



**Office of Thrift Supervision**  
Department of the Treasury

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July 10, 2009

Federal Trade Commission  
Office of the Secretary  
Room H-135 (Annex W)  
600 Pennsylvania Avenue N.W.  
Washington, D.C. 20580

SUBJECT: Comments on Mortgage Assistance Relief Services Rulemaking  
Rule No. R911003

Dear Sir or Madam:

The Office of Thrift Supervision (OTS) has reviewed the Federal Trade Commission's Advanced Notice of Proposed Rulemaking (ANPR) concerning Mortgage Assistance Relief Services. To determine whether unfair or deceptive practices are occurring in this area, the ANPR seeks information about the practices of parties that offer assistance to consumers who are attempting to modify their mortgages or take other steps to avoid foreclosure. In an effort to assist you as you develop a proposed rule on this topic, we have provided the enclosed staff comment.

If you have any questions regarding our comments, please contact either April Breslaw, Consumer Regulations Director at (202) 906-6989 or Rhonda Daniels, Senior Compliance Program Analyst at (202) 906-7158.

Sincerely,

Montrice G. Yakimov

Enclosure

Office of Thrift Supervision  
Staff Comment on Advanced Notice of Proposed Rulemaking  
Mortgage Assistance Relief Services Rulemaking  
Rule No. R911003

The Office of Thrift Supervision (OTS) is taking this opportunity to comment on the Advanced Notice of Proposed Rulemaking (ANPR) on Mortgage Assistance Relief Services issued by the Federal Trade Commission (FTC). The ANPR seeks information about the practices of entities who offer assistance to consumers in dealing with owners or servicers of their loans to modify them or avoid foreclosure. We understand that the FTC plans to use such information to determine whether any of these practices are unfair or deceptive under Section 5 of the FTC Act and should be incorporated into a proposed rule. OTS supports the FTC efforts in this important area and offers the following comments to assist the FTC as it develops its proposal.

Discussion

Steps the OTS Has Taken

With respect to abusive practices relating to mortgage foreclosure prevention, OTS recently issued a consumer advisory titled “Foreclosure Rescue Scams: How to Avoid Becoming a Victim.”<sup>1</sup> The advisory provides consumers with information on common types of mortgage foreclosure rescue scams and resources available to consumers who are facing potential foreclosure.

OTS has also repeatedly encouraged its institutions to work with troubled borrowers.<sup>2</sup> In fact, the agency asked institutions under its jurisdiction to suspend foreclosures on owner-occupied homes until the administration was able to finalize its “Making Home Affordable” mortgage modification program.<sup>3</sup> Moreover, the OTS has joined with other regulators to issue expanded Community Reinvestment Act (CRA) guidance that encourages financial institutions to participate in foreclosure prevention

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<sup>1</sup> The advisory is available on the OTS website at: <http://files.ots.treas.gov/482037.pdf>.

<sup>2</sup> See “Interagency Statement on Working with Mortgage Borrowers” issued April 17, 2007 (available on the OTS website at: [http://www.ots.treas.gov/index.cfm?p=PressReleases&ContentRecord\\_id=0e3f8724-3641-41a4-a93c-13835fe01d04&ContentType\\_id=4c12f337-b5b6-4c87-b45c-838958422bf3&MonthDisplay=4&YearDisplay=2007](http://www.ots.treas.gov/index.cfm?p=PressReleases&ContentRecord_id=0e3f8724-3641-41a4-a93c-13835fe01d04&ContentType_id=4c12f337-b5b6-4c87-b45c-838958422bf3&MonthDisplay=4&YearDisplay=2007) ) and interagency “Statement on Loss Mitigation Strategies for Servicers of Residential Mortgages” issued September 4, 2007 (available on the OTS website at: [http://www.ots.treas.gov/index.cfm?p=PressReleases&ContentRecord\\_id=bc7a472f-f419-4c25-b5d5-e8b0ab9e616b&ContentType\\_id=4c12f337-b5b6-4c87-b45c-838958422bf3&MonthDisplay=9&YearDisplay=2007](http://www.ots.treas.gov/index.cfm?p=PressReleases&ContentRecord_id=bc7a472f-f419-4c25-b5d5-e8b0ab9e616b&ContentType_id=4c12f337-b5b6-4c87-b45c-838958422bf3&MonthDisplay=9&YearDisplay=2007)).

<sup>3</sup> See “OTS Urges Temporary Halt to Foreclosures” issued February 11, 2009 (available on the OTS website at: [http://www.ots.treas.gov/index.cfm?p=PressReleases&ContentRecord\\_id=660fa9f3-1e0b-8562-eb9e-1636207722f4&ContentType\\_id=4c12f337-b5b6-4c87-b45c-838958422bf3&MonthDisplay=2&YearDisplay=2009](http://www.ots.treas.gov/index.cfm?p=PressReleases&ContentRecord_id=660fa9f3-1e0b-8562-eb9e-1636207722f4&ContentType_id=4c12f337-b5b6-4c87-b45c-838958422bf3&MonthDisplay=2&YearDisplay=2009)).

programs that have the objective of providing affordable, sustainable, long term loan restructurings or modifications for homeowners who are facing foreclosure on their primary residences.<sup>4</sup>

In order to address gaps in information about mortgages, the OTS, together with the Office of the Comptroller of the Currency, issues a quarterly *Mortgage Metrics Report*. This report presents key data on first lien residential mortgages serviced by national banks and thrifts, focusing on credit performance, loan modifications, payment plans, foreclosures, short sales and deed-in-lieu-of-foreclosure actions. In addition, the report provides a comprehensive picture of mortgage servicing activities of most of the industry's largest mortgage servicers, covering approximately two-thirds of all mortgages outstanding in the United States and incorporating information on all types of mortgages serviced, including subprime mortgages. The most recent report covered the fourth quarter of 2008.<sup>5</sup> It showed that during that period, completed foreclosures were 29 percent lower than in the third quarter of 2008. Moreover, retention programs, including loan modifications and payment plans, increased by more than 11 percent during the fourth quarter of 2008.

#### Potentially Unlawful Foreclosure Relief Practices

Section 5 of the FTC Act prohibits both unfair and deceptive acts or practices.<sup>6</sup> To determine whether an act or practice is deceptive under the FTC Act, the OTS applies the same standards as the FTC uses when it evaluates such issues.<sup>7</sup> Like the FTC, the OTS treats an act or practice as deceptive if there is a material representation, omission of information, or practice that is likely to mislead consumers acting reasonably under the circumstances.<sup>8</sup> We consider a representation to be material if it is likely to affect the consumer's decision to act. Moreover, in determining whether a representation is deceptive, the OTS considers whether the overall net impression of the representation is likely to mislead consumers. When representations are targeted to a specific audience, we evaluate the effect of the practice on a reasonable member of that group.

Through OTS's Consumer Affairs Division, OTS receives and investigates complaints about financial practices of the institutions under its supervision. Through this process, we have gained insight into certain practices that appear to meet the standards for deception described above by non-depository institutions that are not subject to OTS jurisdiction. The activities of one non-bank firm exemplify these

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<sup>4</sup> The CRA guidance is available on the OTS website at: <http://files.ots.treas.gov/482030.pdf>.

<sup>5</sup> See <http://files.ots.treas.gov/4820362.pdf>.

<sup>6</sup> See 15 U.S.C. 45(n).

<sup>7</sup> See Unfair or Deceptive Acts or Practices: Final Rule 74 FR 5498, 5504 (January 29, 2009).

<sup>8</sup> See FTC Policy Statement on Deception at 1-2. (available on the internet at: <http://www.ftc.gov/bcp/policystmt/ad-decept.htm>).

practices. Over the past year, this firm has submitted hundreds of complaints that allege that various state and federally regulated institutions made “predatory” mortgage loans to consumers.

In an effort to investigate these complaints, we have found that the firm’s website attempts to solicit any consumer if, “you suspect that you may be a victim, paid excessive fees, or were taken advantage of by a lender.” The website claims that if any such consumer pays the firm \$800, the firm “will help you get a REFUND of your ‘Hard Earned Dollars.’” The website also claims that “Most Lenders will have little choice but to settle immediately, once they review the documented report we send them, breaking down our Expert Findings.”

Consumers are not informed that they could file complaints on their own with their lenders or with appropriate state or federal regulatory agencies, without incurring any fees. Beyond this material omission that has likely misled many reasonable consumers, the overall impression created by the website is that the firm will obtain a refund of the mortgage fees that a consumer has paid. Both the firm’s website and its letters received by OTS leave the impression that the firm can accomplish this by invoking section 6 of the Real Estate Settlement Procedures Act (RESPA). However, while Section 6 of RESPA provides a process for a borrower to request information concerning the servicing of the borrower’s mortgage loan, RESPA does not provide any basis for relief for a predatory lending claim.

The practices of foreclosure rescue providers such as the ones described above appear to qualify as deceptive practices. Such advertising, whether in print or on the internet, is generally targeted to distressed homeowners who may be in danger of foreclosure and are susceptible to claims made by unscrupulous foreclosure rescue businesses. While the claims about the firm’s ability to obtain refunds are clearly material to the consumer’s decision to purchase the services offered, there is no substantiation for such claims. The result of these practices is that consumers who are in financial distress pay high fees for illusory services or for services that they could have obtained on their own at no cost.

Accordingly, OTS recommends that the FTC propose prohibiting foreclosure rescue practices that mislead consumers about the availability of free services, such as governmental complaint resolution processes. We also recommend that the FTC consider banning advertising that conveys the impression that upon payment of a fee to a provider, a consumer is essentially guaranteed to receive a refund of monies paid in connection with a mortgage loan, particularly when such a representation is based on an inaccurate portrayal of a consumer’s legal rights.