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Regulation Comments
Chief Counsel's Office
Office of Thrift Supervision
1700 G Street, NW
Washington, DC 20552

RE: Alternative Mortgage Transaction Parity Act (AMTPA)
Docket No. 2002-17

I am writing on behalf of a constituent in the mortgage lending business regarding the proposed Alternative Mortgage Transaction Parity Act (AMPTA) regulation being considered by the Office of Thrift Supervision. Although I have not taken a position on the proposed AMTPA rule at this time, I submit these concerns on my constituent's behalf and ask that you take the concerns highlighted into consideration as you evaluate comments submitted during the public comment period.

My constituent's concerns include the following:

- **There is no consensus as to what constitutes "predatory lending."**

There is no consensus within the lending, consumer or enforcement agency communities as to the meaning of "predatory lending." If adopted, the proposed rule may discourage legitimate lenders from making credit available to those who are most in need, partly because the burdens placed on lenders to comply with a patchwork of federal, state, county and city laws will make it too expensive for lenders to make loans to borrowers who have impaired credit.

- **Prepayment penalties and late fees are terms which may decrease the cost of credit and provide flexibility to borrowers.**

Prepayment penalties and late fees should not, in and of themselves, be construed as being "predatory" features of loans. Both prepayment penalties and late fees are frequently elements of loans to borrowers with perfect credit. The inclusion of these terms can bring the interest rate of a loan down, or reduce or eliminate the inclusion of points. These features can increase the attractiveness of such loans on the secondary market, further reducing the pricing lenders can make available to consumers. Eliminating such ability or creating a patchwork of different state and local rules will make such loans unattractive to investors, further reducing the availability and/or increasing the cost of credit.

Lenders must price loans according to borrower credit risk, with regard to the market interest rates at the time the loan is made. Lenders responding to secondary markets must set the interest rate under the assumption that the loan will last for a certain period of time, thereby spreading the cost of originating and servicing the loan over that period of time. If interest rates fall, and the borrower refinances in order to get a lower interest rate within a few years after the original loan was made, the original lender will take a loss on the loan. Charging a prepayment penalty is one way to mitigate this loss. This is a mechanism commonly used throughout the financial services and banking industries, and is not limited to consumer loans. An alternative way to prevent the loss caused by early repayment is to charge points so that the cost of the loan is essentially "front-loaded." Charging points, of course, means the borrower pays higher up-front costs, a result that may prevent a borrower from being able to afford the loan. Another alternative is to charge a higher interest rate to compensate for the risk of prepayment. Again, this alternative results in a higher cost to the borrower as well. Borrowers should be able to choose their own preference as to which terms are more favorable to them.

Likewise, late fees are necessary for lenders to prevent losses. Lenders frequently must borrow money from other sources in order to fund their loans. Lenders (or their successor assignees) are required to make regular payments on these loans, and when individual mortgage borrowers are late in making their payments, the lenders will lose income as a result of interest loss. Lenders must be able to impose a late fee in order to deter late payment, to recoup the interest lost as a result of the delayed cash flow, and to compensate for the increased costs associated with servicing such a loan. Compliance with a patchwork of state and local laws limiting late fees only serves to increase the cost of doing business for lenders. AMTPA and OTS regulations currently in place reduce that compliance burden, and should remain as they stand today, in order to keep the cost of credit down for borrowers.

It is crucial that borrowers be left with the ability to negotiate the terms of the loan that are important to them as individuals. If a borrower is willing to have a prepayment penalty associated with a loan, because it means that the borrower will be able to receive a lower interest rate, why should the borrower not have the freedom of choice to negotiate that term?

- **Prepayment penalties and late fees are well disclosed to borrowers to allow for meaningful decision-making.**

There is no risk that a borrower will not be made aware of the presence of the prepayment penalties or late charges associated with a loan, so as to prevent the borrower from shopping for a lender who offers more beneficial terms. The Truth-in-Lending Act requires that prepayment penalties and late charges be disclosed prominently to the borrower (oftentimes on multiple occasions). These terms also appear in the note and frequently, in other documents. Unless the lender fails to properly disclose such terms, a failure which is already punishable under the law, the borrower will be made aware of the terms, and will have the ability to discuss available options with the lender, or to shop for a new lender.

- **The proposed rule is not narrowly drafted to impact only predatory lenders.**

Although the proposed rule states that it is aimed at remedying predatory lending problems, the rule does not limit itself to removing preemptive authority for loans which could be predatory in nature. Rather, the proposed rule would strip independent lenders of preemptive authority with respect to prepayment penalties and late fees for all alternative mortgage transactions, most of which would not be characterized as predatory in nature. Alternative mortgage transactions are utilized by borrowers with perfect credit and imperfect credit alike. Even with respect to loans to borrowers with imperfect credit, only a very small portion may be categorized as predatory in nature. We should not let a few bad lenders cause us to limit consumer credit altermatives, by changing the features of alternative mortgage transactions available to independent lenders as a whole, rather than trying to gear any regulatory changes specifically to address the predatory lending problem.

- **The proposed rule deviates from the intended Congressional purposes behind AMTPA, i.e., ensuring an adequate supply of credit, and leveling the playing field between federal and state chartered housing creditors.**

When Congress acted, in 1982, to pass AMTPA, the clear intention was to remove the patchwork of state governmental restrictions on loan terms, so as to allow for market solutions to increase the availability of credit. As the OTS points out in its notice of proposed rulemaking, until 1996, OTS regulations did not extend preemption for late fees and prepayment penalties to state housing creditors with respect to alternative mortgage transactions. As such, there was a prior inconsistency within a single regulatory authority as to available terms for alternative mortgage transactions. However, in 1996, OTS corrected this discrepancy, in the spirit of leveling the playing field for the creditors under its authority. The OTS now wishes to reverse its course of action, and contrary to Congressional directive, revive discrimination in its treatment of federally chartered and state chartered housing creditors.

The independent lenders who would be discriminated against by the change in OTS regulations, are of course, the very lenders who are most likely to make loans to borrowers who do not have a perfect credit history. These lenders are essential to the provision of an adequate supply of credit to the American public. If the independent lenders are driven out of the market place by discriminatory treatment such as that proposed by the OTS, we will be back in the same position that we were before AMTPA was adopted. In fact, we may be forced into the untenable position of pushing the government sponsored entities, i.e., Fannie Mae and Freddie Mac, into the role of direct lender, if other lenders are forced out of the market place.

Thank you for taking the concerns of my constituent into consideration during the rulemaking process.

Sincerely

Rick Santorum

Rick Santorum
United States Senate