NATIONAL ASSOCIATION OF ATTORNEYS GENERAL
2030 M Street, N.W. 8th Floor
WASHINGTON, D.C. 20036
Phone (202) 326-6000
Fax (202) 331-1427
http://www.naag.org

July 15, 2009

<u>*By Electronic Mail*</u>
Federal Trade Commission
Office of the Secretary
Room H-135 (Annex W)
600 Pennsylvania Ave., NW
Washington, DC 20580

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

Dear Sir/Madame:

We are writing in response to Advance Notice of Proposed Rulemaking for Mortgage Assistance Relief Services issued by the Federal Trade Commission ("FTC") on May 29, 2009. This comment is submitted on behalf of the attorneys general of the following jurisdictions: Alabama, Arizona, California, Colorado, Connecticut, Delaware, Florida, Georgia, Guam, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Maryland, Michigan, Minnesota, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, Ohio, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Vermont, Washington, West Virginia, and Wyoming (collectively, "Attorneys General"). We write as the primary state law enforcement officials in the United States who handle consumer complaints against companies offering mortgage assistance relief services and who enforce laws designed to help protect consumers from unfair and deceptive practices perpetrated by these companies.

These comments primarily address issues regarding companies and/or individuals who provide mortgage consulting services for consumers. Issues related to companies that take title to consumers' homes or arrange for the transfer of their title are only briefly summarized. We believe that any rule-making efforts at this time should be focused primarily on issues with consultants for two reasons. First, the consulting business model is dominating the marketplace. Consultants are by far the most common source of consumer complaints received by our offices in the area of mortgage assistance services. Second, we believe that issues related to consultants are more aptly dealt with through appropriate, aggressive nationwide legislation and/or rule-making. Companies or individuals performing transactions involving the transfer of title are generally localized and centered within one particular community. The transactions are also influenced by the type of foreclosure in a specific state. Conversely, most consultants operate in multiple states – if not nationwide – maintaining a physical presence in only one state and using the internet to advertise their services. Although states can and do aggressively pursue out-of-state companies, there are increased logistical issues with litigating and enforcing judgments against out-of-state entities.1 A nationwide rule would provide a means to end piecemeal enforcement actions. With a nationwide rule, states could bring actions in federal court to stop violators from operating in any jurisdiction.

As a preface to the recommendations and comments below, we must acknowledge an on-going discussion regarding the propriety of regulating mortgage consultants as opposed to prohibiting for-profit companies from working in this area entirely. The social utility of mortgage consultants whose work consists solely of obtaining modifications of consumers' mortgages or related assistance, such as short payoffs, repayment plans or forbearance agreements, is questionable.[2]

Mortgage consultants do not facilitate competition in the marketplace because consumers cannot "shop" for a loan modification. The only company that can modify a consumer's loan is the company that is currently servicing the loan. Therefore, to the extent for-profit consultants provide any service, they perform that service by inserting themselves into the middle of the pre-existing relationship between a consumer and her mortgage lender or servicer. Consumers can – and are encouraged to – work directly with their lenders and services. The mortgage lender or servicer makes the final determination whether assistance will be offered to the consumer, not the mortgage consultant. We are aware that consumers have complained about difficulties making contact and dealing with servicers. Nonetheless, many consumers successfully negotiate loan modifications on their own. Many consumers have also successfully negotiated loan modifications with the assistance of the many not-for-profit agencies specializing in this work. Neither of these scenarios requires consumers to pay a fee to a third party.

Ultimately, what we have seen in our offices is that mortgage consultants cause consumers problems, but actually solve none. In Illinois, we have yet to see a for-profit mortgage consultant

[1] As mentioned below, states have or are conducting investigations and/or filing lawsuits against 450 companies offering mortgage rescue services. In addition, as announced on July 15, 2009, many states have partnered with the Federal Trade Commission to coordinate the filing of lawsuits against foreclosure consultants.
[2] These comments pertain to "pure" for-profit foreclosure consultants that do not provide consumers with financial services such as refinancing a mortgage or bona fide legal services such as representation in bankruptcy or foreclosure proceedings.

operating within the boundaries of state law. Regulation would provide the imprimatur of legitimacy to companies whose value is in serious question. Thoughtful consideration should be given to the question of regulating, and thus legitimizing, for-profit companies that engage purely in mortgage loan modifications, as opposed to prohibiting them altogether.[3] That being said, should regulation in this area proceed, we submit the comments below.

1. The Loan Modification and Foreclosure Rescue Industry

What empirical data are available concerning the nature, extent, and impact of the loan modification and foreclosure rescue industry? Please identify any such data sources.

It is difficult to gather exact empirical data on companies providing loan modification and foreclosure rescue services due to the predominance of internet-based companies and their ephemeral nature. The difficulty of gathering information is increased due to the fact many of these companies operate primarily over the internet and do not maintain a physical presence in the states in which they do business. Nevertheless, Illinois and California's experience in prosecuting companies that offer mortgage rescue services illustrates the extent and impact of the harm that they cause to consumers.

The Illinois Attorney General has brought 24 lawsuits against companies that offered some form of foreclosure rescue services. These companies took money from almost 2,300 Illinois consumers and, in most cases, failed to provide any meaningful services to assist the consumers in avoiding foreclosure. In fact, a number of these companies hastened the loss of their homes by providing bad advice, delaying consumers from seeking true help, or simply defrauding consumers and taking title to their homes. It is difficult to calculate the exact amount of monetary harm that these Illinois consumers have suffered. A rough estimate, however, shows that Illinois consumers have lost over five million dollars to foreclosure rescue service providers. As of July 1, 2009, the Office of the Illinois Attorney General had identified roughly 170 companies operating in Illinois that appeared to have offered or were presently offering foreclosure rescue services that violated Illinois state laws. The majority of these companies take impermissible upfront fees and then fail to deliver promised services.

The California Attorney General has filed civil and criminal cases and has ongoing criminal investigations against companies engaged in loan modification and foreclosure rescue scams. These companies took money from more than 16,000 California consumers. After luring consumers with false promises, these companies fail to provide meaningful assistance. Their customers lose the substantial fees they paid to the companies, fail to get a loan modification, and in many cases lose their homes to foreclosure because they relied on the companies' advice to stop making mortgage payments and to cut off communications with their lenders. A rough estimate shows that California consumers victimized by these companies have lost over 15

[3] Regulations in this area may well be appropriate to prevent abuses even if for-profit foreclosure consultants are prohibited, since there are likely to be some entities exempted from an outright prohibition.

million dollars. The Attorney General's office also coordinates enforcement activities with the California State Bar, the Department of Real Estate and various District Attorney's offices.

The proliferation of foreclosure rescue services companies is evident by the number of such companies that are the target of lawsuits or investigations conducted by the Attorneys General. The National Association of Attorneys General ("NAAG") has a working group on foreclosure rescue services companies that maintains a running list of lawsuits and investigations. As of July 1, 2009, over 450 companies are or have been investigated for providing foreclosure rescue services that violated state laws.[4] Collectively, the states participating in the NAAG group have sued at least 130 of these companies.

What business models are used to provide loan modification and foreclosure rescue services? Please identify and describe any such business models and their impact on consumers and competition.

What are the distinctions between different models of providing loan modification and foreclosure rescue services (e.g., free versus fee-for-service, loan negotiation versus title transfer, etc.)?

Companies that offer foreclosure rescue services are currently operating under two primary business models. The majority of companies offer mortgage consulting. Mortgage consultants promise to help consumers stay in their homes through helping them to obtain loan modifications, forbearance agreements or repayment plans. These companies generally charge consumers a fee before providing any services and then provide services that the consumers could have received for free from a number of state and local agencies and non-profit groups, or simply have done themselves through communicating with their own mortgage lenders or servicers. Some companies never provide any services at all after taking the upfront fee.

In addition to companies engaged only in mortgage consulting, we are now seeing mortgage consultants operating in tandem with other businesses. Attorneys and mortgage brokers have an increasing presence in this industry and have been found working in conjunction with or serving as referral sources for mortgage consultants. Also, mortgage consultants may offer more generalized debt settlement services, aside from focusing only on a consumer's mortgage.

Just as the type of entities offering mortgage consulting services has evolved, we have also seen an evolution in the scope of consulting services offered. Consultants generally promise to help consumers prepare the packet of information that they will need to obtain a loan modification, act as a go-between to negotiate the modification, and then send the proposed modification to the

[4] This is based on only those states that have provided information to the working group. These states are Alaska, Arizona, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, Nevada, New Hampshire, New Jersey, North Carolina, Ohio, Oregon, Tennessee, Texas, Vermont, Virginia, Washington, West Virginia, Wisconsin and the District of Columbia.

consumers for their signatures. We are now seeing consultants offering these services piecemeal. For example, some companies represent they will help consumers gather their financial documents and prepare the information to submit to their mortgage servicer for a fee. Then, for another fee, the companies represent that they will facilitate communication between the consumers and their mortgage servicer. Some companies are now even offering software to assist consumers in preparing their financial documents. The problem with the piecemeal division of services is twofold. First, this is likely a way in which to extract additional fees from consumers. There is little value in preparing a packet of material to support a loan modification if that packet is not actually sent to the mortgage servicer. Second, this process leaves consumers confused as to what the company is actually doing. Again, it is of little value to prepare a packet without sending it. Thus, consumers are likely to assume the consultant is taking care of the entire transaction, when that is not the case.

In addition to the for-profit mortgage consultants, non-profit organizations and housing counseling agencies and some governmental entities offer counseling services that provide a wide array of free services to homeowners who are in financial distress, as mentioned in the FTC's Notice. Consumers targeted by mortgage consultants are already in financial distress and can ill-afford to lose any funds, particularly when the services they actually receive are often of little or no value. Not-for-profit organizations, counseling agencies and governmental entities can help consumers make difficult financial decisions – without taking fees from consumers and making their problems worse. We have noticed that some consultants have been engaging in fraudulent and deceptive advertising exploiting consumers' trust in non-profits by giving their companies names that sound like not-for-profit agencies, such as Real Fresh Start Foundation, Hope Now Foundation and U.S. Justice Foundation. Some companies even go so far as to tell consumers that they do not charge fees; rather the consumer may make a "donation." No services will be provided, however, until this "donation" is paid.

Although most foreclosure rescue services companies focus on obtaining loan modifications, some companies specialize in "sale-leaseback" transactions. While these comments do not specifically address proposed rules covering this industry, we did want to provide a general overview of these transactions. Sale-leaseback transactions are designed to deprive consumers of the title to the homes and any equity they have accumulated. These companies target consumers who are in financial distress but still have equity in their homes. The companies arrange for a third-party investor to purchase the consumer's home at or above fair market value. The investor obtains mortgages for nearly all of the home's value and extinguishes all of the consumer's liens. The remaining equity is typically depleted as either fees paid to the investor and the company that arranged the transaction or as pre-paid "rent" kept in an escrow account purportedly on the consumer's behalf. The consumer makes rent payments each month that are often supplemented by funds from the escrow account. The consumer's rent payments exceed the amount of the investor's monthly mortgage payments, so the investor also gets a monthly profit on the "float" between the rent money collected and the mortgage payment made. The contracts generally provide the consumer an option to re-purchase the home within a year or two. In order to re-purchase the home, however, the consumer would have to qualify for a mortgage that is far greater than the mortgage she was previously unable to pay.

Sale-leaseback transactions are virtually guaranteed to fail and do not appear to have any legitimate use. The only benefit possibly derived from these transactions is delaying the consumer's inevitable departure from her home – although this delay comes at a significant cost. We generally find multiple players engaged in fraudulent conduct in sale-leaseback transactions, including appraisers, mortgage brokers, loan officers, title agents, lawyers and notaries. A side effect of the current economic situation is that these schemes have been dramatically curtailed. Declining home values have reduced the amount of equity the companies can strip from homes and reduced the incentive to enter into these transactions. Also, it is now more difficult for investors – who often relied on low or no documentation underwriting standards – to obtain mortgages. We do anticipate, however, that these schemes may well reappear in future after any real estate market recovery. Thus, to the extent any proposed rule addresses this type of transaction, we recommend that they be prohibited altogether.

What are the costs and benefits of various loan modification and foreclosure rescue services?

In our experience, we have found that services provided by foreclosure rescue services companies result only in costs to consumers. There are no benefits. The companies collect an upfront fee that consumers can ill-afford to pay. Consumers then submit financial information to the companies and the companies promise to forward the information to the consumers' loan servicers and obtain a loan modification offer. In the majority of cases, the companies do nothing with the consumers' information. The consumers then end up turning to a non-profit for help, calling their servicers themselves, or falling further behind on their mortgage payments as they wait for the promised loan modification offer that never materializes. Sometimes the companies do perform work. But, we have frequently found that consultants have little knowledge about loan modification programs and give consumers advice that actually makes their financial situations worse and loan modifications more difficult to negotiate. In other cases in which the companies perform work, they forward the consumers' information to the same people at their mortgage servicers with whom the consumers themselves would have dealt. The companies then relay messages back and forth between the consumers and their mortgage servicers until a loan modification offer is made. In short, consumers are paying for services that they could perform themselves or obtain for free from a number of not-for-profit organizations, housing counseling agencies and government entities. Therefore, we do not find a cost benefit analysis question appropriate when applied to the mortgage rescue industry.

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? If so, how are these concerns the same as or different from those raised by third-party loan modification and foreclosure rescue entities?

It is clear that the scope of the mortgage foreclosure crisis initially overwhelmed mortgage servicers' resources. We have received frequent complaints from consumers that they are unable to get through to their mortgage servicers and, after repeated attempts to negotiate with their servicers or even just to reach their servicers, they turn to foreclosure rescue services for assistance. Inadequate servicer resources contribute to consumers using mortgage consultants. We hope this issue will be addressed as servicers continue to increase resources by hiring an adequate number of appropriately trained personnel to assist consumers.

What empirical data are available concerning the performance of loan modification and foreclosure rescue entities in obtaining promised results? Please identify any such data (broken down by business model, if possible) used to provide loan modification and foreclosure rescue services, including but not limited to data addressing the following:

1. *The percentage or proportion of consumers enrolled in loan modification or foreclosure rescue services who successfully obtain a loan modification or foreclosure relief.*

2. *For the consumers described in (F)(1), the percentage who, after successfully obtaining the modification or foreclosure relief, remain current on their mortgage payments for a substantial period of time (e.g., six months, one year, or two years).*

We are not aware of any empirical data regarding either the number of loan modifications or the performance of loans modified through the work of mortgage consultants.

2. Need for FTC Rule

Given that many states have enacted and enforced laws concerning loan modification and foreclosure services and that the FTC has brought law enforcement actions against providers of these types of services under Section 5 of the FTC Act, should the FTC promulgate a rule to address these services? Why or why not?

We believe that an FTC rule would be useful, if it sets a strong *minimum* standard of conduct for foreclosure rescue service companies and does not preempt more protective state laws. These minimum standards should ban upfront fees and cap overall compensation for foreclosure consultants, as well as require adequate disclosures as to the availability of free services and rescission rights. If the FTC is able to issue rules that set a strong, minimum standard, we believe that will prove to be of significant benefit to consumers. First, states without laws regulating mortgage consultants would be able to use such a rule. Second, states that already have mortgage consultant laws could utilize a nationwide rule to obtain injunctive relief in federal court to protect consumers in all states. Finally, such a nationwide standard would send a clear message to the mortgage consultant industry and would, we hope, deter the proliferation of companies in this market.

3. Scope of Covered Practices

Should conduct by loan modification and foreclosure rescue service providers or advertisers that the FTC has challenged as unfair or deceptive in violation of Section 5 of the FTC Act in its law enforcement actions be incorporated into a proposed FTC rule? If so, what conduct should be included, how should it be addressed, and why?

Yes. The FTC's enforcement actions against mortgage consultants have highlighted the significant fraudulent and deceptive advertising tactics in which these companies often engage. Consumers needing assistance with loan modifications are bombarded with advertisements and solicitations from for-profit companies. Because not-for-profit organizations, housing counseling agencies, and governmental entities generally do not advertise their services, fee-for-service companies that advertise have a significant marketplace advantage.

Consumers are also often deceived into paying for consultant services by solicitations promising or implying certain results. There are no guaranteed outcomes in loan modification negotiations. Consumers who are told – accurately – by not-for-profit agencies that they may have to prepare for the possibility they will lose their homes may turn to for-profit consultants based on unfounded promises of their ability to save consumers' homes. Part of this disclosure should also include a statement that consumers are always free to talk to their mortgage lenders or servicers on their own at any time. Some consultants tell consumers that, after signing a contract, the consumers are prohibited from attempting to negotiate with their own mortgage lenders or servicers.

Finally, a number of mortgage consultants have solicitations that incorrectly imply an affiliation with a governmental entity, a not-for-profit, or the consumers' own mortgage servicer. Such untrue claims are already prohibited under Section 5 of the FTC Act and under state consumer protection laws. The rampant abuses seen in mortgage consultants' advertising coupled with the harmful effect such advertising has on consumers' search for legitimate help indicates that more stringent advertising regulations are appropriate. Some states, for example, ban foreclosure consultants from advertising altogether.[5]

> *Some states require providers to create written contracts and include key disclosures in these contracts. Should the Commission impose the same or similar disclosure requirements in a proposed FTC rule? If so, what disclosures should be included and why?*

It almost goes without saying that any agreement between a consumer and a mortgage consultant must be in writing, the writing must be in the consumer's primary language or the language used during negotiations, and the contract must fully describe what the mortgage consultant will do, the timing of the mortgage consultant's performance and what the charges for the consultant's

[5] Massachusetts Foreclosure Rescue Transactions and Foreclosure-Related Services, 940 CMR 25.03(a).

services will be.

Although efficacy of disclosures is often debatable, there are certainly three key disclosures that all mortgage consultant companies should make. First, the mortgage consultant company must disclose that the services it is about to provide for a fee are also available for free from state and local agencies and non-profit organizations. Second, the mortgage consultant must disclose that the consumer has the ability to rescind the contract until services are complete. Third, a mortgage consultant must disclose that it cannot guarantee it will obtain a particular result.

> *Some states require providers to give consumers who enroll the right to rescind or cancel their agreements with the providers. Should the Commission include the same or similar rights of rescission or cancellation in a proposed rule? If so, what rescission and cancellation rights should be included and why?*

Yes, rights of rescission and cancellation provide important consumer protections. Time is of the essence for consumers facing foreclosure. Consumers must be allowed to cancel mortgage consultant contracts without penalty or obligation. Such a provision will provide an incentive for the mortgage consultants to complete their services for consumers in the most expeditious timeframe possible. Even though rights of rescission and cancellation are significant, they are not a substitute for a prohibition on advance fees.

> *Some states have restricted the type, amount, and timing of the fees charged and refunds given by providers of loan modification and foreclosure rescue services. In particular, some states ban advance fees until all services promised or contracted for are completed.*
>
> > *Should the Commission address in a proposed FTC rule any fee or refunds practices of providers of loan modification and foreclosure rescue services? If so, what practices should be addressed, how they should be addressed, and why?*

A ban on advance fees and a cap on overall compensation is necessary for any meaningful mortgage consultant regulation. With a prohibition on advance fees, there should not be any issue with refunds – at least up until the point that services are completed. After that, consumers should be entitled to full refunds if they find that any promised services were not provided.

> > *Should the Commission ban the payment of advance fees for loan modification and foreclosure rescue services in a proposed FTC rule? If so, why or why not? What effect, if any, would an advance fee ban have on the willingness or ability of loan modification and foreclosure rescue services providers to do business?*

A key provision of any rule regulating mortgage consultants is that no fee may be charged or collected until after the mortgage consultant has fully performed each and every service the mortgage consultant contracted to perform or represented that he or she would perform. In the context of mortgage consultants, that means fees should not be charged or paid until the consultant presents the consumer with a loan modification contract that can be executed and returned to the consumer's mortgage servicer. By fees, we mean any transfer of money whatsoever from consumers to consultants. This includes monies placed in escrow, holds placed on credit cards, and checks that are post-dated. Moreover, offering a money-back guarantee or calling a fee a donation does not turn an advance fee into something permissible.

The risk of not receiving payment provides the strongest possible incentive for mortgage consultants to promptly and adequately provide all promised services. Plus, if the consultant provides good services and the consumer obtains an affordable loan modification, the consumer should be in a better position financially to pay the consultant. Legitimate companies can deal with fee collection issues just the same as companies in other industries. A prohibition on advance fees is not uncommon in the consumer credit industry. Indeed, it is a key feature of many state laws governing credit services organizations[6] and federal laws and regulations governing credit repair (15 U.S.C. §1679(b) and 16 C.F.R. §310.4(a)(2)-(4)).

The standard practice in this industry, however, is to collect fees before any services are provided. Presumably, mortgage consultants are concerned that consumers who are obviously in difficult financial situations will find themselves unable to make payment at a later date. Requiring the fee upfront guarantees the consultant gets paid – regardless of the quality of services provided. Paying the fee upfront likely means that some of the consumer's other bills will not be paid or that the consumer will have to use credit cards or funds from friends or family. In some cases, the mortgage consultants will actually counsel the consumer not to make a mortgage payment, which of course frees up funds for the consultants' fee. All of these things go to benefit the consultant to the detriment of the consumers, in some cases having the perverse effect of making it more likely the consumer will lose their home. An advance fee prohibition provides significant consumer protections and will make it difficult for mortgage consultants who do little or no work to stay in the industry. Even with an advance fee prohibition, however, there should still be protections to ensure that consultants actually earn the fees they collect. Issues related to fee limits are discussed below.

> *Should the Commission impose fee restrictions in a proposed FTC rule other than a ban on the advance fees that providers of loan modification and foreclosure rescue services receive? If so, what restrictions should be imposed and why? Would these restrictions prevent or mitigate the potential harm caused by payment of these fees? For example, to what extent might the possible harm from advance fees be prevented or mitigated by requiring providers to make specific disclosures regarding the timing, amount, or allocation of fees? Additionally, to what extent might such harm be prevented or mitigated by requiring providers to make more general disclosures regarding the nature and material restrictions of their services (e.g., the disclosures regarding the likelihood of success, timing of services or negotiations with mortgage servicers, refund restrictions, or any potentially*

[6] Illinois Credit Services Organizations Act, 815 ILCS 605/5(1).

negative ramifications of using the service)?

The incentives created for fraudulent companies to enter into this industry by allowing payment of advance fees cannot be mitigated through disclosures. The only way to ensure that companies are actually working for consumers is to require them to produce results before the consumers make payment.

In addition to prohibiting advance fees, it is important to regulate the total amount of fees collected so that consumers do not pay more for services than the benefit received. We have seen, for example, mortgage consultants charge a fee for negotiating a loan modification that exceeds the annual savings the consumer realizes from the decreased loan payment. Ideally, consumers should be paying fees for the added benefit of a consultant's services over what the consumer could have negotiated without the consultant.

It is possible to structure a compensation cap to incentivize consultants to obtain good results. For example, mortgage rescue consultants in Illinois may only charge up to half of one month's principal and interest mortgage payment for their services. The consultant may collect a higher fee if it obtains a loan modification for the consumer resulting in a decreased monthly mortgage payment for a period of at least five years. In that case, the consultant can charge the consumer an amount up to a one month's principal and interest mortgage payment.

> *Some states have foreclosure rescue laws which, in whole or in part, only apply once a consumer has received a notice of default. At what stage or stages of the process should a proposed FTC rule protect consumers? Should it take effect before consumers receive a notice of default, after the notice of default is received, or once foreclosure proceedings have begun? Why?*

The requirement that consumers be in default before statutory protections begin made sense when mortgage consultants solicited business based on foreclosure filings, as those consumers would necessarily be in default. Mortgage consultants are now able to mine public information to target consumers who are not yet in default. Consultants may rely on an internet presence to draw in consumers who may also not be in default. As consumers have grown more concerned about the state of the economy, these solicitations are proving increasingly attractive. Based on these reasons, a rule should provide as much coverage for consumers as possible.

> *Please identify any other state restrictions or challenged conduct which should (or should not) be addressed in a proposed FTC rule, and explain why.*

Any exemptions to the rule's coverage should be carefully analyzed. We do not believe that mortgage brokers should be fully exempted from coverage. We have already seen complaints in which mortgage brokers charged consumers for mortgage consulting services and then failed to provide services or provided fewer services than originally promised. The trend of mortgage brokers providing loan modification services is likely to continue, especially if the market for mortgage loan origination remains soft.

Any rule would need to take into account the fact that consumers may initially approach mortgage brokers to refinance a loan, not to obtain a loan modification. Mortgage brokers would not, of course, give out the mortgage consultant disclosures to a consumer seeking a refinance. If the mortgage broker is unable to refinance the consumer's mortgage, however, the broker may attempt to negotiate a loan modification instead. At this point, the broker will be unable to retroactively give out the required disclosures. There are various ways to deal with this issue. In Illinois, for example, mortgage brokers may not collect an advance fee for consultant services and are subject to the cap on fees. But, mortgage brokers are exempted from the other provisions of the state's mortgage rescue fraud act. This mirrors how brokers are traditionally paid – at the closing of a consumer's loan, after all services have been provided.

As discussed above, any rule must have, at a minimum, a ban on upfront fees, a compensation cap, the right to rescind until the completion of services and adequate disclosures. It is also necessary that states are empowered to enforce any rules and that more protective state rules are not preempted.

There are a number of other provisions in the various mortgage state rescue laws that provide additional protections that could be considered during rule-making. These include:

- Registration or licensure requirements;
- Maintenance of a surety bond;
- Establishment of a duty of care for foreclosure consultants;
- Requirement for consultants to provide consumers with any documentation they order or obtain on behalf of the consumers, such as appraisal research;
- Prohibition on charging consumers on contingency fee basis;
- Ban on third-party compensation unless that fact is disclosed to consumers;
- Ban on consultants acquiring an interest in consumers' property;
- Prohibition on wage assignments or other security for payment of fees;
- Prohibition on solicitation or acceptance of a power of attorney;
- No mandatory arbitration of disputes;
- Availability of criminal penalties;
- Prohibition on waivers of the protections provided;
- Allowing a private right of action for consumers; and
- Contracts that do not comply are void and unenforceable.

4. Scope of Covered Entities

As described in the text, an FTC proposed rule would not cover banks, thrifts, federal credit unions, and non-profits. To what extent do these types of entities provide or advertise loan modification and foreclosure rescue services? 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?*

We are unaware of any banks, thrifts or federal credit unions engaged in for-profit loan modification or foreclosure rescue services, aside from negotiating loan modifications for consumers whose loans they are servicing. Unlike mortgage consultants who insert themselves between consumers and mortgage servicers, banks, thrifts or federal credit unions servicing loans are in fact one of the two necessary parties to any loan modification. Not-for-profits do provide counseling services in this area. We have not seen any abuses or complaints about the services provided by nonprofits, aside from complaints about fee-for-service companies masquerading as nonprofits.

As described in the text, many states have exempted attorneys from laws (e.g., foreclosure consultant laws) which regulate the conduct of providers and advertisers of loan modification and foreclosure rescue services. What are the costs and benefits of exempting attorneys from these laws? What has been the effect of such exemptions on competition between attorneys and non-attorneys in providing or advertising loan modification and foreclosure rescue services? Should an FTC proposed rule include an exemption for attorneys or any other class of persons or entities? Why or why not?

We have received many complaints regarding attorneys who are offering loan modification business. These attorneys generally provide no legal services for consumers and present the same problems as mortgage consultants in general. Currently, most states exempt attorneys from their mortgage rescue consultant laws. We recommend that attorneys not be exempted from any nationwide rule.

In closing, we believe that a strong, minimum nationwide rule regarding mortgage consulting services could provide significant protections to consumers from abusive and deceptive practices. We hope that the Federal Trade Commission finds our comments useful in achieving its consumer protection goals.

Respectfully,

Lisa Madigan
Attorney General of Illinois

Troy King
Attorney General of Alabama

Terry Goddard
Attorney General of Arizona

Edmund G. Brown, Jr.
Attorney General of California

John Suthers
Attorney General of Colorado

Richard Blumenthal
Attorney General of Connecticut

Joseph R. Biden, III
Attorney General of Delaware

Bill McCollum
Attorney General of Florida

Thurbert E. Baker
Attorney General of Georgia

Alicia G. Limtiaco
Attorney General of Guam

Mark J. Bennett
Attorney General of Hawaii

Lawrence G. Wasden
Attorney General of Idaho

Gregory F. Zoeller
Attorney General of Indiana

Tom Miller
Attorney General of Iowa

Steve Six
Attorney General of Kansas

James D. "Buddy" Caldwell
Attorney General of Louisiana

Janet T. Mills
Attorney General of Maine

Douglas F. Gansler
Attorney General of Maryland

Mike Cox
Attorney General of Michigan

Lori Swanson
Attorney General of Minnesota

Chris Koster
Attorney General of Missouri

Steve Bullock
Attorney General of Montana

Catherine Cortez Masto
Attorney General of Nevada

Kelly A. Ayotte
Attorney General of New Hampshire

Anne Milgram
Attorney General of New Jersey

Gary King
Attorney General of New Mexico

Roy Cooper
Attorney General of North Carolina

Richard Cordray
Attorney General of Ohio

John R. Kroger
Attorney General of Oregon

Patrick C. Lynch
Attorney General of Rhode Island

Henry McMaster
Attorney General of South Carolina

Lawrence E. Long
Attorney General of South Dakota

Robert E. Cooper, Jr.
Attorney General of Tennessee

William H. Sorrell
Attorney General of Vermont

Rob McKenna
Attorney General of Washington

Darrell V. McGraw, Jr.
Attorney General of West Virginia

Bruce A. Salzburg
Attorney General of Wyoming