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March 22, 2021

Representative Joseph J. Solomon, Jr., Chairman
House Corporations Committee and Committee Members
State House
Providence, RI 02903

Re: An Act Relating to Commercial Law-General Regulatory Provisions-Deceptive Trade Practices
21H 6142

Dear Representative Solomon and Committee Members:

This memorandum is to outline the opposition of the Rhode Island Mortgage Bankers Association ("RIMBA") to the changes being proposed to the Rhode Island Deceptive Trade Practices Act, *R. I. Gen. Laws ch. 6-13.1* (the "Act") by H-6142 (the "Bill").

Broadly stated, the Act prohibits "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce". The Attorney General is granted authority under the Act to restrain any method, act or practice prohibited by the Act, and consumers are granted a private right of action, including in an appropriate case, the right to bring class actions on behalf of similarly situated consumers, to recover actual and statutory damages if they have been subject to a violation of the Act. Importantly, the Act does not define what conduct is prohibited by the Act but leaves that prohibition to be worked out by the courts on a case by case basis in resolving complaints raised by the Attorney General and consumers.

The Bill, as proposed, would make two significant and far reaching changes in the way in which the Act will be applied against RIMBA's members, which include banks, credit unions, mortgage bankers and mortgage brokers who are licensed to conduct business in Rhode Island ("Regulated Institutions"). Since originally effective in Rhode Island in 1969, the Act has contained an exemption for "actions or transactions permitted under laws administered by the department of business regulation or other regulatory body or officer acting under statutory authority of this state or the United States." *Act, §6-13.1-4*. This makes sense because Regulated Institutions are subject to significant, expensive, and ever-increasing regulations applicable to the manner in which they conduct their business. In fact, the Consumer Financial Protection Bureau, created by Congress in 2010, administers a myriad of consumer protection laws and creates consumer protection regulations that are designed to balance the rights of consumers and lenders, both from a disclosure standpoint but also as a matter of substantive rule making. Depending upon the nature of the Regulated Institution, it can also be subject to regulation and examination (paid for by the institution) by the Comptroller of the Currency, the Federal Deposit Insurance Corporation, the National Credit Union Administration and other federal regulatory bodies. Similarly, the Rhode Island Department of Business Regulation is charged with licensing and examining (also at the institution's expense) certain of the Regulated Institutions not subject to federal regulation.

These include state-chartered banks and credit unions and mortgage bankers and mortgage brokers. The bottom line is that the exemption provided by Act is reasonable when limited to entities such as the Regulated Institutions because these Regulated Institutions are subject to broad regulation, at great expense to their business, and ample avenues exist for issues of concern to consumers to be brought to the attention of the regulators, vetted by them with their industry expertise, and addressed with appropriate rules and regulations. Indeed, Rhode Island consumers have an existing avenue to complain and seek redress against a regulated entity for licensed activities by asserting a contested case against such entity with the DBR. This is appropriate because the DBR has the tools and necessary expertise to determine whether or not the institution's challenged conduct is, in fact, an unfair practice.

The Bill would essentially eliminate this exemption. As drafted, the exemption would remain applicable to actions brought by a consumer. However, to avail itself of the exemption in an action brought by the Attorney General, the business would have to show that the complained of activities are "expressly authorized, permitted or required by a state or federal agency or by applicable law, rule or regulation." It is highly unlikely that any such activities would ever be found to violate the Act, because it would be difficult for any court to find that action authorized, permitted or required by a regulator or applicable law is unfair or deceptive. Thus, this proposed amendment is simply a backhand attempt to eliminate a sensible exemption that exists and has existed for over 50 years for Regulated Institutions and to add the Attorney General as a potential additional regulator – a potential regulator given the power to punish not through regulations proposed and adopted after notice and administrative hearing but through enforcement proceedings brought under the Act. This is contrary to fundamental principles of administrative law and the Rhode Island Administrative Procedures Act, which requires advance notice of proposed rule-making and the opportunity for the public, including those who would be subject to the regulation, to comment on the proposed rules.

RIMBA understands that the exemption in Section 6-13.1-4 has been broadly interpreted and such interpretations may extend the exemption to business that are simply licensed and not subject to the same degree of regulation as RIMBA's members. If that is the issue, then fix only that problem. RIMBA believes that the exemption should be fully preserved for institutions, such as Regulated Institutions, that are subject to examination by a regulatory body and pay the cost of the examination. At least 10 states, including Wisconsin, Michigan and Ohio, and have exemptions in their consumer protection statues for institutions such as Regulated Institutions (as defined herein) or for mortgage transactions generally.

The second significant amendment is one proposed for Section 6-13.1-8 of the Act. This amendment would create a significant change in the manner in which the Act is enforced. As currently drafted, the Act provides for a civil penalty of up to $10,000 if a business violates an injunction obtained by the Attorney General restraining that business from engaging in a particular unfair or deceptive practice. Imposition of a penalty in this circumstance makes sense. A court has determined that the particular act or practice is unfair or deceptive and restrained the business from continuing the act or practice.

The amendment proposed to Section 6-13.1-8 eliminates the requirement for there to be an injunction in place before the civil penalty imposed by Section 6-13.1-8 could be collected. Rather, the Bill imposes the $10,000 civil penalty on any business that violates the provisions of the Act. The problem, as noted above, is that the Act does not define what conduct it makes unlawful. It simply prohibits "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce" and leaves the courts to figure out what those unfair and deceptive acts or practices are. When those determinations are made prospectively, the business has the opportunity to become aware of the objection and conform its behavior. As modified by the Bill, all such determinations would be made retrospectively. Essentially, the amendment would allow the Attorney General to use 20/20 hindsight and assess a $10,000 penalty against any business that is found liable under the Act, even though the business had no knowledge that the particular act or practice complained of was considered unfair or

deceptive prior to the commencement of the action against it. And, the $10,000 penalty applies to each transaction in which the act or practice was used. Regulated Institutions engage in multiple transactions daily and apply consistent procedures across all transactions to comply with fair credit laws and other anti-discriminatory rules. Thus, a single practice for which the business has no prior notice of unlawfulness could result in millions of dollars of exposure. This scheme violates basic principles of due process and fairness and could be used selectively to punish individual businesses rather than to regulate an industry generally.

The unfair and deceptive practices acts of at least half of the other states have limitations on the imposition of a penalty for a first offense, ranging from tiered penalties to requiring that violations be shown to have some element of scienter, such as having been done knowingly, or willfully, or with intent, or proven by clear and convincing evidence. At a minimum, RIMBA believes that this penalty portion of the Bill should only apply if it is shown that the unfair act or practice complained of was done by the business "with intent to defraud". Additionally, if the Bill eliminates the need for the Attorney General to obtain an injunction first declaring an act or practice to be unfair or deceptive before a business can become liable for the $10,000 penalty, at a minimum, the Bill should be amended to require the Attorney General to give the business written notice of the objectionable aspects of the act or practice and allow the business a reasonable opportunity to correct the act or practice prior to being liable for the statutory penalty.

For the foregoing reasons, RIMBA believes that the amendments proposed by H-6142 are flawed and opposes adoption of the Bill.

Rhode Island Mortgage Bankers Association

By: _____
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