordkeeping provisions impose compliance costs; however, many covered entities in the ordinary course of business already retain the types of documents that the Final Rule requires be retained. For those entities that may not already do so, staff estimates minimal burden and expense for each entity to comply with the requirements. The professional or other skills necessary for compliance with the Rule are discussed in the Paperwork Reduction Act analysis in Part IV.B, above. To further reduce any burden, the Rule permits covered entities to keep the records in any legible form and in the same manner, format, or place as they keep such records in the ordinary course of business. The Final Rule also attempts to avoid imposing any unnecessary burden by limiting the recordkeeping requirements only to, for example, ''materially different'' commercial communications. It also limits the timeframe for recordkeeping to 24 months.

E. Steps the Agency Has Taken To Minimize Any Significant Economic Impact on Small Entities, Consistent With the Stated Objectives of the Applicable Statutes

As previously noted, the Final Rule is intended to prevent deceptive acts and practices in mortgage advertising. In drafting the Rule, the Commission has made every effort to avoid unduly burdensome requirements for all entities. The Final Rule does not impose any affirmative disclosure requirements for advertisements. Further, as discussed above, Commission staff believes that many covered entities in the ordinary course of business already retain the types of documents that the Final Rule requires be retained. In addition, § 21.5(b) states that entities may keep such records in any legible form and in the same manner, format, or place as they keep such records in the ordinary course of business. The recordkeeping requirements are format-neutral; for example, they permit the use of electronic methods that might reduce compliance burdens.

The Final Rule also limits the types of information that must be retained to avoid imposing any unnecessary burden. For example, covered persons must retain only ''materially different'' versions of commercial communications and related materials. Finally, the Rule calls for a 24-month record retention period, which the Commission believes requires mortgage advertisers to retain sufficient documentation for efficient and effective compliance monitoring, while avoiding the imposition of unnecessary costs on advertisers.

The Commission is not aware of any feasible or appropriate exemptions for small entities. The protections afforded to consumers in the Rule are equally important regardless of the size of the entity making the commercial communication. Nonetheless, as discussed above, the Final Rule attempts to minimize compliance burdens and any significant economic impact for all entities, including small entities.

TABLE A—LIST OF COMMENTERS AND SHORT-NAMES/ACRONYMS

Short-Name/Acronym	Commenter
ABLE	Advocates for Basic Legal Equality
AFSA	American Financial Services Association
ABA	American Bankers Association
BECU	Boeing Employees' Credit Union
Britz	Britz, Suzy
Coe	Coe, D
CMC/MBA	Consumer Mortgage Coalition and Mortgage Bankers Association
CUAO	Credit Union Association of Oregon
CUNA	Credit Union National Association
CSBS/ACSSS/NACCA	Conference of State Bank Supervisors, American Council of State Savings Supervisors, and National Association of Consumer Credit Administrators
Gorbey	Gorbey, Jacqueline
HSA	HomeServices of America, Inc.
HPC	Housing Policy Council of The Financial Services Roundtable
IDF	Idaho Department of Finance
Johnson	Johnson, Sondra
NAR	National Association of REALTORS
NASCUS	National Association of State Credit Union Supervisors
NRMLA	National Reverse Mortgage Lenders Association
OMNI	OMNI Community Credit Union
PCUA	Pennsylvania Credit Union Association
Swider	Swider, Keith
WCUL	Washington Credit Union League

TABLE B—LIST OF FTC MORTGAGE ADVERTISING ENFORCEMENT ACTIONS

- *FTC* v. *Assocs. First Capital Corp.,* No. 1:01–00606 (N.D. Ga. 2001)
- *FTC* v. *Capital City Mortg. Corp.,* No. 1:98CV237 (D.D.C. 1998)
- *FTC* v. *Chase Fin. Funding, Inc.,* No. SACV04–549 GLT (ANx) (C.D. Cal. 2004)
- *FTC* v. *First Alliance Mortg. Co.,* No. SACV 00–964 DOC (EEx) (C.D. Cal. 2000)
- *FTC* v. *Mortgages Para Hispanos.com Corp.,* No. 4:06–cv–19 (E.D. Tex. 2006)
- *FTC* v. *Ranney,* No. 04–F–1065 (MJW) (D. Colo. 2004)
- *FTC* v. *Ryan,* No. 1:09–cv–00535–HHK (D.D.C. 2009)
- *FTC* v. *OSI Fin. Servs., Inc.,* No. 02–C–5078 (N.D. Ill. 2002)
- *FTC* v. *Safe Harbour Found. of Fla., Inc.,* No. 08–C–1185 (N.D. Ill. 2008)
- *FTC* v. *30 Minute Mortg., Inc.,* No. 03–60021 (S.D. Fla. 2003)
- *In re Am. Nationwide Mortg. Co.,* F.T.C. Dkt. No. C–4249 (2009)
- *In re Felson Builders, Inc.,* 119 F.T.C. 642 (1995)
- *In re FirstPlus Fin. Group, Inc.,* F.T.C. Dkt. No. C–3984 (2000)
- *In re Lomas Mortg. U.S.A., Inc.,* 116 F.T.C. 1062 (1993)
- *In re Michael Gendrolis,* F.T.C. Dkt. No. C–4248 (2009)
- *In re Shiva Venture Group, Inc.,* F.T.C. Dkt. No. C–4250 (2009)
- *United States* v. *Mercantile Mortg. Co.,* No. 02–C–5079 (N.D. Ill. 2002)
- *United States* v. *Unicor Funding, Inc.,* No. 9901228 (C.D. Cal. 1999)

VI. Final Rule

List of Subjects in 16 CFR Part 321

Advertising, Communications, Consumer protection, Credit, Mortgages, Trade practices.

For the reasons set forth in the preamble, the Federal Trade Commission amends title 16, Code of Federal Regulations, by adding a new part 321, to read as follows:

PART 321—MORTGAGE ACTS AND PRACTICES—ADVERTISING

Sec.

Authority: Public Law 111–8, section 626, 123 Stat. 524, as amended by Pub. L. 111–24, section 511, 123 Stat. 1734.

§ 321.1 Scope of regulations in this part.

This part implements the 2009 Omnibus Appropriations Act, Public Law 111–8, section 626, 123 Stat. 524 (Mar. 11, 2009), as amended by the Credit Card Accountability Responsibility and Disclosure Act of 2009, Public Law 111–24, section 511, 123 Stat. 1734 (May 22, 2009). This part applies to persons over which the Federal Trade Commission has jurisdiction under the Federal Trade Commission Act.

§ 321.2 Definitions.

(a) ''Commercial communication ''means any written or oral statement, illustration, or depiction, whether in English or any other language, that is designed to effect a sale or create interest in purchasing goods or services, whether it appears on or in a label, package, package insert, radio, television, cable television, brochure, newspaper, magazine, pamphlet, leaflet, circular, mailer, book insert, free standing insert, letter, catalogue, poster, chart, billboard, public transit card, point of purchase display, film, slide, audio program transmitted over a telephone system, telemarketing script, onhold script, upsell script, training materials provided to telemarketing firms, program-length commercial (''infomercial''), the Internet, cellular network, or any other medium. Promotional materials and items and Web pages are included in the term ''commercial communication.''

(b) ''Consumer'' means a natural person to whom a mortgage credit product is offered or extended.

(c) ''Credit'' means the right to defer payment of debt or to incur debt and defer its payment.

(d) ''Dwelling'' means a residential structure that contains one to four units, whether or not that structure is attached to real property. The term includes any of the following if used as a residence: an individual condominium unit, cooperative unit, mobile home, manufactured home, or trailer.

(e) ''Mortgage credit product'' means any form of credit that is secured by real property or a dwelling and that is offered or extended to a consumer primarily for personal, family, or household purposes.

(f) ''Person'' means any individual, group, unincorporated association, limited or general partnership, corporation, or other business entity.

(g) ''Term'' means any of the fees, costs, obligations, or characteristics of or associated with the product. It also includes any of the conditions on or related to the availability of the product.

§ 321.3 Prohibited representations.

It is a violation of this part for any person to make any material misrepresentation, expressly or by implication, in any commercial communication, regarding any term of any mortgage credit product, including but not limited to misrepresentations about:

(a) The interest charged for the mortgage credit product, including but not limited to misrepresentations concerning:

(1) The amount of interest that the consumer owes each month that is included in the consumer's payments, loan amount, or total amount due; or

(2) Whether the difference between the interest owed and the interest paid is added to the total amount due from the consumer;

(b) The annual percentage rate, simple annual rate, periodic rate, or any other rate;

(c) The existence, nature, or amount of fees or costs to the consumer associated with the mortgage credit product, including but not limited to misrepresentations that no fees are charged;

(d) The existence, cost, payment terms, or other terms associated with any additional product or feature that is or may be sold in conjunction with the mortgage credit product, including but not limited to credit insurance or credit disability insurance;

(e) The terms, amounts, payments, or other requirements relating to taxes or insurance associated with the mortgage credit product, including but not limited to misrepresentations about:

(1) Whether separate payment of taxes or insurance is required; or

(2) The extent to which payment for taxes or insurance is included in the loan payments, loan amount, or total amount due from the consumer;

(f) Any prepayment penalty associated with the mortgage credit product, including but not limited to misrepresentations concerning the existence, nature, amount, or terms of such penalty;

(g) The variability of interest, payments, or other terms of the mortgage credit product, including but not limited to misrepresentations using the word ''fixed;''

(h) Any comparison between:

(1) Any rate or payment that will be available for a period less than the full length of the mortgage credit product; and

(2) Any actual or hypothetical rate or payment;

(i) The type of mortgage credit product, including but not limited to misrepresentations that the product is or involves a fully amortizing mortgage;

(j) The amount of the obligation, or the existence, nature, or amount of cash or credit available to the consumer in connection with the mortgage credit product, including but not limited to

misrepresentations that the consumer will receive a certain amount of cash or credit as part of a mortgage credit transaction;

(k) The existence, number, amount, or timing of any minimum or required payments, including but not limited to misrepresentations about any payments or that no payments are required in a reverse mortgage or other mortgage credit product;

(l) The potential for default under the mortgage credit product, including but not limited to misrepresentations concerning the circumstances under which the consumer could default for nonpayment of taxes, insurance, or maintenance, or for failure to meet other obligations;

(m) The effectiveness of the mortgage credit product in helping the consumer resolve difficulties in paying debts, including but not limited to misrepresentations that any mortgage credit product can reduce, eliminate, or restructure debt or result in a waiver or forgiveness, in whole or in part, of the consumer's existing obligation with any person;

(n) The association of the mortgage credit product or any provider of such product with any other person or program, including but not limited to misrepresentations that:

(1) The provider is, or is affiliated with, any governmental entity or other organization; or

(2) The product is or relates to a government benefit, or is endorsed, sponsored by, or affiliated with any government or other program, including but not limited to through the use of formats, symbols, or logos that resemble those of such entity, organization, or program;

(o) The source of any commercial communication, including but not limited to misrepresentations that a commercial communication is made by or on behalf of the consumer's current mortgage lender or servicer;

(p) The right of the consumer to reside in the dwelling that is the subject of the mortgage credit product, or the duration of such right, including but not limited to misrepresentations concerning how long or under what conditions a consumer with a reverse mortgage can stay in the dwelling;

(q) The consumer's ability or likelihood to obtain any mortgage credit product or term, including but not limited to misrepresentations concerning whether the consumer has been preapproved or guaranteed for any such product or term;

(r) The consumer's ability or likelihood to obtain a refinancing or modification of any mortgage credit product or term, including but not limited to misrepresentations concerning whether the consumer has been preapproved or guaranteed for any such refinancing or modification; and

(s) The availability, nature, or substance of counseling services or any other expert advice offered to the consumer regarding any mortgage credit product or term, including but not limited to the qualifications of those offering the services or advice.

§ 321.4 Waiver not permitted.

It is a violation of this part for any person to obtain, or attempt to obtain, a waiver from any consumer of any protection provided by or any right of the consumer under this part.

§ 321.5 Recordkeeping requirements.

(a) Any person subject to this part shall keep, for a period of twenty-four months from the last date the person made or disseminated the applicable commercial communication regarding any term of any mortgage credit product, the following evidence of compliance with this part:

(1) Copies of all materially different commercial communications as well as sales scripts, training materials, and marketing materials, regarding any term of any mortgage credit product, that the person made or disseminated during the relevant time period;

(2) Documents describing or evidencing all mortgage credit products available to consumers during the time period in which the person made or disseminated each commercial communication regarding any term of any mortgage credit product, 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 the person made or disseminated each commercial communication regarding any term of any mortgage credit product, including but not limited to the names and terms of each such additional product or service available to consumers.

(b) Any person subject to this part may keep the records required by paragraph (a) of this section in any legible form, and in the same manner, format, or place as they keep such records in the ordinary course of business. Failure to keep all records required under paragraph (a) of this section shall be a violation of this part.

§ 321.6 Actions by states.

Any attorney general or other officer of a state authorized by the state to bring an action under this part may do so pursuant to Section 626(b) of the 2009 Omnibus Appropriations Act, Public Law 111–8, section 626, 123 Stat. 524 (Mar. 11, 2009), as amended by the Credit Card Accountability Responsibility and Disclosure Act of 2009, Public Law 111–24, section 511, 123 Stat. 1734 (May 22, 2009).

§ 321.7 Severability.

The provisions of this part are separate and severable from one another. If any provision is stayed or determined to be invalid, it is the Commission's intention that the remaining provisions shall continue in effect.

By direction of the Commission.

Donald S. Clark,

Secretary.

Note: The following appendices will not appear in the Code of Federal Regulations.

Appendix A—Concurring Statement of Commissioner Ramirez, in Which Chairman Leibowitz and Commissioner Brill Join

Final Rule: Mortgage Acts and Practices—Advertising

We support the final rule the Commission issues today concerning the advertising of home mortgages (Mortgage Acts and Practices—Advertising Rule or ''MAP Rule''). The MAP Rule is narrow in scope—addressing only the advertising phase of the mortgage lifecycle by those subject to the Federal Trade Commission's jurisdiction—and does not render unlawful any conduct that is not already banned by the prohibition on deception in Section 5 of the FTC Act.[1] At the same time, the MAP Rule accomplishes several important objectives by: (1) Giving the FTC and the states authority to seek civil penalties for deceptive mortgage advertising, broadly defined, by entities subject to the FTC's jurisdiction; (2) providing guidance and clarity as to what constitutes deceptive mortgage advertising; and (3) imposing record-keeping requirements on mortgage advertisers to facilitate law enforcement. We write separately to underscore the importance of one issue addressed by the MAP Rule: Communications about mortgages to consumers whose native language is not English.

The United States population today is highly diverse, representing cultures and languages from all over the world. According to the Census Bureau, of the 281 million people age five and older in the United States in 2007, 55.4 million individuals, or nearly 20 percent, reported speaking a language

[1] 15 U.S.C. 45(a).

other than English at home.[2] Marketers are well-aware of this trend, and today they often tout a wide array of products and services, including home loans, in languages other than English.

It is essential that our consumer protection laws keep pace with such marketplace realities, and we are pleased that the MAP Rule broadly bans deception in commercial communications concerning residential mortgages regardless of the language or languages in which they are made. For example, under the MAP Rule it can be unlawful to offer a consumer one set of terms in her native language but then deliver different terms in loan documents written in English.[3] In addition, because the ''net impression'' of an advertisement is the lynchpin of deception analysis,[4] a fine print disclaimer or qualifying statement may be insufficient to cure an otherwise misleading advertisement.[5] This principle, as applied to advertising that uses multiple languages, means that, in advertising that targets consumers in a language other than English, a disclaimer in English may be insufficient to cure misleading claims in another language.[6]

But there are many questions about the communication of mortgage loan terms that go beyond the scope of this rulemaking, among them whether mortgage disclosure documents should be provided to non-English speakers in languages other than English.[7] Congress has charged the Consumer Financial Protection Bureau with the long-overdue task of simplifying and clarifying mortgage disclosure documents,[8] and has granted the new agency broad rulemaking authority with respect to the advertising and communication of mortgage loan terms. We look forward to the results of the CFPB's work in this area, including its consideration of the needs of non-native English speaking consumers when carrying out that important mandate.[9]

More generally, given our country's changing demographics, we believe that government and industry alike will need to pay greater attention to ensuring that consumers, no matter what language they speak, have access to important information regarding their purchases and are protected from unfair and deceptive practices.

Appendix B—Response of Commissioner J. Thomas Rosch to the Concurring Statement of Commissioner Ramirez, in Which Chairman Leibowitz and Commissioner Brill Join

Final Rule: Mortgage Acts and Practices—Advertising

July 19, 2011

I agree with the concurring statement of Commissioner Ramirez concerning the Mortgages Acts and Practices—Advertising Rule to the extent it reiterates the assertions of the Statement of Basis and Purpose that the ''net impression'' of an advertisement is a touchstone of FTC deception analysis regardless of the language or combination of languages. It is also axiomatic that government and industry need to be vigilant that all consumers, regardless of what language they speak, are not victims of unfair and deceptive practices.

However, insofar as the concurring statement suggests that the Consumer Financial Protection Bureau should require that mortgage disclosure documents be provided to non-English speaking consumers in their native language, I disagree. There is no basis for making any recommendation to ''go beyond'' the MAP Rule or Section 5 as respects requirements that lenders furnish ''non-English speakers'' with disclosures that are not in English. *See* Concurring Statement at 3. Specifically, Census Bureau data showing that nearly 20 percent of people in the United States in 2007 ''reported speaking a language other than English at home'' (*id.* at 1) does not suggest that they could not read or understand English. Indeed, so far as the rulemaking record for the MAP Rule is concerned, it is my understanding that a majority of the comments received favored making disclosures only in English. Thus, there is currently no basis for the Federal government to burden this industry with disclosure requirements that would oblige the industry to make disclosures in a language other than English except when the ''net impression'' left by not doing so would violate Section 5.

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[2] U.S. Census Bureau, *Language Use in the United States: 2007* (Apr. 2010), *available at http://www.census.gov/prod/2010pubs/acs-12.pdf.*

[3] In fact, the FTC has challenged such a practice as deceptive under Section 5 of the FTC Act. *See FTC* v. *Mortgages Para Hispanos.com Corp.,* No. 4:06–cv19 (E.D. Tex. 2006) (alleging mortgage broker engaged in deceptive practices by orally offering Spanish-speaking customers one thing in Spanish and then delivering something else in loan documents written entirely in English).

[4] *See, e.g., FTC* v. *Cyberspace.com, LLC,* 453 F.3d 1196, 1200 (9th Cir. 2006); *FTC* v. *Nat'l Urological Group, Inc.,* 645 F. Supp. 2d 1167, 1189 (N.D. Ga. 2008), *aff'd,* 356 Fed. App'x (11th Cir. 2009).

[5] *See, e.g., Cyberspace.com,* 453 F.3d at 1200.

[6] In 2008, the Board of Governors of the Federal Reserve System amended Regulation Z under the Truth in Lending Act to prohibit advertising certain information only in a foreign language while providing, in the same advertisement, other critical information in English. *See* Final Rule, Truth in Lending, 73 FR 44522, 44601 (Jul. 30, 2008) (codified at 12 CFR 226.24(i)(7)). This approach is consistent with longstanding FTC requirements that mandatory disclosures be made in the language of the target audience. *See* 16 CFR 14.9 (under FTC rules, cease-and-desist orders, and guides that require the ''clear and conspicuous'' disclosure of information, such disclosure must be made in the language of the target audience); 16 CFR 610.4(a)(3)(ii) (in marketing free credit reports, mandatory disclosures must be made in the same language as that principally used in the advertisement); 16 CFR 429.1(a) (in door-to-door sales, failure to furnish a completed receipt or contract in the same language as the oral sales presentation is an unfair and deceptive act or practice); 16 CFR 455.5 (where used car sales pitches are conducted in Spanish, mandatory disclosures must be made in Spanish); 16 CFR 308.3(a)(1) (mandatory disclosures about pay-per-call services must be made in the same language as that principally used in the advertisement); *see also* FTC Final Rule, Free Annual File Disclosures, 75 FR 9726, 9733 (Mar. 3, 2010) (noting ''the Commission's belief that a disclosure in a language different from that which is principally used in an advertisement would be deceptive'').

[7] The CFPB has begun testing draft prototype mortgage disclosure documents in English and Spanish in advance of a formal rulemaking process. *See* CFPB, *Consumer Financial Protection Bureau Announces Initiative to Combine Mortgage Loan Disclosures* (May 18, 2011), *available at http://www.consumerfinance.gov/pressrelease/consumer-financial-protection-bureau-announces-initiative-to-combine-mortgage-loan-disclosures/.*

[8] *See generally James M. Lacko & Janis K. Pappalardo, Federal Trade Commission Staff Report, Improving Consumer Mortgage Disclosures: An Empirical Assessment of Current And Prototype Mortgage Disclosure Forms* (2007), *available at http://www.ftc.gov/os/2007/06/P025505MortgageDisclosureReport.pdf.*

[9] Our colleague, Commissioner Rosch, expresses concern that we may be advancing an argument about mortgage disclosures that is not supported by the record before us. But far from prejudging the outcome of any work to be performed by the CFPB, we are simply highlighting some of the important consumer protection issues that may arise in connection with mortgage advertisements targeting consumers whose primary language is not English. As we noted above, the matters before the Commission in this rulemaking were narrow, and the evidence received on the issue of the use of multiple languages in advertising—a mere four comments—does not address the questions to be examined by the CFPB concerning improvements to mortgage disclosure documents. While this limited record does not purport to address such issues, we have no doubt that in considering this and other questions, the CFPB will develop a full and complete record that properly takes into account the impact on all stakeholders of any measure that is designed to ensure that consumers receive clear and accurate information to assist them in making sound decisions about mortgages.

CONSUMER PRODUCT SAFETY COMMISSION

16 CFR Part 1700

[CPSC Docket No. CPSC–2011–0007]

Poison Prevention Packaging Requirements; Exemption of Powder Formulations of Colesevelam Hydrochloride and Sevelamer Carbonate

AGENCY: Consumer Product Safety Commission.

ACTION: Final rule.

SUMMARY: The Consumer Product Safety Commission (''CPSC,'' ''Commission,'' or ''we'') is amending its child-resistant packaging requirements to exempt powder formulations of two oral prescription drugs, colesevelam hydrochloride and sevelamer carbonate. Colesevelam hydrochloride, currently marketed as Welchol®, is available in a powder formulation and is indicated to reduce elevated LDL cholesterol levels and improve glycemic control in adults with type 2 diabetes mellitus. Sevelamer carbonate, currently marketed as Renvela®, is also available as a powder formulation and is indicated for the control of elevated serum phosphorus in chronic kidney disease patients on dialysis. The rule exempts these