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Federal Trade Commission
Office of the Secretary
Room H-135 (Annex W)
600 Pennsylvania Avenue Northwest
Washington, DC 20580

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

Dear Commissioners:

The Office of the Minnesota Attorney General submits the following written comments to the Federal Trade Commission ("Commission") in response to the questions posed in the Commission's Advance Notice of Proposed Rulemaking for Mortgage Assistance Relief Services, issued on May 29, 2009.

I. The Loan Modification and Foreclosure Rescue Industry

In the midst of the foreclosure crisis and current economic recession, the loan modification and foreclosure rescue industry has exploded. However, instead of addressing the significant problems facing homeowners in financial distress, the for-profit loan modification and foreclosure rescue industry simply has added to those problems. Over the past 18 months, this Office has filed lawsuits against twelve such companies.¹ These companies typically offer to modify homeowners' mortgage loans or "save" their homes from impending foreclosure, in return for up-front fees of between several hundred to several thousand dollars. However, after receiving these up-front fees, the loan modification and foreclosure rescue companies have little

¹ This Office has sued the following foreclosure consultants: American Financial Corp. d/b/a National Foreclosure Counseling Services; American Foreclosure Specialists, LLC; American Housing Authority, Inc./American Housing Financial, Inc.; Davis Mitigation, Inc. d/b/a Davis Foreclosure Assistance; D.R. Financial Services Corp. of California d/b/a D.R. Financial and Superior Home Loans; Foreclosure Assistance Solutions, LLC; Home Assure, LLC; IMC Financial Services, LLC; Law and Associates, LLC; Lewis Loss Mitigation, Inc.; Mortgage Default Assistance, LLC; National Foreclosure Relief, Inc.

incentive to provide any meaningful service to homeowners, leading to predictably unsatisfactory results. As a general rule, these companies provide no service, or at most, simply submit paperwork to the homeowner's mortgage company.

The impact of these up-front fees, combined with the absence of any meaningful service in return, is often disastrous for homeowners. This Office is aware of homeowners who have paid as much as \$3,000 or more for foreclosure rescue services that were never provided. For homeowners in financial distress, payment of these advance fees often comes at the expense of their other bills, or even at the expense of a mortgage payment. In fact, homeowners who have been victimized by loan modification and foreclosure rescue companies often assert that they were encouraged *not* to make their mortgage payments, and to use the funds to pay the solicited up-front fee. These advance fees often make it even more difficult for the homeowner—and the loan modification or foreclosure rescue consultant—to effectively resolve homeowner's financial dilemma. Moreover, there is no reason for homeowners to pay these fees because there are several non-profit counselors (many of whom have been approved by the U.S. Department of Housing and Urban Development) and government agencies that assist homeowners in negotiating with their lenders for free.

Further, because loan modification and foreclosure rescue services typically fail to perform any real work for the homeowner's benefit, homeowners lose valuable time in negotiating with their mortgage lender while the company they hired does little or nothing to resolve their situation. By the time the affected homeowners realize how little has been done, they are typically worse off than they were when they initially hired the loan modification or foreclosure rescue company. Moreover, many for-profit foreclosure consultants and mortgage modification companies explicitly instruct homeowners *not* to negotiate with their lenders once they are hired. As a result, the homeowners who hire these companies to provide them with service typically rely on these companies exclusively, and do not negotiate directly with their lenders or seek assistance from reputable governmental or non-profit organizations in the meantime. Consequently, there is a substantial opportunity cost, as well as out-of-pocket financial cost, associated with hiring for-profit foreclosure consultants and mortgage modification companies, which prejudices homeowners. Indeed, this Office is aware of homeowners who discovered that their home was sold at sheriff's sale during the period of time that they assumed their foreclosure consultant or mortgage modification company was taking meaningful steps to negotiate with their lender.

In addition to these loan modification and foreclosure rescue companies that collect up-front fees with the promise of providing homeowners with better loan terms, other rescue scam artists victimize homeowners in financial distress by using "sale-leaseback" transactions. These "equity strippers" target homeowners in financial distress who have equity in their homes. In the typical scheme, the equity stripper arranges to purchase the homeowner's residence and rent the property back to the homeowner, with a promise that the homeowner will be able to re-purchase the home at a later date, once his or her financial condition has improved. After acquiring title to the home, the equity-stripper then obtains mortgages for all of the home's value, and extinguishes all of the homeowner's liens—and equity. Typically, the equity-stripper will rent

the property to the victim, but for more than the victim's previous mortgage payments. Moreover, in order to re-purchase the home and extinguish the equity-stripper's liens, the victim would have to qualify for a mortgage greater than the mortgage that he or she previously could not afford. As a result, these sale-leaseback transactions are inherently designed to benefit the supposed rescue artist, not the homeowner in financial distress. This Office also has sued a number of equity strippers. Although this Office has seen a reduction in these schemes due to the current housing crisis and the resulting decline in home values, equity stripping schemes may rebound when housing values improve.

II. Need for an FTC Rule

Although several states, including Minnesota, have passed laws regulating loan modification and/or foreclosure rescue companies, a national rule targeting such companies would be beneficial due to the national nature of the problem. Loan modification and foreclosure rescue companies are based in many different states and target homeowners across state lines. Indeed, all of the twelve foreclosure rescue companies sued by this Office for defrauding Minnesota homeowners were located outside of Minnesota. For that reason, a national rule would help to combat this problem.

Any nationwide rule should, however, be clear that it only sets a minimum standard of conduct for loan modification or foreclosure rescue services, and that it does not preempt more protective state law.

III. Appropriate Scope of Covered Practices

A. *Disclosure and Right to Cancel*

Like the laws adopted by many states, any rule regulating loan modification and foreclosure rescue companies should include provisions requiring that any agreement between the homeowner and the company be in writing. *See e.g.* Minn. Stat. § 325N.03 (2008). The written document should also clearly describe the services to be provided by the loan modification or foreclosure rescue service, as well as the total amount and terms and conditions of compensation. *Id.* In addition, the written document should disclose to the homeowner that the loan modification or foreclosure rescue company cannot extract a fee from the homeowner until it has fully completed its services. *Id.*

Homeowners also should be provided with an appropriate amount of time in which they may cancel any contract with a loan modification or foreclosure rescue company, and this rescission period should be clearly disclosed on the homeowner's contract. *See e.g.* Minn. Stat. § 325N.02-.03 (2008). Homeowners facing foreclosure are facing enormous pressures and are in a uniquely emotional state. Such homeowners are particularly vulnerable to promises of relief from loan modification and foreclosure rescue companies. In addition, foreclosure is a time-sensitive process in which homeowners feel the need to act quickly. Accordingly, homeowners are often faced with enormous pressures to sign contracts with loan modification and foreclosure

rescue companies, even though they often have only vague information on the services that will be provided and have not had an opportunity to conduct basic due diligence regarding these companies.

B. *Prohibition of Advance Fees*

While appropriate disclosures are a necessary component of any rule regulating loan modification and foreclosure rescue companies, they are not sufficient alone to fully address the concerns posed by such companies. The only way to ensure that loan modification and foreclosure rescue companies are working for the benefit of the distressed homeowner is to ban the collection of any fees until all promised services have been performed. As stated above, homeowners in foreclosure are in a particularly emotional and vulnerable state. Many of these homeowners want to believe that a company can save their home or provide needed financial relief, despite even the best-worded disclosure.

A prohibition on up-front fees also provides the strongest incentive for loan modification and foreclosure rescue companies to provide adequate services, as they will not receive any payment until they fulfill all of their obligations. Presumably, the homeowner should be in a stronger financial position because of the work that the loan modification or foreclosure rescue company provides, and will therefore be able to pay for any services rendered. In the rare instances when a homeowner does not pay for legitimate services after such services have been provided, loan modification and foreclosure rescue companies can avail themselves of the same collection measures utilized by firms in other industries.

C. *Provisions Relating to Title Transfer/Security*

Any rule that applies to foreclosure consultants and mortgage modification companies also should prohibit them from taking title to the homeowner's property or any other form of security. *See, e.g.,* Minn. Stat. § 325N.04(3),(5) (2008). In addition, the Commission should consider adopting rules that would apply to "foreclosure purchasers" who engage in sale-lease back transactions, instead of offering to negotiate with the homeowner's lender. The same Minnesota statutory chapter that regulates foreclosure consultants also contains several provisions relating to foreclosure purchasers. *See* Minn. Stat. § 325N.10-18 (2008). These provisions contain similar requirements relating to contract disclosures, and also allow for rescission of the contract within a specified period of time. *See* Minn. Stat. § 325N.11-14 (2008). In addition, Minnesota law imposes several other requirements on these types of transactions, including the following: (1) the foreclosure purchaser must pay adequate consideration for the property (at least 82% of fair market value); (2) the closing must be handled by a third party; (3) the foreclosure purchaser must objectively verify the borrower's ability to repurchase the property and make any required lease payments in the interim; (4) the reconveyance terms must be fair and reasonable; and (5) the foreclosure purchaser may not make any false, deceptive, misleading, or confusing statements. *See* Minn. Stat. § 325N.17 (2008). Any federal rule should, at a minimum, contain similar requirements.

D. *Non-Waiver*

Finally, any rule adopted by the Commission should include a provision that voids any waiver by the homeowner of the consumer protections provided in the rule and prohibits the loan modification or foreclosure rescue company from obtaining such a waiver. *See* Minn. Stat. § 325N.05 (2008). If such waivers were permitted, they would virtually eliminate any benefit of the rule. Likewise, foreclosure consultants and mortgage modification companies should not be allowed to shield themselves from the judicial process by enforcing mandatory arbitration clauses in their agreements with homeowners. *See* Minn. Stat. § 325N.09(1) (2008).

IV. *Scope of Covered Entities*

A. *Non-profit Agencies*

This Office is aware that certain loan modification and foreclosure rescue companies recently have attempted to avoid state laws by registering as non-profit corporations and soliciting an up-front “donation” from the homeowner before beginning any work. Any proposed rule should take these practices into account without further burdening or complicating the work of legitimate non-profits who seek to help homeowners. To address this concern, Minnesota’s recent amendment to its statute regulating foreclosure consultants includes a provision prohibiting nonprofit agencies from collecting up-front fees from homeowners, while exempting them from the other requirements of the statute. *See* 2009 Minn. Sess. Laws Ch. 141 (S.F. 708). In this Office’s experience, legitimate non-profits—who do not solicit up-front fees from homeowners—supported the provision as an additional protection for homeowners.

B. *Mortgage Brokers/Originators*

Similarly, certain companies that claim to offer mortgage modification or foreclosure consulting services are licensed as mortgage brokers or originators. While these types of companies are subject to a unique regulatory framework, there is no reason why they should not be subject to the rules that apply to mortgage modification companies and foreclosure consultants, to the extent that they are operating in that capacity. Accordingly, Minnesota’s recent amendment to its statute regulating foreclosure consultants includes a provision prohibiting mortgage originators from collecting up-front fees when they “negotiate[] or offer[] to negotiate the terms or conditions of an existing residential mortgage loan.” *See* 2009 Minn. Sess. Laws. Ch. 141 (S.F. 708).

C. *Attorneys*

This Office is aware of several loan modification and foreclosure rescue companies that have affiliated with licensed attorneys in other states in an effort to circumvent state law. Therefore, any proposed rule should carefully consider the participation of licensed attorneys in the loan modification and foreclosure rescue industry, and at a minimum, contain similar restrictions.

V. Appropriate Stages for Consumer Protection

Finally, regulation of loan modification or foreclosure rescue companies should not be limited to companies providing assistance to homeowners already in foreclosure or default. Instead, any rule should seek the broadest possible protection for all homeowners. Many companies have attempted to thwart state statutes originally designed to protect homeowners in foreclosure or default by claiming that they do not work with homeowners who are currently in foreclosure or default. Instead, these companies contact homeowners before the foreclosure process has begun, often times when the homeowner is experiencing some type of financial distress, and promise to modify the homeowner's mortgage loan and resolve the homeowner's overall financial dilemma.

Minnesota recently amended its statute regulating foreclosure consultants to include any person who offers to "negotiate or modify the terms or conditions of an existing residential mortgage loan," without regard to when such services are offered or performed. *See* 2009 Minn. Sess. Laws Ch. 141 (S.F. 708). This language helps clarify that homeowners are protected against unscrupulous loan modification or foreclosure rescue companies, regardless of whether such companies explicitly promise to help homeowners avoid foreclosure or default. There is no reason, from a regulatory standpoint, to treat companies that offer the same services differently, simply based on when such services were offered to the homeowner.

We appreciate the Commission's consideration of these comments in connection with its Advance Notice of Proposed Rulemaking for Mortgage Assistance Relief Services. Please feel free to contact our Office if there is any additional information that we might be able to provide that would be helpful to the Commission in achieving its regulatory objectives.

Sincerely,

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LORI SWANSON
Attorney General