



NATIONAL ASSOCIATION OF REALTORS®

*The Voice For Real Estate®*

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March 29, 2010

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

Re: Mortgage Assistance Relief Services Rulemaking

**Rule No. R911003**

Submitted electronically via: <http://public.commentworks.com/ftc/MARS-NPRM>

Dear Chairman Leibowitz:

On behalf of the 1.2 million members of the National Association of REALTORS® (NAR), I am pleased to provide comments on the Federal Trade Commission's Notice of Proposed Rulemaking; request for comment regarding mortgage assistance relief services (MARS).

The National Association of REALTORS® (NAR) is America's largest trade association, including NAR's five commercial real estate institutes and its societies and councils. REALTORS® are involved in all aspects of the residential and commercial real estate industries and belong to one or more of some 1,400 local associations or boards, and 54 state and territory associations of REALTORS®.

NAR broadly supports efforts to ensure that MARS services truly benefit consumers. Numerous NAR members have provided anecdotal evidence of subpar services and abusive schemes that are to the detriment of homeowners in troubled situations. Efforts to weed out MARS providers that do not truly work for the benefit of homeowners are therefore welcome. Nevertheless, NAR has some concerns with the proposed rule and its potential application to real estate professionals in short sale and other sales transactions. We believe clarification is necessary to ensure that real estate professionals are not treated as acting in a MARS capacity when they are performing traditional real estate functions.

### **MARS Providers**

NAR believes that a real estate professional acting in that capacity should clearly be excluded from the definition of "Mortgage Assistance Relief Service Provider"<sup>1</sup> provided that they are not attempting to collect an upfront fee and/or otherwise holding themselves out to be a MARS provider

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<sup>1</sup> §322.2(i)

via advertising or other means and attempting to collect a fee at any point for such services. While the short sale is certainly on the menu of possible avenues of relief for a homeowner, the activity of the sale itself by a real estate professional is a distinct activity well within the customary activities engaged in by real estate professionals.

### **Assisting and Facilitating**

Additionally, a real estate professional, engaged by a potential short seller on the advice of a MARS provider or by a MARS provider directly, should not face a presumption that they know or are consciously avoiding knowledge of the provider's possible unlawful activity.<sup>2</sup> The broad goal of the real estate professional is to sell the home in a manner that comports with the seller's wishes. Unless strong evidence of some collusion is provided to the contrary, the mere involvement in a transaction that also involves a wayward MARS provider should not be viewed as implicating the real estate professional, whose sole goal and task is to sell the property.

### **Beneficial Results**

The Commission should also examine more closely the requirement for beneficial results.<sup>3</sup> Footnote 155 uses a short sale example where the MARS provider actively concealed the sales price from the lender. Clearly this is an egregious action that most likely violates a number of existing laws. However, this extreme example does not offer valuable guidance precisely because it is extreme. The Commission should be more careful in defining the term "beneficial" and in providing examples especially in the case of the outcomes of a short sale and other efforts to prevent foreclosure.

The spectrum of outcomes facing a distressed homeowner is broad. An option such as a short sale, which is beneficial in its impact on the home seller's credit record, is still not necessarily the kind of outcome that is going to produce an elated consumer. Nevertheless, it is generally agreed to be a better outcome than a foreclosure for both the seller and the community in which the home is located. The Commission should be careful not to discourage short sales and therefore promote foreclosures. MARS providers and other people in positions to offer advice might not do so out of fear of liability under this rule or from concern that they may not receive compensation if the outcome is not considered "beneficial." A short sale will never be viewed as positively as other outcomes, such as a major loan modification that reduces principal and the monthly payment significantly and allows someone to stay in their home. The reality of current market and economic conditions precludes that scenario for large numbers of homeowners. In many circumstances, the least bad outcome is also the only good outcome.

### **Incidental or De Minimis Advice**

The Commission posed the question whether the proposed Rule should exclude from the MARS provider category persons who provide incidental or de minimis advice. NAR believes the Commission should consider tailoring the definition to exclude persons such as real estate professionals who often provide advice to troubled homeowners but do not hold themselves out as providing MARS services or collect fees for such advice and services, except to the extent it may be part of real estate services covered by the traditional commission paid at closing. Real estate professionals are often contacted by past clients who are having problems paying their mortgage or fear they will lose their home. These professionals make a good faith effort to provide useful information and access to resources, even if there is no fee charged. In particular, REALTORS® adhere to a strict code of ethics and are licensed by their respective states. They

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<sup>2</sup> §322.6

<sup>3</sup> §322.5(a)(1)(ii)

rely on their past clients for referrals and future business and therefore have a strong motivation to see a positive outcome achieved regardless of whether the situation yields any remuneration in the short run.

If the rule is too stringent, it may create a disincentive for the real estate professional to provide such assistance, leaving the consumer without a valuable and knowledgeable resource. This is particularly true if the initial facts dictate that a short sale may be the best option. Real Estate professionals, seeing that their eventual work on a short sale (and subsequent potential commission) may be construed as making them a MARS provider, may be reluctant to accept the listing, leaving the consumer to find another broker and denying the consumer valuable advice. The Rule should cover those who hold themselves out as MARS providers and seek compensation in the form of fees for the advice and intermediation they provide, not real estate professionals providing counsel in the normal course of their real estate activities.

Once again, NAR supports efforts to ensure that people who provide counseling, advice and other services to troubled homeowners are indeed providing a benefit for the fees they charge. However, we also strongly believe that our members, when acting in their capacity as real estate agents and brokers, should be exempted from this regulation.

Thank you for your time and consideration in this matter. Should you or your staff have any questions or concerns, please do not hesitate to contact our Senior Regulatory Policy Representative, Scott Rinn at (202) 383-7508 or [srinn@realtors.org](mailto:srinn@realtors.org) or our Director of Real Estate Services, Ken Trepeta at (202) 383-1294 or [ktrepeta@realtors.org](mailto:ktrepeta@realtors.org).

Sincerely yours,

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