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By electronic delivery to:

<https://secure.commentworks.com/ftc-mortgageassistancereliefservices>

July 15, 2009

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

Re: Mortgage Assistance Relief Services Rulemaking, Rule No.
R911003; 74 Federal Register 26130 (June 1, 2009).

Ladies and Gentlemen:

The American Bankers Association (ABA)¹ welcomes the opportunity to respond to the Advanced Notice of Proposed Rulemaking (ANPR) issued by the Federal Trade Commission (FTC) regarding whether certain acts and practices of mortgage loan modification and rescue entities are unfair and deceptive under Section 5 of the Federal Trade Commission Act (the FTC Act) and should be incorporated into a proposed rule promulgated under Section 18 of the FTC Act.²

Summary of Comment

ABA welcomes the FTC's efforts to protect consumers from unfair or deceptive acts committed by non-bank mortgage market participants. ABA and the banking industry are fully supportive of effective consumer protection and believe that the practices of many for-profit entities that offer mortgage assistance relief services present very real consumer protection concerns. ABA, however, cautions the FTC to ensure that the rules it promulgates are not overbroad and do not result in duplicative and

¹ The American Bankers Association brings together banks of all sizes and charters into one association. ABA works to enhance the competitiveness of the nation's banking industry and strengthen America's economy and communities. Its members – the majority of which are banks with less than \$125 million in assets – represent over 95 percent of the industry's \$13.6 trillion in assets and employ over 2 million men and women.

² 15 U.S.C. §57a.

potentially conflicting rules applicable to bank or thrift affiliated mortgage servicers already subject to Regulation Z's sweeping proscriptions. To do so may interfere with the vital work of mortgage servicers to reach out to financially distressed homeowners to help them modify their mortgage loans and avoid foreclosure in a timely manner.

Background

Section 626 of the Omnibus Appropriations Act of 2009 (the Act), which was signed by President Obama on March 11, 2009, directs the FTC to initiate, within 90 days of enactment, "a rulemaking proceeding with respect to mortgage loans" in accordance with section 553 of the Administrative Procedure Act.³ Following this open-ended legislative directive, the FTC has initiated a rulemaking in two parts by simultaneously issuing two Advance Notices of Proposed Rulemaking. This ANPR, the Mortgage Assistance Relief Services Rulemaking, addresses the practices of non-profit third-party mortgage assistance relief providers that offer assistance to consumers seeking to modify their mortgage loans or to avoid foreclosure.⁴ The other ANPR, the Mortgage Acts and Practices Rulemaking, addresses acts and practices that occur throughout the life cycle of a mortgage loan, practices involving advertising and marketing, origination, appraisals, and servicing.⁵ ABA will respond to the ANPR on mortgage acts and practices in a separate letter.

In the absence of direction from the Act as to the type of conduct to address or the entities to cover, the FTC has chosen to rely on the Federal Trade Commission Act (the FTC Act) to establish the parameters for the rulemaking. Thus, the conduct the FTC proposes to cover in the rulemaking includes acts and practices that meet the FTC's standards for unfairness or deception under Section 5 of the FTC Act,⁶ and the entities the FTC intends to cover are those over which the FTC has jurisdiction under the FTC Act, entities other than banks, thrifts, federal credit unions, or non-profits.⁷

ABA and its membership support consumer protection.

The severe contraction of the economy and the housing market has resulted in devastating consequences for homeowners and communities throughout the United States.⁸ Countless resources and employee hours

³ Omnibus Appropriations Act of 2009, Pub. L. No. 111-8, § 626, 123 Stat. 524 (Mar. 11, 2009).

⁴ 74 *Fed. Reg.* 26130 (June 1, 2009).

⁵ 74 *Fed. Reg.* 26118 (June 1, 2009).

⁶ 15 U.S.C. §45(a)(1).

⁷ 15 U.S.C. §§ 44, 45(a)(2).

⁸ *OCC and OTS Mortgage Metrics Report, Disclosure of National Bank and Federal Thrift Mortgage Loan Data*, (April 2009), available at <http://files.ots.treas.gov/4820362.pdf> (Reporting

have been expended by financial institutions, mortgage servicers, and counselors to reach out to and help millions of families restructure or refinance their mortgages. Unfortunately, the need for relief has also presented an opportunity for the unscrupulous to prey on consumers seeking assistance. Mortgage foreclosure rescue scams have dramatically increased.⁹

ABA welcomes the FTC's efforts to protect consumers from unfair or deceptive acts committed by non-bank mortgage market participants. ABA and the banking industry are fully supportive of effective consumer protection. Indeed, ABA members recognize that their success or failure, individually and as an industry, depends on responsible and efficient service to consumers. ABA also strongly supports the goal of closing the existing regulatory and supervisory gaps in financial markets to ensure that unsupervised or minimally supervised participants are subject to consumer regulations that parallel those of the federally regulated banking system. The FTC's proposed rulemaking which seeks to identify unfair and deceptive acts and practices of third-party mortgage assistance relief providers, so-called "foreclosure consultants," is a positive step toward ensuring that consumer regulation and supervision exists across the full spectrum of financial products and participants.

ABA supports the coordinated effort, initiated in April 2009, by the FTC, the Department of the Treasury, the Department of Justice, the Department of Housing and Urban Development, and state governments to protect consumers from mortgage loan modification and foreclosure rescue fraud. ABA members are actively participating in outreach efforts to educate consumers about legitimate options for mortgage relief. They are distributing in monthly statements, correspondence with delinquent borrowers, counseling sessions, and on their websites consumer alerts produced by the FTC that provide tips for avoiding mortgage relief scams. In addition, financial institutions have incorporated into their suspicious activity monitoring procedures the "red flags" identified by the Financial Crimes Enforcement Network (FinCEN) as indicative of a mortgage rescue scam, and have educated their employees to watch for and report suspected incidents of fraud, including suspected incidents of mortgage rescue fraud. Following FinCEN's guidance, financial institutions are including the term "foreclosure rescue scam" in the narrative portions of all

that credit quality declined during the fourth quarter of 2008, continuing the trend reported from the first three quarters. Over the full year, the percentage of current and performing mortgages decreased from 93.33 percent at the end of the first quarter to 89.95 percent at the end of the fourth quarter.).

⁹ Federal, State Partners Announce Multi-Agency Crackdown Targeting Foreclosure Rescue Scams, Loan Modification Fraud (April 6, 2009) available at <http://www2.ftc.gov/opa/2009/04/loanfraud.shtm> .

relevant Suspicious Activity Reports¹⁰ and are including information available for each party suspected of engaging in this fraudulent activity.¹¹ The time and resources expended on these efforts demonstrate the financial industry's commitment to combating loan modification and foreclosure scams.

In addition, banks, acting through their in-house, subsidiary, or affiliated mortgage servicers, are actively working with programs such as "HopeNow," "Making Home Affordable" or "Hope for Homeowners" as well as their own modification programs to restructure or refinance customer mortgages. ABA and its members understand that the recovery of the housing market and economy as a whole will be affected by the ability of mortgage servicers to reach out to customers experiencing hardship and to explore mortgage loan modification possibilities. Recent reports showing a positive trend in mortgage modifications bear witness to this commitment. The OCC and OTS Mortgage Metrics Report for the first quarter of 2009 reports that servicers implemented 185,156 new loan modifications, up 55 percent from the previous quarter and 172 percent from the first quarter of 2008.¹²

FTC rules must be carefully drawn so that they do not restrict the legitimate loss mitigation efforts of financial institutions.

As previously stated, ABA generally supports the FTC's efforts to protect consumers from the unfair and deceptive acts and practices of third-party mortgage assistance relief providers. ABA, however, has concerns about the jurisdictional reach of the proposed rulemaking. Although the FTC acknowledges that the FTC Act expressly excludes banks, thrifts, and federal credit unions from the agency's jurisdiction, it asserts jurisdiction "over the non-bank affiliates of banks, such as parent companies or subsidiaries" as well as "entities that have contracted with banks to perform certain services on behalf of banks."¹³ Accordingly, ABA cautions

¹⁰Guidance to Financial Institutions on Filing Suspicious Activity Reports regarding Loan Modification/Foreclosure Rescue Scams, April 6, 2009, available at http://www.fincen.gov/statutes_regs/guidance/html/fin-2009-a001.html

¹¹ "Mortgage Loan Fraud, An Update of Trends Based Upon an Analysis of Suspicious Activity Reports" (April, 2008) available at http://www.fincen.gov/news_room/rp/files/MortgageLoanFraudSARAssessment.pdf (In calendar year 2006, financial institutions filed 37,313 SARs citing suspected mortgage loan fraud, a 44% increase from the preceding year, compared to a 7% overall increase of depository institution SAR filings); The SAR Activity Review – By the Numbers, Issue 12 (June 2009) available at http://www.fincen.gov/news_room/rp/files/sar_by_numb_12.pdf (Reporting that the number of depository institution filings depicting Mortgage Loan Fraud as a suspicious activity continues to rise significantly, going from 52,868 SARs in 2007 to 64,816 in 2008).

¹² OCC and OTS Mortgage Metrics Report , First Quarter of 2009 (June 30, 2009), available at <http://www.occ.gov/ftp/release/2009-77a.pdf> (Noting that "An unambiguously positive development was a significant increase in the number of modifications made by servicers.").

¹³ 74 Fed. Reg. at 26132.

the FTC that the rules it promulgates must be drawn so that they do not restrict the legitimate loss mitigation efforts of financial institutions and their affiliated mortgage servicers.

ABA also urges the FTC to consult with the federal banking agencies in this proceeding. In July of 2008, the Federal Reserve Board (the Board) concluded an extensive review of the mortgage lending process, applying its authority under Section 129(I)(2) of the Truth-in-Lending Act (TILA) to prohibit unfair or deceptive practices in connection with mortgage lending as well as to prohibit abusive practices or practices not in the interest of the borrower in connection with mortgage refinancing.¹⁴ The resulting amendments to Regulation Z are the culmination of thoughtful analysis engaged in by federal banking regulators charged with addressing consumer protection together with the safety and soundness and operational realities of the banking industry, goals which can and should be mutually supportive.¹⁵ The goals of the amendments were to protect consumers in the mortgage market from unfair, abusive, or deceptive lending or servicing practices, and the amendments address practices with respect to advertising and marketing, origination, appraisals, and servicing. Care should be exercised by the FTC in this rulemaking not to burden bank affiliated mortgage servicers with additional potentially conflicting or counterproductive rules.

ABA also urges the FTC to ensure that third party companies and attorneys retained by mortgage servicers are excluded from any rule regulating foreclosure rescue firms. Servicers often enlist outside companies (as well as non-profit community groups) to assist them with direct outreach to borrowers and education about the loss mitigation process, obtaining financial information, and exchanging documentation in the loan modification context. These companies—who also do not charge borrowers fees for these services—should not be confused with for-profit foreclosure consultants. Similarly, foreclosure attorneys retained by servicers support efforts to engage in loss mitigation discussions with borrowers to avoid foreclosure, and they should not be confused with attorneys directing or affiliated with for-profit foreclosure consultants.

ABA responses to particular FTC requests for comment.

What roles do mortgage servicers play in the loan modification and foreclosure rescue industry? What are the costs and benefits of their conduct in the context of loan modification and foreclosure rescue services? Do the practices of mortgage servicers present consumer protection concerns?

¹⁴ 15 U.S.C. §1639(I)(2).

¹⁵ 73 Fed. Reg. 44538 (July 30, 2008).

It is important to underscore a significant difference between the roles played by mortgage servicers and foreclosure consultants in the loan modification/foreclosure avoidance process. Mortgage servicers act on behalf of the mortgage holder pursuant to their delegated authority to help struggling customers bring their loans current and avoid foreclosure. Servicers engage in outreach efforts and respond to borrower inquiries. 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. Mortgage servicers do not make promises or representations to customers that they will qualify for relief or avoid foreclosure. If a customer does qualify for a modification, servicers prepare the necessary paperwork and work with the borrower to have the documentation signed and the modifications processed. Many servicers place pending foreclosure sales on hold while borrowers' eligibility for these programs is determined. All of these services are provided to customers at no additional cost because servicers do not charge modification fees.

Mortgage assistance relief providers, in contrast, act on behalf of the borrower. Their intended purpose is to help borrowers communicate with their servicers and understand the loan modification process, provide the necessary financial information to servicers to evaluate modification requests, and explain the terms of modification agreements to their clients. The providers of mortgage assistance relief charge consumers fees that vary widely in amounts for their services.

ABA does not believe that the practices of bank affiliated mortgage servicers present consumer protection concerns. These mortgage servicers, like the banks with which they are affiliated and unlike third-party foreclosure consultants, have an interest in a long term relationship with the customer. They have no incentive to allow customers to default and lose their home to foreclosure because their compensation comes from ongoing payment processing and servicing. In addition, under most agreements, servicers must pay property taxes and other items, such as electricity and water bills, when a borrower fails to pay them as required. Servicers, therefore, engage in a careful assessment of a customer's ability to pay, apply investor requirements and eligibility guidelines established by the investor's and/or the Administration's Hope for Homeowners and Making Home Affordable programs,¹⁶ and provide customers with detailed disclosures regarding the terms of the loan modification. Moreover, bank affiliated mortgage servicers are subject to federal banking agency supervision and regulation, including the new servicing rules of the Regulation Z amendments. Because servicers are a necessary party to the modification and foreclosure avoidance process

¹⁶ ABA members report that government program guidelines have helped mortgage servicers achieve greater consistency and uniformity in loan modifications.

and do not charge for loan modifications, a cost/benefit analysis of their participation is not necessary. ABA, however, recommends that the FTC focus on the costs and benefits associated with foreclosure consultants' participation in the process. In addition to the concerns noted by the FTC in its ANPR, there are other costs associated with improper conduct that may occur among such persons:

- They often misuse the intellectual property of lenders and servicers by claiming in mailings, on websites, and in other communications 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.
- They purport to "audit" consumers' loan origination documents to identify alleged mistakes or abuses in the loan origination process to support class action and other litigation threats that have no basis in fact or law.
- They often abuse Section 6 of the Real Estate Procedures Act (RESPA)¹⁷ by submitting letters masquerading as Qualified Written Requests (QWRs) that are not properly limited to requests for "information related to servicing," but rather, are large, open-ended requests for information about all aspects of the mortgage loan, including information about loan settlement and secondary market transactions.
- There are reports that some harass servicer employees with demands for immediate modifications, threats of litigation, and other highly aggressive and offensive tactics that often involve long lists of borrowers. They raise baseless legal claims, demand significant amounts of irrelevant information, and often call numerous departments with the same questions, all resulting in unnecessary interruption of legitimate modification efforts.

To what extent do banks, thrifts, federal credit unions, and non-profits provide or advertise loan modification and foreclosure rescue services?

¹⁷ 12 U.S.C. §2601 *et seq.* (RESPA imposes on a servicer a duty to investigate and respond in writing to a written request from the borrower (or an agent of the borrower) for information "relating to the servicing of such loan." Written responses and necessary corrections to the account must be made within 60 days of receipt of the QWR. The failure to respond exposes the servicer to the threat of a private right of action by an individual or a class in instances in which there is a pattern or practice of non-compliance.)

To what extent do these entities compete with entities that an FTC proposed rule would cover and what effect would an FTC proposed rule have on such competition?

Banks and thrifts do not advertise loan modification and foreclosure rescue services, *per se*. As previously discussed, ABA members are actively participating in outreach efforts to educate consumers about legitimate options for mortgage relief. To contact customers experiencing financial difficulties, they use of some of the same methods as foreclosure rescue consultants—written correspondence, messages in monthly statements, email, text messages, and website and social media postings—but the content of these messages is subject to supervisory review by the federal banking agencies.

Banks messages “compete” with the advertisements of foreclosure consultants only because financial institutions and their affiliated servicers want to make their customers aware of legitimate avenues for mortgage relief. The ubiquitous and often misleading advertisements of foreclosure rescue consultants threaten to overwhelm bank and mortgage servicer outreach messages.

Conclusion

Consumer protection is advanced by servicers who offer modification and other foreclosure avoidance programs to struggling homeowners. Such programs result in families staying in their homes and financial institutions and investors seeing their loans perform. The same cannot necessarily be said of foreclosure consultants that provide dubious services for significant fees that already are available to consumers for free, either by dealing directly with their servicers or by seeking assistance from community non-profit organizations. ABA welcomes the FTC’s efforts to protect consumers from the unfair or deceptive acts committed by these non-bank mortgage market participants, but cautions the FTC to ensure that the rules it promulgates do not inadvertently burden bank affiliated mortgage servicers with unnecessary and potentially conflicting UDAP rules.

If you have any questions about these comments, please contact Virginia O’Neill at (202) 663-5073 or via email at voneill@aba.com.

Respectfully submitted,

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