



July 15, 2009

The Honorable Jon Leibowitz
Chairman
Federal Trade Commission
Office of the Secretary
Room H-135 (Annex W)
600 Pennsylvania Avenue, NW
Washington, DC 20580

Re: Mortgage Assistance Relief Services Rulemaking, Rule No. R911003

Dear Chairman Leibowitz:

The Mortgage Bankers Association (MBA)¹ appreciates the opportunity to provide comments on the Federal Trade Commission's (FTC) advanced notice of proposed rulemaking (ANPR) regarding Mortgage Assistance Relief Services (MARS). As stated in the ANPR, the FTC was directed by the 2009 Omnibus Appropriations Act to issue rulemaking on mortgage loans. In carrying out this requirement, the FTC has chosen to address acts and practices of mortgage assistance relief services, also known as foreclosure consultants. The ANPR defines MARS as "entities (other than mortgage servicers) who offer assistance to consumers in dealing with owners or servicers of their loans to modify them or avoid foreclosure."² Banks, thrifts, federal credit unions, and non-profit organizations are not covered by the FTC Act and thus would not be covered by the ANPR.

MBA appreciates the FTC's exemption for mortgage servicers. Such exclusion is absolutely necessary to ensure property loss mitigation activities in the future. With regard to foreclosure consultants, MBA believes that programs designed to defraud mortgage borrowers in distress should not be allowed to operate. However, entities that provide legitimate services to borrowers should be allowed to perform their services without a complex regulatory structure or fear that legitimate activities will be deemed unfair or unscrupulous. While MBA believes there are sufficient state and federal laws to address concerns associated with foreclosure consultants, if the FTC does act in this area, such rules should be clear and unambiguous. Also, to avoid undue burden on legitimate assistance, the FTC should avoid duplicating laws or protections that already exist under federal law, state law or common law.

¹ The Mortgage Bankers Association (MBA) is the national association representing the real estate finance industry, an industry that employs more than 280,000 people in virtually every community in the country. Headquartered in Washington, D.C., the association works to ensure the continued strength of the nation's residential and commercial real estate markets; to expand homeownership and extend access to affordable housing to all Americans. MBA promotes fair and ethical lending practices and fosters professional excellence among real estate finance employees through a wide range of educational programs and a variety of publications. Its membership of over 2,400 companies includes all elements of real estate finance: mortgage companies, mortgage brokers, commercial banks, thrifts, Wall Street conduits, life insurance companies and others in the mortgage lending field. For additional information, visit MBA's Web site: www.mortgagebankers.org.

² 74 Fed. Reg. 26130 (June 1, 2009)

I. Background

Those who commit financial fraud are always looking for new opportunities. Fraudsters are targeting troubled borrowers to profit from their misfortune. Borrowers need to turn to the right sources for help. However, in many cases, borrowers in trouble are often reluctant to call their servicers or other trustworthy companies. In other cases, borrowers need more personal attention. In both these cases, the borrower may come in contact with individuals or businesses that are looking to scam them.

MBA and our foreclosure prevention coalition partners such as HOPE NOW³ have worked hard to make borrowers aware of free and legitimate homeownership counseling. These efforts include homeowner education and outreach on an unprecedented scale. HOPE NOW and its partners, NeighborWorks and the Homeownership Preservation Foundation, continue to support and/or fund the HOPE hotline to help borrowers navigate loss mitigation and other financial solutions. The HOPE hotline is free and home retention counselors are approved by the U.S. Department of Housing and Urban Development (HUD). The industry also appreciates the FTC's and other government agencies' help in alerting the public of potential scams.

Foreclosure rescue scams can take many forms, but the two most common are:

- **Title Transfers:** Perpetrators convince homeowners that they can save their homes from foreclosure through deed transfers and promises to lease back or sell back the property. This type of so-called "foreclosure rescue" often results in a manipulated deed process that results in the preparation of forged deeds or fraudulent lien releases. In extreme instances, perpetrators sell the home or secure a second loan without the homeowner's knowledge, stripping the homeowner of his or her property or any equity in the property for personal gain.
- **Phantom Help** – In these cases, for-profit counselors promise to complete paperwork and obtain a loan workout settlement in exchange for thousands of dollars. The scammers either do not follow through or perform menial tasks that the borrower could complete easily for free. Many for-profit companies perform the same services HUD-approved counselors and servicers do for free.

II. MBA Comments on FTC ANPR

Effectiveness of FTC Rule

Title transfer scams are usually blatant and involve forged and fraudulent documents. The Federal Bureau of Investigation (FBI) has been helpful in shutting down these facilities. We believe existing mail and wire fraud law, criminal law, specific state law, contract law, and common law provide sufficient coverage to prosecute individuals who defraud the public and to recompense victims. Adding new layers of federal regulation will do very little to stop this type

³ MBA is a founding partner in the HOPE NOW alliance, a partnership among counselors, mortgage market participants, and mortgage servicers to create a unified, coordinated plan to reach and help as many homeowners as possible. Since its inception in 2007, HOPE NOW has expanded its outreach efforts to include public service announcements that encourage delinquent borrowers to contact the person to whom they send their mortgage payment, or a qualified housing counselor at 1-888-995-HOPE.

of criminal activity. These individuals are already breaking the law and thus adding one new regulation will not be a deterrent. Enforcement is the key.

To combat mortgage fraud at large, MBA supports providing greater resources to law enforcement. In the past, MBA has requested Congress appropriate \$6.25 million per year over five years to provide dedicated funding for the FBI to track down and prosecute mortgage fraud. The funding would provide for new FBI field investigators; additional prosecutors dedicated to mortgage fraud; and support for the operations of FBI Interagency Task Forces in the areas with the 15 highest concentrations of mortgage fraud. This funding may be higher in fiscal year 2010. Going forward, preventing and prosecuting foreclosure rescue scams must be among the targets of these resources. The FBI should also set a lower "dollar loss" threshold for when it investigates a pattern or scheme.

"Phantom Help" can be harder to classify as fraud, misrepresentation or breach of contract. In some cases, it is very obvious that the assistance is bogus. In other cases, it is a matter of differing expectations and lack of mutuality. States appear particularly focused on these concerns. More than half the states have enacted or are contemplating legislation regulating these foreclosure rescue firms (19 states cited by the FTC in its notice, and another 10 states according to MBA's survey of state laws and bills). Based on previous FTC enforcement action, the questionable activities appear to be covered by existing unfair and deceptive acts or practices (UDAP) and FTC authority.

If the FTC does decide to proceed with rulemaking on this subject, the benefit of such rulemaking would be the establishment of clear expectations for foreclosure consultants and greater disclosure to homeowners. These rules should be reasonable, clear and unambiguous, and avoid duplicating or conflicting with existing state or federal law. The FTC rule should set a ceiling and not a floor so that legitimate companies can operate without a complex web of requirements that will inadvertently result in violations. Such a ceiling, however, should not be set so high as to deter legitimate assistance.

Exclusion of Loan Servicers

MBA appreciates the FTC proposed exclusion of mortgage servicers from the rule. Servicers have a different role in the modification/foreclosure avoidance process when compared to "foreclosure consultants" and do not pose the risks that are the subject of the FTC rulemaking.

Mortgage servicers act on behalf of the *mortgage holder* pursuant to their delegated authority in taking action to help struggling customers bring their loans current and avoid foreclosure.

Servicers are assigned the mortgage to execute foreclosures, when required, and are nominees of the lienholder in these proceedings (and thus have legal capacity to enforce the mortgage). If delegated the authority to perform modifications, the servicer is also the party with authority to change the contractual terms. Foreclosure consultants do not have such contractual rights.

Servicers engage in outreach efforts and respond to borrower inquiries relating to the various options for resolving mortgage loan defaults. They provide information to educate their customers on available options, and they review customers' financial information to determine whether they qualify for loan modifications or other foreclosure avoidance programs. If the customers do qualify for modifications, servicers prepare the necessary paperwork and work with the borrowers to have the documentation signed and the modifications executed. Many

servicers place pending foreclosure sales on hold while borrowers' eligibility for these programs is determined. Servicers do not charge fees for this service. Moreover, mortgage servicers already are regulated by state and/or federal authorities.

Mortgage assistance relief services act on behalf of the *borrower*. Their intended purpose is to help unsophisticated consumers communicate with their servicers, understand the loan modification process, timely provide the necessary financial information to servicers to evaluate modification requests, and explain the terms of modification agreements to their clients. Notably, non-profit housing counseling and consumer advocacy agencies are available in every state and provide the same services at no charge to the consumer. The mortgage assistance relief providers, however, do charge consumers fees that vary widely in amounts for their services. Again, many states have now enacted legislation regulating these firms, as the FTC has noted in its ANPR.

MBA believes borrowers at risk of delinquency and foreclosure should contact their mortgage servicer as soon as possible to identify the borrower's options. Ultimately the servicer must render the loss mitigation decision. When a borrower feels it is beneficial to work through an independent third party, MBA recommends a borrower contact a mortgage counselor approved by HUD or NeighborWorks and the Homeownership Preservation Foundation. These organizations provide services free of charge to the borrower as does the servicer.

Exclude Contractors and Agents of the Servicer or Lienholder

Given the unprecedented level of delinquencies, servicers have had to enlist outside companies (as well as non-profit community groups) to assist them with the loss mitigation function. Specifically, the companies are hired to perform direct outreach to borrowers, educate consumers about the loss mitigation process, collect financial information, exchange documentation, and execute modification and loss mitigation agreements. Foreclosure attorneys have also been very helpful in the process. Although retained to execute foreclosure when necessary, foreclosure attorneys have been invaluable in initiating discussions with borrowers and facilitating loss mitigation agreements. Often a borrower's first communication with the servicer is through the foreclosure attorney after receiving a demand or acceleration letter. Companies hired by the servicer or lienholder also do not charge borrowers fees for these services.

We urge the FTC to exclude contractors and agents of the servicer or lienholder from the scope of rule. Given that these entities act at the direction and oversight of servicers or lienholders, the FTC's enumerated concerns are not present. An exclusion would allow loss mitigation and standard business operations to continue without interruption or significant additional costs or liability.

Cost/Benefit Analysis of the Servicer: The FTC asks at Request 1.E. what roles mortgage servicers play in the foreclosure rescue industry, the costs and benefits of their loan modification and foreclosure rescue services, and any consumer protection concerns with servicer conduct.

Servicers are a necessary party to the modification and foreclosure avoidance process and do not charge for loan modifications. We do not consider servicers or their contractors and agents "foreclosure consultants" within the meaning of this rulemaking. Servicers have the legal authority to enforce the mortgage and note on behalf of investors or to change the term of the mortgage provided mutual agreement between the parties. Foreclosure consultants, however,

have no authority to change the contractual terms and rights of the mortgage and note. These are fundamental differences.

As a result, we do not believe it would be particularly helpful or constructive to perform a cost/benefit analysis as to the servicer's (or the servicer's contractors or agents) involvement in the loss mitigation process. Moreover, servicers are regulated by state and/or federal law as well as subject to government agency oversight for compliance with lending and servicing practices established by Federal Housing Administration (FHA), Veterans Affairs (VA), Fannie Mae and Freddie Mac.

Cost/Benefits of Foreclosure Consultants: Above we noted the benefits of these foreclosure rescue firms when they act according to their intended purposes. However, in addition to the concerns noted by the FTC in its ANPR, there are other costs associated with their improper conduct:

- Foreclosure rescue scammers often misuse the intellectual property of lenders and servicers by claiming in mailings, phone calls and websites that they either are affiliated with the lenders and servicers or have special relationships with them that do not exist. They use the names, trademarks and logos of these lenders and servicers in their advertising to deceive consumers into believing they can obtain modification relief for them that these consumers could not otherwise obtain for themselves at no cost.
- Foreclosure rescue scammers harass servicer employees, threaten litigation, and partake in other highly aggressive and offensive tactics that often involve long lists of borrowers. They abuse qualified written request laws to eliminate accurate delinquency information from credit reports to misrepresent their credit quality to other lenders. All of these tactics unnecessarily delay the modification process or inappropriately abuse the mortgage lending process. Our servicers indicate that these tactics occur most frequently in states where fees are payable only after the modifications are complete. These actions, however, do not change the outcome and serve to delay or frustrate decision-making.
- With respect to the concern raised by the FTC about chilling competition by placing restrictions on these companies as opposed to banks and servicers, foreclosure rescue activities do not compete with the loss mitigation activities of servicers.

Data on Foreclosure Rescue Scams: Unfortunately, we are not aware of reliable data to adequately characterize the scope of the scams on distressed consumers. The "Phantom Help" schemes are relatively new developments or have become more prominent in mortgage fraud and fraud against consumers. The Mortgage Asset Research Institute (MARI),⁴ which provides an annual report to MBA on mortgage fraud cases, does not yet have enough information over a sufficient period of time to describe the scope and/or cost of the problem. At this time, only anecdotes provide insight into the issue which is posing a new risk, not only to borrowers, but the financial institutions interested in preserving the homeownership of these distressed borrowers.

⁴ James, Denise, Butts, Jennifer, Donahue, Michelle, "Eleventh Periodic Mortgage Fraud Case Report," Mortgage Asset Research Institute, March 2009 <http://marisolutions.com/pdf.mba.mortgage-fraud-11th.pdf>

III. In Sum

Once again, thank you for the opportunity to comment on the ANPR and to provide you with additional answers to your questions. Should you have any additional questions please do not hesitate to contact Vicki Vidal, Associate Vice President for Loan Administration, at (202) 557-2861 or vvidal@mortgagebankers.org or Andrew Szalay, Senior Public Policy Specialist at (202) 557-2941 or aszalay@mortgagebankers.org.

Sincerely,

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Mortgage Bankers Association