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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

Via weblink: (<http://public.commentworks.com/ftc/MARSNPRM>)

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

Dear members of the Federal Trade Commission:

We are a legal services organization based in San Jose, California. Since 2003, we have maintained a robust predatory lending practice, representing borrowers who have been taken advantage of in various ways by unscrupulous actors in the mortgage origination field. During the recent mortgage crisis, we have been dealing with a flood of borrowers whose mortgages are distressed and who have been subject to abuses by companies and individuals promising assistance with obtaining modification of those loans (in FTC's parlance, MARS providers). We are also a member of the California Reinvestment Coalition and have been involved with CRC's policy efforts to stem this rising problem.¹

Thus, we were very glad to see the FTC's proposed rule, which sets forth a strong, sensible set of protections from these pernicious practices. While we generally support the proposal, we have several comments, set forth below.

Include a right to rescission

In its proposal, the FTC requests comment on whether a right of rescission should be included, and notes its belief that such a right is not needed if advance fees are prohibited (75 FR 10721). While such a bar would certainly be helpful in many respects, it would not alter one of the fundamental dynamics of these transactions. Namely, consumers have a very difficult time understanding the nuances of the loan modification process in the best of times; some MARS providers take advantage of this lack of knowledge in the worst of times, as working families desperately seek to avoid foreclosure. In short, as the FTC noted in the request for comment in the context of door-to-door sales, these are "circumstances in which the context of the transaction [makes] it difficult for consumers to make well-informed purchasing decisions." (*Id.* at n.168.)

¹ For a more detailed discussion of problems with the for-profit MARS industry, see CRC's previous comments in response to the FTC's ANPR on this rulemaking.

Further, we have seen MARS providers who are effectively evading the advance fee prohibition in California law by charging for their “services” in “phases.” An example of one such agreement is attached; the first two phases of “services” are, standing alone, of no real value to the customer, since the loan modification package is not even submitted to the lender until phase 3. At this point, the consumer has already paid \$3,500. Because of the potential for MARS providers to come up with similar methods of evading an FTC-imposed ban, it cannot be said that enacting an advance fee ban in and of itself removes the possibility of a consumer signing an unfair, abusive agreement.

Thus, consumers should have the ability to rescind these contracts so that consumers can review and discuss the contract with trusted friends, family and advisors. Consonant with CRC’s proposal in its July 15, 2009, letter, we submit that this period should be at least 14 days to allow this process to take place in a thoughtful manner; further, this period should not begin to run until the consumer receives proper notice of their right to rescind.

Require translation of documents

As set forth in CRC’s July 15, 2009, letter, in California, a substantial percentage of affected consumers are non-English speakers. While California’s linguistic diversity puts it in the vanguard, the rest of the country is not far behind. Census data shows that in 2000 18 percent of Americans spoke languages other than English in their homes; almost 40 percent of Californians fell into this category, more than half of whom spoke English less than “very well.”² The 18 percent national figure in the 2000 Census was up from 14 percent in 1990 and 11 percent in 1980.³

Loan modification scam artists prey upon immigrant populations by making unfair and deceptive representations to homeowners in their native language and then having them sign an utterly different contract in English, a language that many do not fully understand. Loan modification companies should not be allowed to profit on this predatory practice.

The FTC should require that companies that negotiate a contract primarily in a language other than English provide a contract in the language in which the contract was primarily negotiated; violation of this provision should entitle the consumer to rescind the contract. This is required under California law, which the FTC should consider as a model. (Cal. Civ. Code § 2944.6(b).)

Require that fees be reasonable

Fees for loan modification services should be commensurate with the benefit to the homeowner. Loan modification and foreclosure rescue scammers make big promises and

² U.S. Census Bureau, Language Use and English-Speaking Ability: 2000 at 2 (Oct. 2003), available at <http://www.census.gov/prod/2003pubs/c2kbr-29.pdf>.

³ *Id.* at 2.

charge thousands of dollars but often deliver little. Homeowners go to them for one reason—to save their homes from foreclosure. Any fee charged should bear a reasonable relationship to the benefit actually provided to the homeowner. As noted in the FTC’s notice, even industry representatives agree with this premise (75 FR 10708 n.20 [quoting American Financial Services Association’s statement that “fees should be reasonable”]).

Do not substitute third-party escrow accounts for advance fee ban

The proposal that in lieu of a ban on advance fees, MARS providers be allowed to place such fees in a third-party escrow account is unwise. With the abundant evidence—both from our own practice and nationwide—that MARS providers are all too often misleading consumers into paying upfront fees with false or misleading promises, this proposal would substantially reduce the rule. It would require consumers to engage in a legal battle to recover their hard-earned money, a battle they are almost invariably less able to wage than the MARS provider. In addition, this proposal could open the door to an unintended host of potential abuses by the MARS provider, including kickbacks, excessive fees, and others.

Require modifications to be affordable

One important requirement that is missing from the proposed definition of mortgage loan modification for which MARS providers may be compensated under § 322.5(d) is that a modification be affordable to the consumer. If the MARS provider is not securing an affordable modification, the consumer is not truly benefitting; indeed, he or she may well be placed in a worse position by paying thousands of dollars toward an ultimately unaffordable loan.

The affordability of the modification can be determined in two ways; by examining the ratio of the consumer's home-related debt to his or her documented income, and by examining the interest rate. As to both, standards of the HAMP program would seem to be the appropriate benchmarks, as they are intentionally pegged to standard industry practices and widely known at this point.

Require notice of availability of free HUD-approved counseling

A particularly galling aspect of the practice of MARS providers squeezing excessive fees from their customers is that no-cost loan modification services are provided by HUD-approved nonprofit housing counseling agencies. All loan modification services agreements should be required to notify consumers in visible font of the availability of such services. Again, this is required under California law and the FTC should look to this statute as guidance for crafting a similar provision. (Cal. Civ. Code § 2944.6(a).)

Increase period of record retention and create customer right to copies

We are glad to see that FTC would require MARS providers to retain documents for at least 24 months. However, given the difficulty many consumers may have in unearthing a legal violation and the time it may take them to be able to assert their rights or inform regulatory authorities of potential legal violations, we believe this period should be lengthened so that wrongdoers may not escape liability for their bad acts by prematurely destroying documents proving their culpability.

To ensure consumers' rights are not infringed upon, a sensible metric is the applicable statute of limitations. In California, the statute of limitations for violation of our unfair/illegal business practices statute is four years (Cal. Bus. & Prof. Code § 17208); the same time period applies to claims for breach of a written contract (Cal. Code Civ. Proc. § 337) and attorney malpractice (assuming the wrong is not discovered earlier) (Cal. Code Civ. Proc. § 340.6(a)).

A related point is that customers should have the right to a full copy of the MARS provider's file related to the loan modification upon request. We have too often seen customers unable to meaningfully discuss a possible resolution of a complaint they have against a MARS provider—or even determine what services the provider has performed—because the provider simply refuses to provide copies of documents that they were ostensibly generating on the customer's behalf. MARS providers should be required to produce these documents within 10 days of the customer's request (this time frame mirrors California's public records disclosure law; see Cal. Gov. Code § 6253(c)).

Modify ban on up-front fees for attorneys and accountants

The Commission requested comment regarding whether, instead of banning fees outright, the proposed Rule should permit MARS providers to charge a small up-front fee or to collect fees as they perform services preliminary to obtaining the result that are commensurate with those services. We urge the Commission to adopt a general ban on fees charged by MARS providers but clarify Section 322.5(a) or add a provision permitting state-licensed attorneys and public accountants to provide preliminary and/or limited mortgage default counseling to consumers.

HUD-approved mortgage default counselors have been overwhelmed by applicants seeking advice as to whether they qualify for a loan modification. Those seeking advice, who are likely in or facing mortgage default, may need specific advice regarding the contractual and tax implications of a loan modification, which HUD-approved counselors may not be qualified to provide. Licensed attorneys and public accountants in our community are prepared and capable of providing this important and potentially useful advice, but may choose to avoid contracting with consumers to address these questions for fear that they may run afoul of the Commission's proposed rule.

Set baseline protections, no preemption

California and a growing number of California cities are seeking to address this problem in a manner that meets local needs. Los Angeles has passed an ordinance, and San Francisco and Long Beach are considering doing so. In keeping with the states' historical role as laboratories for regulatory reform, the FTC should propose rules that set a baseline of protections that allow state and local government to craft stronger and more appropriate protections, as needed.

Again, we are very encouraged by the general direction of these proposed regulations and hope that the above suggestions will be taken in the spirit they were created—in the hope of making a good proposal even better, informed by our work in the trenches with affected consumers. Thank you for your consideration of our views. If you have any questions regarding this letter, please direct them to James Zahradka at (408) 280-2423 or jamesz@lawfoundation.org.

Sincerely yours,

/s/
James Zahradka
Supervising Attorney
Law Foundation of Silicon Valley

/s/
Diana Castillo
Senior Attorney
Law Foundation of Silicon Valley

Retainer Agreement

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- g) Client agrees that he/she is to make every attempt to provide the required documents to Attorney to affect a favorable resolution of Client's loan modification. If Client fails to provide such information and/or any other documentation necessary to affect the same, Client breaches the working relationship and forfeits any and all earned fees paid to Attorney to affect the loan modification process.

4. FEES.

- (a) **Payment for Phases.** Client agrees to pay Attorney upon completion of each phase specified below. Attorney shall be entitled to \$1,995.00 for completion of Phase I, \$1,500.00 for completion of Phase II, and \$500.00 for completion of Phase III.

The fee set forth above is not set by law, but is negotiable between an attorney and client.

Phase I includes the following services:

- Drafting and preparation of documents including Attorney-Client Fixed Fee Agreement, Financial Snapshot, Letter of Authorization, Hardship Worksheet, Client Disclosures, and Client Declarations.
- Scheduling and confirmation of notary appointment and necessary follow-up.
- Attorney-Client conference call and consultation.
- Submission of Letter of Authorization to Lender(s).
- Lender research, including communicating with Lender to determine/verify submission requirements for loan modification.
- Review, analysis, and evaluation of client's financial information and hardship, including, but not limited to, income, loan balance, assets, monthly payment amount, current interest rate, expected rate and payment adjustment, equity, and debt.
- Correspondence with Client including emails, letters, and verbal conversations regarding the documents and information specified above.

Attorney will mail and/or e-mail a billing statement to Client upon completion of Phase I. Client understands and agrees that payment of \$1,995.00 is immediately due and payable upon Attorney's completion of Phase I.

Client further understands and acknowledges that although the length of time may vary to complete Phase I, such services are typically performed and completed within 3 to 5 days from the date of signing.

Client further understands and agrees that Attorney has no obligation to provide Phase II or Phase III services until Client pays the fees for Phase I and no contract exists to perform those services until the fees for Phase I have been paid.

 Initial Client

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Phase II includes the following services:

- Confirmation of Lender's receipt of Letter of Authorization.
- Underwriting of case file based on Lender specific guidelines.
- Collection, review, analysis, and evaluation of client documents, including, but not limited to, mortgage statements, loan documents, loan payment history, correspondence from lender, paystubs, W-2, 1099s, benefits award letters, retirement and pension benefits statements, annuity statements, child support/alimony, tax returns, profit and loss statements, schedules of real estate owned, stock and mutual portfolio statements, bank statements, and proof of other income.
- Complete and comprehensive audit of Client case file to ensure supporting documentation and information is sufficient to support request for loan modification.
- Notify client of missing or incomplete documents and/or information.
- Follow-up with Client until all necessary and updated documents and information are collected.
- Assist Client in preparing hardship summary.
- Client conference call regarding preparation of loan modification request, including Client's income and expenses, objectives for loan modification, affordability of proposed settlement terms, and explanation of process going forward.
- Contact lender(s) to find out status of Client's mortgage loan(s), including amount owed, delinquency, and whether a notice of default or notice of trustee's sale has been filed.
- Draft request(s) for loan modification.
- Attorney review and revision of request(s) for loan modification prior to submission to Lender(s).
- Correspondence with Client including emails, letters, and verbal conversations regarding the documents and information specified above.

Attorney will mail and/or e-mail a billing statement to Client upon completion of Phase II. Client understands and agrees that payment of \$1,500.00 is immediately due and payable upon Attorney's completion of Phase II.

Although the length of time may vary to complete Phase II, such services are typically performed and completed within 14 to 21 days from the date of signing.

Client further understands and agrees that Attorney has no obligation to provide Phase III services until Client pays the fees for Phase II and no contract exists to perform those services until the fees for Phase II have been paid.

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Phase III includes the following services:

- Submission of loan modification request(s) to lender(s).
- Confirm that request(s) for loan modification were received by lender(s).
- Contact the lender on a regular basis (at a minimum) to verify status of request for loan modification, including whether any documents and/or financial information need to be updated and/or re-submitted.
- Update Client on a regular basis as to the status of their request(s) for loan modification.
- Confirm lender assignment of a case negotiator.
- Negotiate and/or receive settlement/modification terms from lender(s).
- Review and analysis of settlement/modification terms.
- Communicate settlement terms with Client and advise Client accordingly.
- Further negotiation with lender(s) of settlement terms if necessary.

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Attorney will mail and/or e-mail a billing statement to Client upon completion of Phase III. Client understands and agrees that payment of \$500.00 is immediately due and payable upon Attorney's completion of Phase III.

Client understands and hereby acknowledges that services provided by Attorney are not guaranteed, no particular result has been promised or guaranteed, and no prediction of result has been made. Client acknowledges that Attorney cannot guarantee that the Client's existing Lender(s) will agree to a modification of the loan(s), and that Client's existing Lender(s) is not obligated to modify the terms of the loan(s) in any way and may not agree to any changes in the loan(s). In the event that Lender is unwilling to modify the terms of Client's loan(s), Attorney is still entitled to receive payment for Phase III services.

Should Client choose to contact their Lender after Attorney has submitted a loan modification request to the Lender and a modification is offered directly to Client, the offer shall be deemed a product of Attorney's work and efforts and Attorney earns the fees for Phase III services at that time.

Additionally, representation shall be deemed concluded when Client has been reviewed and approved by their Lender(s) for a trial modification. It is the sole responsibility of Client to follow the terms of the trial period and to submit any documentation requested by their Lender(s) at the conclusion of the trial period directly to Client's Lender(s).

(b) Payment of Fees By Third Parties.

California Rule of Professional Conduct 3-310(F) provides: A member shall not accept compensation for representing a client from one other than the client unless: (1) There is no interference with the member's independence of professional judgment or with the client-lawyer relationship; and (2) Information relating to representation of the client is protected as required by Business and Professions Code section 6068, subdivision (e) and (3) The member obtains the client's informed written consent....

Client understands and acknowledges that if any part of the Attorney's fee is paid by a third party that there will be no interference with the Attorney's independence of professional judgment and that Attorney must protect information relating to representation of the Client from disclosure to the third party as required by law.

5. BILLING STATEMENTS.

At the completion of each phase specified above, Attorney will provide Client a statement for fees and costs incurred to Client's current address and/or e-mail address. Once each phase has been completed, such fees are earned and are non-refundable.

6. RETENTION OF LAW FIRM.

Client is hiring Law Firm and not any particular attorney, and the services to be provided to Client will not necessarily be performed by any particular attorney, paralegal or legal assistant.

7. DISCHARGE AND WITHDRAWAL.

Client may discharge Attorney at any time. Attorney may withdraw with Client consent or for good cause. Good cause includes Client's failure to pay fees as provided by this Agreement, any other breach of this Agreement, refusal to cooperate or to follow Attorney's advice on a material matter, and any fact or circumstance that would render Attorney's continuing representation unlawful or unethical. When Attorney's services conclude, all unpaid charges will immediately become due and payable. After services conclude, Attorney will, upon Client request, deliver Client files, and property in Attorney's possession, whether or not Client has paid for all services.

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