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CENTER

Sargent Shriver National Center on Poverty Law

July 14, 2009

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

RE: Proposed Rule on Mortgage Assistance Relief Services Fed. Reg. Vol. 74, No. 103, June 1, 2009

To Whom It May Concern:

I am writing from the Sargent Shriver National Center on Poverty Law ("Shriver Center"), a Chicago-based non-profit development and advocacy organization, to comment on proposed revisions to 16 CFR 321 and 322, which would create new rules to regulate the loan modification and foreclosure rescue industry.

We appreciate the Commission's attention to this industry and commend its goal of protecting distressed homeowners from unfair and deceptive practices as they seek to save their homes from foreclosure.

In 2008, over 2.3 million homeowners faced foreclosure.¹ The large number of foreclosures has warranted actions to reduce preventable foreclosures and promote economic stability for homeowners, their communities, and mortgage lenders². The Making Home Affordable program provides an exemplary effort by the current Administration to help homeowners refinance or modify their loans. However, the high amounts of equity in many homes facing foreclosure also attracts unscrupulous foreclosure consultants seeking to make a profit³.

¹ Center for Community Capital, *Loan Modifications and Re-default Risks: An Examination of Short-term Impact*, University of North Carolina at Chapel Hill. Mar. 2009 available at http://www.ccc.unc.edu/documents/LM_March3_%202009_final.pdf

² Id.

³ Prentiss Cox, *Foreclosure Equity Stripping: Legal Theories and Strategies to Attack a Growing Problem*, CLEARINGHOUSE REVIEW JOURNAL OF POVERTY LAW AND POLICY, May.-Apr. 2006

Although 22 states have laws in place to help prevent foreclosure and loan modification rescue schemes more than half the states do not have such laws and their residents are left unprotected⁴. A nationwide standard that provides a baseline of protection that does not undermine current state legislations against foreclosure and loan modification rescue fraud is needed. For this reason, we recommend the following goals:

A) State statutes should be considered in a proposed FTC rule

Currently, SARS, state law enforcement actions, and complaints to state attorney generals' offices are the main avenues of collecting data on the practices of corrupt foreclosure consultants. As a result, state laws for rooting out corrupt foreclosure consultants represent best practices that can be used to help regulate the industry. The most common features of state laws against mortgage rescue fraud include the following features:

1. Prohibition of Up-front Fees

Up-front fees typically start at \$500 and can exceed \$2000. Unscrupulous foreclosure consultants usually require up-front fees from distressed homeowners. Once fees are collected, they disappear and it becomes very difficult for homeowners to recover their losses. As a result, these distressed homeowners find their financial situation exacerbated by the time and money invested in fraudulent and expensive foreclosure rescues.

2. Written Contract Requirement

A written contract increases protections at the state and federal levels. For example, the Truth in Lending Act would require foreclosure consultants to clearly disclose terms and conditions for services – including fees – in contracts. Additionally, many states have also required contracts to include a homeowner's right to cancel services. This is especially important since consultants generally pressure distressed homeowners into agreements before they have had the chance to do adequate research on their options – i.e. finding free HUD-approved credit counseling services.

Additionally, we recommend that individuals and organizations involved in for-profit foreclosure rescues be prohibited from entering into a contract with a distressed homeowner before the homeowner has directly contacted his/her mortgage servicer for options available to prevent default or stop foreclosure the foreclosure process.

⁴ Fed. Register, Vol. 74, No. 103, Jun 1, 2009, pg. 26136 et seq.

3. Alignment of Compensation With Results

Loan modifications are highly complex and do not necessarily result in lowered monthly payments. Loan modifications depend on a homeowner's income, home equity, and credit score. Once a foreclosure proceeding has begun, delinquent payments have already lowered a homeowner's credit score. Furthermore, as housing prices continue to decline and unemployment rises, the chances of loan modifications that will result in lower payments decreases. Despite these facts and contingencies, foreclosure rescue schemes continue to guarantee loan modifications in advertisements. Consequently, contracts should specify compensation commensurate with results achieved. Illinois provides a good example of a compensation structure⁵ that aligns consultants' payments with their success rates.

B) FTC Rules Should Provide Early Protections

Protections should begin before the notice of default is given. Public notices of default, published in the County Recorder's Office, help those engaged in fraudulent foreclosure rescue schemes to identify potential target homeowners. During the three to six month window before a notice of default is given homeowners are also vulnerable to deception through radio, television, and internet advertising. We applaud the FTC's recent action against 71 separate organizations under suspicion of deceptive advertising, but recognize that deceptive advertisements can be as simple as flyers posted in and around communities. Therefore it is important that consumer protections should include the period prior to commencement of the foreclosure process.

C) Whether or not a proposed FTC rule should include exemptions for attorneys or any other class of persons or entities.

State laws against mortgage rescue fraud define and regulate the behavior of foreclosure consultants. In most cases, however, licensed state attorneys are not included in the definition but are instead required to follow the rules and regulations of state bar associations. Thus, attorneys engaged in judicial foreclosure proceedings should remain exempt at the federal level since they are already regulated and supervised. However, any proposed FTC rule should ban partnerships between foreclosure consultants and lawyers that violate state bar associations' codes of conduct.⁶

⁵ 765 ILCS 940/1 et seq.

⁶ E.g. Ethics Alert: Legal Services to Distressed Homeowners and Foreclosure Consultants on Loan Modifications (Committee on Professional Responsibility and Conduct, The State Bar of California, San Francisco, CA) Feb. 2, 2009 available at <http://www.calbar.ca.gov/calbar/pdfs/ethics/Ethics-Alert-Foreclosure.pdf>

Once again, we commend the FTC on the proposed regulation as an important first step in the right direction to ensure consumer protections in this foreclosure crisis. The revisions suggested herein will help ensure that the proposed regulations are effective and strong.

Please feel free to contact me if you have any questions regarding the Shriver Center's comments.

Sincerely,

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