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March 29, 2010

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

Re: Mortgage Assistance Relief Services Rulemaking, Rule No. 911003, 16 CFR 322

To Whom It May Concern:

We write on behalf of Land of Lincoln Legal Assistance Foundation's Homeownership Task Force. This letter is in response to the proposed rule regulating Mortgage Assistance Relief Services. Organized in 1972, Land of Lincoln Legal Assistance Foundation, Inc. (LOLLAF) is an Illinois not-for-profit corporation whose mission is to pursue civil justice for low-income persons through representation and education. Our goals are: (1) to promote economic security, adequate shelter and health care; (2) to alleviate domestic violence and improve family stability; and (3) to advance the interests of vulnerable populations. Land of Lincoln is the sole provider of the full range of free civil legal services for low-income persons in 65 counties in central and southern Illinois.

We receive National Foreclosure Mitigation Counseling funding and have helped hundreds of low-income homeowners seeking assistance with their mortgages because they are facing foreclosure. We have worked with many homeowners who have paid money to a Mortgage Assistant Relief Services (MARS) provider, only to discover that they received absolutely no service in exchange for the fee. Worse yet, many of them have found themselves further along in the foreclosure process because they assumed the MARS provider was working diligently on their behalf to resolve the issue. Sometimes, it is only after they are served with a summons that the homeowner discovers the MARS provider has done nothing.

We applaud the Commission's efforts to protect distressed homeowners through the issuance of this rule. Further, the Commission requested comment on significant, important questions on the effectiveness of the proposed rule. We cannot offer comments on all of its questions. However, we will attempt to address those requests that pertain to Land of Lincoln's clients, as well as where we believe the Commission can more aggressively address the unfair practices and defective acts of these service providers.

The proposed rule offers significant benefits to consumers by curbing some of the unfair and deceptive practices of mortgage assistance relief services providers.

The proposed Rule would provide an enormous benefit to homeowners. Most consumers we assist with foreclosure mitigation counseling are either in default on their mortgages, at imminent risk of default, or in foreclosure. Moreover, because we assist low income individuals, few, if any, truly have the extra income to pay MARS providers. However, a common characteristic among all of our clients is their desperate desire to save their homes. Some of our clients are lured into paying MARS providers because of the siren song of MARS false advertising. Inevitably, these clients find their misplaced hope dashed against the rocks, when the MARS provider has taken their advance fee and provided them with no service. The result is that these clients are out thousands of dollars for a service they never received and still face losing their homes. The proposed Rule would ensure that consumers, including our clients, do not spend what little extra money, if any, they have to pay for services they would never receive. Furthermore, its limits on how a MARS provider can advertise its services may significantly curb the abusive, deceptive ways that MARS providers promote their services.

Homeowners are regularly misled by MARS providers.

LOLLAF frequently counsels consumers who were misled in the promotion and sale of mortgage assistance services. The deceptive practices come in innumerable forms. For example, one client told us that a MARS provider "guaranteed" it would get him a loan modification with a reduced interest rate and reduced payment. This client paid an advance fee only to find that the MARS provider did not get him a loan modification, or even assist with his mortgage default whatsoever. Other clients have been deceived into believing the MARS provider will assist them because it claimed to a "non-profit," used a government symbol or claimed to be affiliated with the HOPE hotline. This proposed rule may prevent future clients from being deceived by the false promises of the many MARS providers out there.

Comments regarding Specific Proposed Provisions

Section 322.2: Definitions

The rule should include mortgage brokers, real estate agents, servicers and nonprofits.

The proposed Rule should also cover entities, such as mortgage brokers, who assist consumers in negotiations with their lenders to obtain new loans or refinancing. In our practice, we encounter homeowners who have been deceived by mortgage brokers and realtors, who offered to help them "save their home" from mortgage delinquency or unpaid real estate taxes by helping them obtain a new loan, refinance to redeem unpaid taxes, or make repairs to their homes. Because we have seen all of these entities cheat and swindle homeowners, we do not believe any of these entities should be exempt from this proposed rule. If any of these entities wish to expand and capitalize on the foreclosure crisis, they should be covered by the rule.

In the course of our work, LOLLAF has also seen abusive and deceptive practices by servicers and nonprofits. Servicers have told homeowners to quit making payments; they have

also required homeowners to pay a fee just to be considered for a loan modification. Some nonprofits demand fees, promise modifications, and leave the homeowner hanging. To the extent that both promise results to homeowners to save their homes, servicers and nonprofits should not be exempt from the proposed rule.

The rule should define "substantially" when describing a loan modification as a contractual change that "substantially reduces" the consumer's payments.

Rather than leaving it to MARS providers to define what a substantial reduction to a consumer's payment is, the FTC should define the term "substantially." LOLLAF believes an appropriate definition would incorporate the standards of HAMP, e.g. 31% of a homeowner's gross income at the time a MARS contract is signed would be a good indicia of substantial reduction. HAMP is the industry-wide standard at this time.

Section 322.3: Prohibited Representations

The FTC should adopt the proposed rule's prohibited representations.

LOLLAF endorses the proposed rule's ban on MARS providers advising consumers not to contact their mortgage lenders and servicers. This ban is necessary for several reasons. First, ongoing communication with mortgage servicers is key to any homeowner negotiating a workout to save their home from foreclosure. Furthermore, communication with a servicer may allow a homeowner to determine whether or not the MARS provider is providing any service on his or her behalf, as that provider promised. Additionally, because time is of the essence in dealing with a mortgage default, urging a homeowner not to communicate with his/her servicer only increases the likelihood that a homeowner will end up in foreclosure, as well as burdened with additional late charges and other fees, with the clock running out on their time to save their home.

With regard to the prohibition on misrepresentations of material aspects of any mortgage assistance relief services, it is evident in our interaction with distressed homeowners that misrepresentation of the likelihood of negotiating, obtaining, or arranging any represented service or result is very widespread. In our practice, virtually all homeowners we assist have been contacted by a MARS provider who promised that it would get their interest rate lowered or payment reduced. Other clients have been enticed by government symbols and agency logos MARS providers affix to their websites. It is often difficult to persuade clients that the free counseling services we provide will almost certainly get the same result the MARS provider will get for a fee. The prohibited misrepresentations enumerated in the proposed rule accurately targets the deceptive conduct that it is intended to prevent and may help dispel the misconceptions that consumers hold regarding MARS providers.

Section 322.4: Required Disclosures

The FTC should require other disclosures, in addition to the disclosures in the proposed rule.

The required disclosures enumerated in the proposal will assist consumers who consider using a MARS provider. However, we believe that for-profit MARS providers should be required to make an additional disclosure. The following disclosure may be even more helpful to

consumers: "The services provided by (Name of company) are available for free from local HUD-certified housing counseling agencies. If you are considering our service, you should check www.hud.gov or contact 1-800-569-4287 to see if HUD housing counseling agencies can assist you for free." The benefit to consumers of this counseling disclosure would be to alert consumers who may not know that they can receive foreclosure free of charge. In our practice, homeowners we encounter do not have hundreds or thousands of dollars to spare for services they can receive at no cost.

Assuming the FTC adopts the advance fee ban, an additional disclosure that would significantly curtail unfair and deceptive acts and practices, would be to require MARS providers to disclose to consumers that fees are not owed unless promised results are delivered. This would ensure that consumers understand they are under no obligation or threat of legal action if they refuse to pay for services that were promised but not delivered.

Historical Performance Disclosures should be included in the rule.

The FTC should require MARS providers to disclose their historical performance so that consumers understand the risks in engaging their services and the significant likelihood that they will not get the relief they request the MARS provider to obtain for them. Even in the midst of this housing crisis, loan modifications continue to be the exception, rather than the rule. Only 170,000 homeowners have received a HAMP modification since the program's inception a year ago.[1] Given the substantial media attention to the housing crisis, homeowners are often surprised when lenders refuse to modify their loans.

MARS providers should be required to break down into categories for each specific type of relief requested and obtained. This information should be expressed as a percentage, e.g. 20% of homeowners seeking loan modifications through the MARS providers obtained a modification. Such categories could include how many of their clients requested a loan modification, the number or percentage of clients who actually received a loan modification, the number who received only a forbearance agreement, the number who received a repayment agreement, and the number who received no relief at all. If the data is available to MARS providers, they should also disclose how many of their clients were not able to save their homes and lost them to foreclosure.

Section 322. 5: Prohibition on the Collection of Advance Payment

Prohibit ALL upfront fees: Advances payments are an unfair act and practice.

LOLLAF urges the FTC to adopt the proposed rule banning MARS providers from charging upfront payments prior to a permanent loan modification being offered to the consumer. Prohibiting these providers from collecting advance fees will reduce the injuries suffered by countless distressed homeowners who pay these providers significant sums of money, only to find that mortgage assistance relief service did little or nothing to help them obtain a loan modification. By requiring MARS providers to obtain the loan modification or other results they promised prior to getting paid, the FTC will protect consumers by eliminating the financial incentives MARS providers have for making promises they cannot keep or have no intention of keeping, including promises of pie-in-the-sky loan modifications and saving distressed

[1] http://www.treas.gov/press/releases/tg586.htm

homeowners' homes from foreclosure. Prohibiting upfront frees is the reality check many MARS providers need to prevent them from overpromising and overselling their results.

Furthermore, LOLLAF encourages the FTC to ignore alternatives to a wholesale ban on upfront fees, such as initial set up fees or partial fees for intermediate results. Allowing any fees to be collected prior to providing a permanent loan modification presents MARS providers with a back door opportunity to extract significant sums of money without any benefit provided to the consumer. If the FTC intends to adopt an up-front set up fee, the fee should be *de minimis*, such as $10-$25.

Nevertheless, any advance fee is a substantial detriment to consumers. Consumers who pay advance fees may delay contacting their mortgage servicer, believing the MARS provider is acting on their behalf. Furthermore, they may delay seeking assistance of legitimate ***free*** mortgage assistance from HUD-certified agencies and NFMC counseling agencies. Additionally, consumers who pay advance fees have few avenues for recovering an advance fee they paid in which no service is provided. Their only recourse may be filing a lawsuit, which is cost-prohibitive.

Another alternative proposed by the FTC, escrowing funds and not allowing MARS providers to access them without providing a benefit, does not provide a significant safeguard to protect consumers from abusive MARS providers. Consumers who seek to recover fees may have to bring a lawsuit to either recover them from escrow or to claw back the fees paid to a MARS provider. MARS providers must provide a minimum level of benefit before they are allowed any fee. However, LOLLAF strongly encourages the FTC to adopt a rule prohibiting the collection of fees until a sustainable, affordable loan modification is achieved, or at a minimum, the benefit provided in writing to the consumer is accomplished. This is the only avenue for barring the unfair and deceptive acts of many MARS providers.

<u>Limit the amount of fees.</u>

The FTC should prohibit unreasonable and excessive fees. MARS providers have consistently promised to help homeowners, charged thousands of dollars, and then failed to deliver results. LOLLAF suggests capping fees at $400 or a similar flat rate. LOLLAF provides NFMC counseling to homeowners for no fee. As a result of our work on behalf of distressed homeowners, we know that there is little to no correlation between the amount of effort undertaken on behalf of the homeowner, and the benefit to the homeowner in the loan modification achieved. Loan modifications, and their terms, are subject to servicer and investor discretion. We have had clients who were not seeking loan modifications offered ones with amazing terms—significant principal and interest rate reduction. At the same time, we have performed yeomans' efforts on behalf of some of our clients, only to have them offered workout packages that barely lower their payments and do not include principal reduction. Thus, we believe that any compensation package for MARS providers that correspond with the size and significance of a loan modification, rewards MARS providers who may have provided little service on behalf of a homeowner, or who duplicated the service of a free counseling agency.

In the alternative, the Illinois Mortgage Foreclosure Rescue Fraud Act provides a good prototype for how to limit fees in proportion to the benefit received by the homeowner. *See* 765 ILCS 940/1 *et seq.* The Act limits compensation in the following way: for modifications that

reduce monthly payments for at least five years, (e.g. HAMP), the fee is capped at the lesser of the existing principal and interest payment or the total net savings from the lowered payments over the succeeding 12 months. This fee structure insures that the homeowner actually receive a benefit in proportion to the fee. Nevertheless, LOLLAF believes that limiting fees is no substitute for barring advance fees. The FTC should prohibit advance fees.

Require a written contract that includes the right to rescind the contract for 30 days.

The FTC rule should require all MARS providers to provide consumers with a written contract that specifically describes the services that will be provided, what fee will be charged and when, notices regarding this specific FTC rule, and a right to cancel. While the proposed rule requires MARS providers to state the total cost of the service, there is no requirement that it be given in writing. Providing homeowners with a contract will significantly curb unfair and deceptive sales tactics by offering them an idea of what services they can reasonably expect undertaken on their behalf and what promised results they will receive prior to payment.

However, the contract should also allow all homeowners the right to cancel the contract with the MARS provider within 30 days. Thirty days, rather than the three allowed in refinancing under Truth in Lending, gives homeowners the opportunity to discover the services of a free HUD-approved counseling agency. It also gives homeowners an opportunity to reconsider the contract, away from the aggressive sales tactics. The 30 day period should begin running when the homeowner receives notice of the right to cancel and no waiver under any circumstance should be allowed.

A contract with a notice of a right to cancel is no substitute for barring advance fees in the FTC's efforts to rein in unfair and deceptive practices. It should complement any advance fee ban. A consumer who pays an advance fee and then cancels in 30 days may ask for their money back. However, that consumer has little recourse for recovering the money if the MARS provider fails to return it, save a lawsuit. Lawsuits are often cost-prohibitive and time-consuming and few consumers could afford to bring them. Thus, a right to cancel with no ban would continue to allow MARS providers and their practices to abuse consumers without restraint.

Require written documentation of an affordable, sustainable loan modification or other result achieved prior to collecting a fee.

The FTC should adopt its proposed rule requiring the MARS provider to provide the consumer with written documentation of achieved results before collecting its fee. Any documentation submitted by a MARS provider to request payment of a fee should include a copy of the modification or forbearance agreement from the lender to the consumer. This allows consumers to understand clearly what terms they are offered and could be retained by the MARS provider if an audit by the FTC were to occur.

Other concerns regarding the proposed rule

The proposed rule should not preempt states' laws that regulate MARS providers and provide stronger consumer protections.

LOLLAF would also like to address our concern over preemption of state law. Illinois, in addition to a number of other states, has a statute that regulates MARS providers. We strongly support the FTC's desire to prohibit deceptive practices by MARS providers, but we are concerned that if the proposed rule pre-empts state law, these covered homeowners may lose the protective provisions of their much-stronger state law, including the right to file a lawsuit individually to enforce the law's provisions.

<u>The proposed rule should require MARS providers' employees to attend Neighborworks Training or HUD counseling training prior to working with homeowners.</u>

LOLLAF encourages the FTC to adopt a rule requiring MARS providers' employees to be trained in foreclosure mitigation counseling or mortgage default counseling. To truly be of service to homeowners, these providers must have knowledge of the full array of programs, products, and loss mitigation options to assist homeowners in default. Absent training, the MARS providers' employees may be ignorant of the byzantine loss mitigation options or the lack thereof, e.g. there is no HAMP modification of USDA loans.

Thank you for your consideration of these comments. We looked forward to the Commission's adoption of strong consumer protections in the near future.

Sincerely.

/s/
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/s/
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