

Consumers Union

Nonprofit Publisher
of Consumer Reports

March 26, 2010

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

Via Electronic Submission
<http://public.commentworks.com/ftc/MARS-NPRM/>

Re: Mortgage Assistance Relief Services - Proposed Rulemaking; Rule No. R911003

Dear Sir/Madame:

Consumers Union,¹ the nonprofit publisher of *Consumer Reports*, appreciates this opportunity to comment on the Federal Trade Commission's (FTC) Notice of Proposed Rulemaking (NPRM) regarding mortgage assistance relief services.

I. Summary & General Comments

Consumers Union supports the FTC's proposed Rule regulating for-profit companies that, in exchange for a fee, offer to work with lenders and servicers on a homeowner's behalf to modify the terms of mortgage loans or to avoid foreclosure on those loans. With some enhancements, the proposed rules prohibiting advance fees, barring false or misleading claims, and requiring certain disclosures regarding loan modification services taken together will help to protect consumers from the deceptive and abusive practices that have been so pervasive in the mortgage assistance relief services (MARS) industry. Consumers Union also supports the Rule's extension of liability to those who provide substantial assistance to an entity engaged in a violation of these Rules, as well as the recordkeeping, reporting and compliance requirements imposed.

Currently, MARS providers are offering consumers negotiation services and assistance for obtaining loan modifications, short sales and other forms of foreclosure avoidance relief. Although consumers may have invested thousands of dollars in order to receive these services, too often their expectations are not being met. As a result, many consumers are receiving little or no benefit in return, and in some cases are worse off than if they hadn't engaged the services of for-profit MARS providers.

¹ Consumers Union of United States, Inc., publisher of *Consumer Reports*®, is a nonprofit membership organization chartered in 1936 to provide consumers with information, education, and counsel about goods, services, health and personal finance. Consumers Union's publications and services have a combined paid circulation of approximately 8.3 million. These publications regularly carry articles on Consumers Union's own product testing; on health, product safety, and market place economics; and on legislative, judicial, and regulatory actions that affect consumer welfare. Consumers Union's income is solely derived from the sale of *Consumer Reports*®, its other publications and services, fees, noncommercial contributions and grants. Consumers Union's publications and services carry no outside advertising and receive no commercial support.

The proposed Rule would benefit consumers and improve the MARS marketplace by more carefully regulating the market and provision of MARS services to consumers. It will have the desirable effect of eliminating those MARS companies that obtain business by luring and misleading desperate consumers rather than by providing quality services.

The need to regulate this industry is urgent and great. With record numbers of homeowners facing foreclosure, the market opportunities for for-profit MARS providers is enormous.² This reality has led to an explosion in the for-profit MARS industry and a corresponding rise in abuses against consumers by members of this industry. This is indicated by the fact that the National Association of Attorneys General (representing Attorneys General from 37 states) has urged the FTC to implement strong rules protecting consumers in this area. Consistent with this approach, in California, (the state with the highest number of foreclosure filings in the nation in 2009), the Attorney General has engaged in high profile action against unscrupulous MARS providers accused of abusing consumers.³ Additionally, many homeowners have reported to Consumers Union that they have been aggressively solicited by MARS providers who lured them into contracting for their pricey services by making promises that have not been delivered. In some cases consumers report being worse off after paying thousands of dollars to for profit MARS providers who did not help them. The pervasiveness of MARS entities leading consumers down this path and the vulnerability of borrowers desperate for relief compel the need for the implementation of strong Rules regulating the actions of this industry.

Though not covered by the NPRM, Consumers Union recommends that the FTC prohibit MARS providers from advising clients who are not yet in default to cease making payments on their loans in order to receive a loan modification. Consumers Union also supports the inclusion of a right to rescission in the Rule and urges the FTC to not create an exemption for attorneys from requesting or receiving advance fees for MARS services. Taken together, the proposed Rule and the additional protections we propose will be effective to help to reduce the widespread abuse in the MARS industry and allow consumers to make informed choices when seeking a mortgage loan modification or other form of foreclosure avoidance assistance from a for-profit entity.

II. Definitions

Consumers Union believes that the definition of “mortgage assistance relief services” in proposed Sec. 322.2(h) is sufficiently broad to include the types of companies offering the services which are the subject of abuses. The definition could benefit, however, by adding the word “product.” This addition would prevent MARS providers from claiming they are not covered by the rule because they offer a product, not a service.

Consumers Union also believes that the current definition of “mortgage assistance relief service” is adequate to cover services to assist consumers in negotiating with their

² The Center for Responsible Lending today stated that since 2007, we have had 6.6 million foreclosures filed across the nation, and by 2012 that number may climb as high as 13 million. See <http://www.responsiblelending.org/media-center/press-releases/archives/New-Mortgage-Plan-Lifting-Underwater-Loans-is-Crucial.html>

³ See <http://ag.ca.gov/loanmod/>

lenders to obtain new loans or refinancing. The language in Sec. 322.2(h)(2) includes any service represented as “otherwise saving the consumer's dwelling from foreclosure or repossession.” A refinance could fall within this definition; however, it may be helpful to include a statement in Sec. 322.2(h) that gives examples of included services. The statement could read: “including but not limited to a loan modification, short sale, bankruptcy filing, principal reduction or a refinance of the existing mortgage.” This may give consumers and MARS providers a clear idea of the types of services targeted by this rule, while at the same time not limiting the definition to only those specific services.

Consumers Union supports a stronger definition of “mortgage assistance relief service providers” under Sec. 322.2(h)(i) of the proposed Rule. Specifically, a MARS provider should be defined as *every entity that stands to benefit financially from persuading a consumer to sign on to MARS services*. Consumers Union is concerned that exempting an entity who advises or assists the consumer to obtain the relief on his or her own will create a loophole in the law, giving rise to an unregulated “do it yourself” MARS advice industry, which would charge consumers a fee in exchange for helping them modify their mortgage loans on their own and not be subject to the proposed Rule.

Consumers Union agrees that lenders and servicers should be exempted from the definition of “mortgage assistance relief services.” Consumers Union is not aware of any lenders or servicers actively marketing MARS services for a fee to their customers. However, Consumers Union is concerned that the lender and servicer exemptions may be used by MARS entities who otherwise provide or service loans and are technically lenders or servicers, but are not the lenders or servicers for the mortgage loan that is the subject of the MARS services. The Rule should specify that the only lender or servicer qualifying for this exemption is the one currently holding the mortgage loan of the homeowner retaining the services of a MARS entity.

Consumers Union also supports the exemption of bona fide non-profit housing counseling services from the requirements of the rule. However, it is important to note that the exemption will create incentives for for-profit entities to convert to non-profit status in order to evade the proposed rules. The FTC must carefully monitor the marketplace and engage in enforcement against those who will seek to circumvent the Rule through these means.

III. Prohibited Representations

Consumers Union strongly supports the Rule's prohibition on any representation that would encourage consumers not to speak with their lender or servicer. Consumers often report being instructed by MARS entities to cease all communication with their lenders and/or loan servicers, even though the provider subsequently does nothing of value on the homeowner's behalf. As a result, the foreclosure clock continues to run, and rather than seeking help from a legitimate non-profit housing counseling agency, the homeowner is diverted away from legitimate sources of help by the MARS provider's assurances that they will deliver results.

In addition, Consumers Union believes MARS providers should be prohibited from advising current or prospective clients who are not yet in default to stop making payments on their mortgage loans. Consumers often report being instructed by for-profit MARS entities to stop making mortgage payments in order to qualify for loan modification services or other forms of foreclosure relief. Homeowners who follow this

advice are often unaware that doing so may ruin their credit scores and lead to fewer options to avoid foreclosure. Consumers Union recommends that the FTC add this additional prohibition to prevent consumers who are still managing to meet their loan payments, even with some difficulty, from going in to default with the hope that doing so will result in more manageable loan terms.

Consumers Union also supports the Rule's prohibition on any communications that misrepresent a MARS provider's affiliation, endorsement, or approval of a government entity. This is a serious and common problem where for-profit MARS entities have without permission used symbols and emblems associated with or suggestive of a government entity for the purpose of adding legitimacy to their operations. MARS providers have used the White House seal, the Department of Housing and Urban Development seal, and other federal and state agency insignia to imply that they have received the approval of these various government entities. MARS agents have falsely informed consumers that their agency has been "officially recommended" by HUD as an authorized loan modification service provider. Homeowners trying to navigate their options for avoiding foreclosure are easily confused by the use of these symbols and insignia and may choose to do business with a for-profit MARS entity because the use of such symbols makes the homeowner believe they are dealing with an entity that is either affiliated with the government or sanctioned by it. Use of such emblems or insignia should be prohibited by the new Rule.

Consumers Union supports the non-exclusive enumeration of other misrepresentations that give rise to a violation under the proposed Rule. As long as the list is treated as non-exclusive, but is clear about the nature of misrepresentations that are prohibited, the Rule will be flexible enough to allow for the regulation of emerging abusive practices that violate the spirit of the Rule.

IV. Required Disclosures

Consumers Union supports the Rule's disclosure requirements listed in Sec. 322.4. However, under the proposed Rule, these important disclosures need only be made in commercial communications made prior to the signing of the contract between the homeowner and the for-profit MARS provider subject to the Rule. This language seems to suggest that once the homeowner becomes a client, the required disclosures would no longer be required. Consumers Union believes that the disclosures should be repeated *in every written and oral communication* between the MARS provider and the borrower, even once the homeowner becomes a client or customer of the MARS. The operational effect of this proposed modification would be to require that the specified information be disclosed in every letter, every phone call, and every email targeted to a specific consumer, from the very beginning to the very end of the consumer-MARS provider relationship. This will protect both the homeowner and the MARS provider from any misunderstandings regarding the MARS providers' status as a for-profit entity, unaffiliated with a non-profit organization, lender, or governmental entity.

In addition, each disclosure requirement should be applicable to all for-profit MARS providers across the board. Consumers should not be expected to discern which for-profit MARS providers perform services and achieve results that are only set forth in Sec. 322.2(h)(1) and Sec. 322.2(h)(3)-(6) and which do not. Establishing an across the board disclosure requirement for all MARS providers will help eliminate possible confusion regarding when the disclosures should be provided. With such a general

requirement in place, consumers would more easily be able to note non-compliance and report it to the FTC.

Consumers Union agrees that MARS providers should be required to disclose the total amount the consumer will have to pay for the service provided in every targeted communication. However, Consumers Union supports an additional requirement that MARS providers include a breakdown that clearly and conspicuously explains the services the consumers will receive, as well as an itemized cost for each service. Requiring MARS providers to provide a clear and detailed breakdown of their services, together with the price for each service, will allow consumers to contrast and compare what different MARS providers offer, and more easily choose the one that provides the best value.

Consumers Union also believes that MARS providers should be required to make the above-mentioned disclosures in writing. Where MARS entities provide services only over the telephone, at least once during the consumer-MARS provider relationship, Mars providers should be required to send consumers a written correspondence with the required disclosures immediately after the first contact is made with a specific client. Disclosures cannot fix bad practices but they can help put the consumer on notice about his or her rights.

Consumers Union believes it would also be beneficial for MARS providers to disclose to consumers the consequences of not paying their mortgages (such as the loss of their home and damage to their credit rating). Even if FTC adopts the recommendation that MARS providers be prohibited from actively advising clients to default on their mortgages, this bad advice could also come through indirectly, if the consumer initiates the conversation. For example, if the consumer asks the MARS agent what will happen if they default on their mortgage, the agent could simply respond that the bank will give them a loan modification. Because of the danger this poses to consumers, MARS providers should be required to disclose to consumers the disastrous consequences that can result from failing to meet mortgage payments.

If the proposed ban on advance fees is enacted, for-profit MARS providers must be required to disclose to consumers that no advanced fees may be charged and that fees are not owed unless and until promised results are delivered. In addition, MARS providers should be required to disclose the minimum specific benefit the consumer will receive, e.g., the minimum reduction in the monthly payment amount, for the amount of fees to be paid. This disclosure would help consumers evaluate whether the amount of the benefit equals the amount of the total fees to be paid.

Requiring disclosure of historical performance could be helpful if the company has been in business long enough to calculate a meaningful success rate. In addition, if the company has performed poorly in the past, such a disclosure requirement may help consumers make more informed choices. However, many of the for-profit MARS companies are new and requiring a new company to provide historical performance information without also disclosing the duration of the MARS business entity could distort results and mislead consumers. For example, a new company with only one previous customer, for whom it obtained a beneficial result, could truthfully represent itself as having a 100% success record. This statement would be statistically accurate but not statistically relevant vis-à-vis future performance. The FTC should study this question

further to determine whether and how such a requirement should be included and/or implemented.

V. Prohibition on Collection of Advance Fees

Consumers Union strongly supports the Rule's proposed prohibition on any and all advance fees. The fraud and abuses present in the MARS industry are so widespread and far-reaching that simply capping fees is not sufficient to ensure that consumers will actually receive the services they are sold and reasonably expect. Often times, consumers pay as much as \$2,000 or \$3,000 in up-front fees to receive loan modification services regardless of whether any value is delivered. Consumers Union urges the FTC to preserve all requirements listed in Section 322.5, which would only permit payment upon satisfaction of the contract that delivers what the consumer reasonably expected. Consumers Union is not aware of any for-profit MARS providers currently requiring payment only after results have been achieved. However we believe that imposing this requirement will force for-profit MARS providers to sell their services only to those they can reasonably expect to help rather than anyone they can sign up to generate advance fees even when there is no hope of offering them the help they seek.

Consumers Union would advocate against allowing any up front fees for MARS providers at all, no matter how small. It may seem innocent enough to allow a small initial fee of \$25.00 or \$50.00. At first glance, this fee may not seem particularly burdensome to consumers. However, this may incentivize certain for-profit MARS providers to simply sign up as many people as possible only for the initial fee, and nothing else. The small fees could potentially add up to sizeable profits for MARS companies, depending on the aggressive nature of the MARS provider's marketing campaign. In addition, because of the small loss suffered by each individual, consumers would be even less likely to recuperate their money or complain about a problem with the MARS provider.

Consumers Union also agrees that in order to determine whether the MARS provider has achieved beneficial results triggering payment obligations, one must look both to the representations of the MARS agent regarding those results, as well as to the consumer's reasonable expectations regarding the services sold. Absent this provision, MARS providers could draft contracts that could be easily satisfied, without actually being "beneficial" to the consumer or that fail to meet consumer expectations created by the MARS provider.

MARS providers who promise that consumers will obtain a specific end result (e.g., a successful loan modification) should not be allowed to charge partial or piecemeal fees for intermediate results (e.g., helping the consumer fill out required forms to apply for the loan modification). No entity can guarantee a specific end result because the loan servicer makes the ultimate decision, even if a MARS provider may have an opportunity to try to influence a servicer's decision. As a result, MARS providers who promise specific end results should not have an additional right to charge for partial or intermediate "results" any more than would an entity not offering specific end results. Allowing such an exemption would only encourage MARS providers to continue "guaranteeing" results in order to collect as many fees as possible.

The provision defining "mortgage loan modification" also ensures that MARS providers do not simply procure a temporary modification that will cause consumers' loan

obligations to skyrocket after several months, but rather provide them with a modification that will be permanent for five years or more. We support this provision in the proposed Rule.

In keeping with the proposed Rule prohibiting advance fees for MARS services, Consumers Union would oppose allowing MARS providers to request, demand or otherwise collect advance fees to be deposited in an escrow account whether or not the MARS provider pays all third party escrow fees. Placing advance fees into an escrow account is still requiring the homeowner to advance compensation before services are delivered. Indeed, the State Bar of California interpreted a newly enacted law banning advance fees in connection with MARS services to prohibit attorneys collecting advance fees to be placed into escrow or trust accounts before MARS services are delivered.⁴

Consumers Union supports including a right of rescission in the Rule, and proposes that consumers be given a minimum of 7 days in which to nullify a contract with a MARS provider. MARS providers generally market their services in a very aggressive and persistent manner, through mail, phone, and Internet advertising. While this proposed rule, with some enhancements will be essential to help curb much of the fraudulent activities that persist in this industry, it is unlikely that all MARS providers will be immediately deterred from making dishonest claims. As a result, the right of rescission is essential to protect consumers who are lured into an agreement with a MARS provider, only to later discover that the company has a poor reputation or is not affiliated with the government. A consumer may, for example, be led to believe that a company has received the endorsement of a federal or state agency by the company's use of a seal or insignia. A consumer may also be led to believe that the company has an excellent track record in obtaining mortgage loan modifications, when in fact, the opposite is true. Upon discovering such misrepresentations, consumers should have adequate time to carefully consider a MARS contract that they may not have fully understood at the time of creation. The prohibition on advance fees is not sufficient to protect consumers in this situation, because a consumer will be required to pay a fee under the contract, even if the results were substandard, as long as the parties initially contracted for a substandard result. Giving a consumer a right to rescission could prevent this particular unfair outcome.

Consumers Union believes that the proposed Rule's advance fee ban (Sec. 322.5) prevents harm to consumers that would not be eliminated by its prohibition against misrepresentations (Sec. 322.3) and the disclosure requirements (Sec. 322.4). Prohibitions against misrepresentations and requiring disclosures help consumers make more informed decisions about the products and services they purchase, but they do not rid the marketplace of bad actors. Those entities intent on making money by taking advantage of consumers will not stop doing so as long as they can collect income from such actions without consequence. The prohibitions on advance fee payments is the most effective tool in this proposed Rule to drive bad actors from the marketplace, making room for the legitimate companies to fill in the void and provide quality, honest services and products to consumers.

⁴ See State Bar of California FAQ regarding SB 94 (Calderon) enacted into law on October 11, 2009. <http://calbar.ca.gov/calbar/pdfs/ethics/Ethics-SB94-FAQs.pdf>

VI. Assisting and Facilitating

Consumers Union commends the FTC for targeting those companies and individuals directly assisting MARS providers in carrying out fraudulent or abusive activities against consumers. Most MARS providers would not be able to operate without the services of others such as lead generation companies who provide them with homeowners' names, numbers, and addresses. Consumers Union believes, however, that extending liability only to those who "know or consciously avoid knowing" about the violation is not sufficiently stringent to address the abuses present in the MARS industry. The "consciously avoids knowing" language would, in effect, limit liability for any company who *should have known* of a MARS provider's wrongdoing, but simply took no affirmative action to verify the provider's bad activities. Because of the vital role that lead generation companies and others play in supporting and perpetuating the abuses of the MARS providers, Consumers Union would propose modifying the language of the rule to extend liability to any entity who "knew or should have known" of the violation. Failure to verify a company's integrity in the face of clear and reasonable evidence to the contrary should expose an entity or individual to liability. These third parties that assist and facilitate fraudulent MARS providers often walk away with a sizeable share of the funds defrauded from consumers. As a result, they have a direct incentive *not* to monitor the activities of the MARS provider. Introducing the "should have known" language in the rule ensures that such entities do not hold on to their ill-gotten gains when the MARS provider faces liability.

VII. Attorney Exemption

Proposed Sec. 322.7 would exempt attorneys from the proposed Sec. 322.3(a) ban on instructing consumers not to communicate with their lenders and the prohibition against requesting or collecting advance fees. Section 322.7 proposes these exemptions for licensed attorneys' conduct in connection with a bankruptcy case or other court proceeding to prevent foreclosure, where that conduct complies with state law, including rules regulating the practice of law. The proposed Rule would not provide an attorney exemption from the prohibitions against misrepresentations, disclosure requirements, and prohibition against knowing substantial assistance or support, and recordkeeping requirements.

Consumers Union supports a ban on the demand, collection or receipt of any advanced fee in connection with the delivery of MARS related services, whether or not the provider is an attorney. We support the position of the National Association of Attorneys General that the FTC should provide no exemption to the prohibition against the collection of advance fees for attorneys engaged in MARS.⁵ Consumers Union has received many complaints about attorneys involvement in fraudulent MARS scams. The State Bar of California also received a record number of complaints against attorneys licensed in California engaging in unethical MARS activities prompting it to take action against attorneys involved in loan modification fraud.⁶ Similarly, Consumers Union supported legislation in California⁷, also supported by the State Bar of California, which prohibited

⁵ See correspondence from the National Association of Attorneys General to the Federal Trade Commission, July 15, 2009, p. 13, <http://www.ftc.gov/os/comments/mars/542309-00040.pdf>

⁶ See http://www.calbar.ca.gov/state/calbar/calbar_generic.jsp?cid=10144&n=95962

⁷ SB 94 (Calderon) was enacted into law as an urgency measure on October 11, 2009. See http://info.sen.ca.gov/pub/09-10/bill/sen/sb_0051-0100/sb_94_bill_20091011_chaptered.pdf.

anyone, including attorneys, from claiming, demanding, charging, collecting, or receiving any compensation in the form of an advance fee in connection with mortgage loan modification or other form of mortgage loan forbearance. We believe the FTC should not exempt attorneys from the advanced fee restrictions contained in the proposed Rule.

VIII. Recordkeeping and Monitoring Requirements

Consumers Union supports the Rule's recordkeeping and monitoring requirements. However, Consumers Union believes MARS providers should be required to maintain all consumer records and contracts for 5 years instead of only 24 months. This time period would be commensurate with the five-year statute of limitations for an FTC action for civil penalties. It may take time for violations to surface, and if records are destroyed before the expiration of the statute of limitations period, enforcement action could be hampered. In addition, the Rule should require MARS providers to make available to the FTC all data, records, and information collected in order to process a consumer's case.

In addition to requiring MARS providers to establish a procedure for receiving and responding to consumer complaints, Consumers Union also supports requiring all MARS providers to respond to consumer complaints within 14 days of receiving the complaint, and to resolve the matter in question within 30 days. Consumers seeking the aid of MARS providers often face tight deadlines and do not have a lot of time to resolve their situation. If they do not act promptly, or if they are subject to undue delay caused by the MARS provider, they may lose their home. Requiring MARS providers to respond and resolve consumer complaints in a prompt and timely manner makes it more likely that consumers will have time to find help elsewhere if their MARS provider cannot provide adequate assistance or resolution of their complaint. In addition, MARS providers should be required to provide records of all customer complaints and outcomes to the FTC.

IX. Actions by States

A strong nationwide Rule from the FTC will be beneficial to protect consumers from MARS abuses, however it is absolutely essential that the Rule should not preempt States from enacting and implementing laws that provide more stringent MARS regulation in order to protect its citizens.

X. Conclusion

Consumers Union appreciates the FTC's careful consideration of the regulations it has proposed to protect consumers from fraudulent and deceptive MARS providers. With the revisions we have proposed, the proposed Rule will weed out the scam artists preying on desperate consumers, and will make more room for legitimate operators, who can actually help today's homeowners to navigate the mortgage loan modification process. The proposed Rule will not eliminate competition; it will simply get rid of bad actors who

Similarly AB 764 (Nava) banned the collection of advance fees by anyone, including attorneys in connection with loan modification services and provided that compensation for services was not due until until a borrower's loan is modified. AB 764 was approved by the California Legislature but was vetoed by Governor Arnold Schwarzenegger in favor of SB 94 which allowed the receipt of compensation upon performance of the MARS services contract.

take consumer's money while failing to deliver results. MARS providers who are engaged in legitimate practices should have no added burden since they will already be conducting themselves in a manner that is designed to benefit the consumers they serve. Those not conducting themselves in an ethical and legitimate manner will be forced to either conduct themselves according to the new rule or fail. That result is entirely consistent with cleaning up the MARS industry, and benefits consumers and other legitimate providers in the long run.

Please do not hesitate to contact me should you have any questions regarding Consumers Union position concerning Mortgage Assistance Relief Services - Proposed Rulemaking; Rule No. R911003.

Very truly yours,

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