



March 26, 2010

The Honorable Jon Leibowitz  
Chairman  
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. 911003**

Dear Chairman Leibowitz:

The Mortgage Bankers Association (MBA)<sup>1</sup> appreciates the opportunity to provide comments on the Federal Trade Commission's (FTC) proposed rule regarding Mortgage Assistance Relief Services (MARS). While the proposal addresses a number of issues related to MARS providers as defined in the proposed rule, this letter will focus on the issues that impact borrowers in their relationship to their mortgage servicer and those activities in which our members are directly involved. In particular, we are pleased that the proposed rule specifically excludes mortgage servicers, though certain other improvements to the exemption language would ensure mortgage servicers can continue to work with and assist borrowers free of unnecessary restrictions.

As explained in the proposed rule, the FTC was directed by the 2009 Omnibus Appropriations Act to issue rulemaking on mortgage loans. In carrying out this requirement, the FTC has chosen to address acts and practices of MARS providers, sometimes known as foreclosure and modification consultants. In general, the proposed rule regulates mortgage assistance relief services, which include for-profit services for financially troubled borrowers – particularly where fees are required upfront. It exempts entities that own or service mortgage loans. In addition, attorneys would have a limited exemption from the proposed advance fee ban if they represent consumers in a bankruptcy or other legal proceeding. The proposal also prohibits covered companies from being paid until they have a documented offer from a

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<sup>1</sup> The Mortgage Bankers Association (MBA) is the national association representing the real estate finance industry, an industry that employs more than 280,000 people in virtually every community in the country. Headquartered in Washington, D.C., the association works to ensure the continued strength of the nation's residential and commercial real estate markets; to expand homeownership and extend access to affordable housing to all Americans. MBA promotes fair and ethical lending practices and fosters professional excellence among real estate finance employees through a wide range of educational programs and a variety of publications. Its membership of over 2,400 companies includes all elements of real estate finance: mortgage companies, mortgage brokers, commercial banks, thrifts, Wall Street conduits, life insurance companies and others in the mortgage lending field. For additional information, visit MBA's Web site: [www.mortgagebankers.org](http://www.mortgagebankers.org).

mortgage lender or servicer that lives up to the promises they have made to the consumer.

MBA is pleased that the FTC is taking action to combat modification and foreclosure rescue scams by addressing inappropriate actions by mortgage assistance relief services, because activities designed to defraud mortgage borrowers in distress should not be allowed to freely operate. However, there is concern that because the FTC's jurisdiction only covers for-profit companies, fraudulent MARS providers could convert to nonprofit mortgage assistance relief services and evade FTC jurisdiction. MBA strongly suggests that the FTC coordinate with law enforcement and regulators with jurisdiction over the non-profit space, such as through the interagency Mortgage Fraud Working Group under the Financial Fraud Enforcement Task Force established by the President with the Executive Order issued on November 17, 2009.

### **MARS Requirements and Prohibitions**

The proposed rule specifically defines "mortgage assistance relief services" as "any service, plan or program offered or provided in exchange for consideration on behalf of the consumer, that is represented, expressly or by implication, to assist or attempt to assist the consumer"<sup>2</sup> to negotiate a modification of any term of a loan or obtain other types of relief to avoid delinquency or foreclosure. Proposed Section 322.2(h)(2) provides that the term "mortgage assistance relief services" includes any service marketed to "stop[], prevent[], or postponed[] any (i) mortgage or deed of trust foreclosure sale for a dwelling or (ii) repossession of the consumer's dwelling; or otherwise save the consumer's home from foreclosure or repossession."<sup>3</sup> Section 322.2(i) also excludes mortgage servicers and their agents and provides a safe harbor to some attorney activities. Generally, this definition covers the for-profit entities that ought to be prohibited from collecting upfront fees and should be required to disclose key information to the consumer, however, the current definition could also apply to the servicers' contractors that help them perform loss mitigation and other critical loan administration functions. As will be discussed in further detail later in this letter, we believe contractors that are under the direction and supervision of the servicer should also be excluded from the definition of mortgage assistance relief services providers.

MBA supports the FTC's proposed list of prohibited activities. Specifically, the proposed rule would: 1) Prohibit MARS providers from instructing consumers to cease communicating with their lenders or servicers; 2) Prohibit misrepresentations of any material aspect of any mortgage assistance relief service; 3) Require MARS providers to disclose information to consumers to assist them in making decisions about mortgage assistance relief services; and 4) Ban MARS providers from requiring that consumers pay in advance for their services prior to doing or accomplishing what was promised.

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<sup>2</sup> 75 Fed. Reg. 10736 (March 9, 2010).

<sup>3</sup> Ibid.

The FTC proposed banning upfront payment to MARS providers by considering such a request to be an unfair and deceptive act or practice under Section 5(n) of the FTC Act. The proposed rule also suggests alternatives to the advanced fee ban, such as limiting or capping the advance, using third-party escrow accounts to hold the fees until the assignment is completed or accomplished, and providing a right of rescission. While MBA prefers a strict prohibition, if the FTC determined some instances warrant an alternative means of paying upfront, MBA favors using third-party escrow accounts rather than limiting fees or providing rescission. This is because, in the event the matter is not resolved where the fee is capped or limited, the amount may have been better spent on other expenses. In the event the matter is not resolved where rescission is provided, the fee may be completely unrecoverable where the MARS provider was purely a fraudulent operation.

### **Mortgage Servicer Exemption Clarification**

MBA is particularly pleased that the FTC has excluded mortgage servicers and their agents as urged by MBA in its comment letter to the advanced notice of proposed rulemaking; however, the final rule should also exempt contractors in addition to agents of the servicer. The final rule also should clarify that collection of amounts due under the mortgage and typical transaction costs are outside of the scope of this rule.

Currently, the proposed rule provides that the term “mortgage assistance relief services provider” does not include: (1) the dwelling loan holder, or any agent of such person, provided that any such agent does not claim, demand, charge, collect, or receive any money or other valuable consideration from the consumer for the agent’s benefit; (2) the servicer of a dwelling loan, or any agent of such person, provided that any such agent does not claim, demand, charge, collect, or receive any money or other valuable consideration from the consumer for the agent’s benefit; and (3) any nonprofit, bank, thrift, federal credit union, or other person specifically excluded from the Federal Trade Commission’s jurisdiction.<sup>4</sup>

The exclusionary language in the proposed rule should clarify that the collection of mortgage payments, tax and insurance escrows or reimbursements of servicer advances of these funds, or other costs that are owed under the mortgage contract (such as foreclosure attorney fees incurred) are not considered a claim, demand, charge, collection or receipt of “any money or other valuable consideration” as provided in Section 322.2(i). Failure to do so would render the exclusion meaningless, would abrogate the mortgage contract, and fail to recognize that services have already been rendered (e.g. funds disbursed to the borrower at origination or foreclosure costs incurred due to borrower’s breach of contract as permitted by the mortgage).

MBA appreciates the FTC’s recognition that servicers often employ third parties to help them fulfill their administration and loss mitigation activities. Now more than ever,

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<sup>4</sup> 75 Fed. Reg. 10736 (March 9, 2010).

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servicers depend on these third parties to execute a variety of activities including collection of payments, borrower contact and outreach, execution of modifications or other loss mitigation agreements. We are, therefore, pleased that the FTC has specifically excluded agents of servicers from the definition of a mortgage assistance relief services provider. However, most of the third parties assisting servicers with loss mitigation and loan administration do not have an agency relationship with the servicer. As a result, we respectfully request that, in addition to excluding agents of the servicer, the final rule exclude *contractors* of the servicer who are under the direction and supervision of the servicer. These contractors do not operate independently from the mortgage servicer and thus do not pose the risk of a foreclosure scam or phantom help.

The final rule should also clarify that certain up-front fees are permissible by a *licensed mortgage company, servicer or depository institution* when necessary to execute a refinance, modification, or other loss mitigation agreement. Such fees could include third-party costs such as mortgage recordation fees (required for modifications in some states and all refinances) and appraisals or broker price opinions (required for refinances). Failure to clarify that a *licensed mortgage company or depository institution* can charge the borrower traditional up-front transaction costs associated with a refinance or modification could limit the borrower's legitimate choices.

### **Safe Harbor for Attorneys**

Instead of providing a general exemption for attorneys, the FTC proposes a limited exemption 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.

This is appropriate in the context of a debtor's counsel. MBA does not wish to chill the borrower's ability to be adequately represented by counsel. At the same time, we are aware of licensed attorneys who have "rented" their licenses to mortgage assistance relief providers. The definition in the rule should retain the integrity of the licensed attorney within the state laws and rules regulating the practice of law to remain effective and those outside that standard should be prosecuted.

As for creditors' counsel (foreclosure and bankruptcy attorneys), these attorneys should be covered under the true exemption for servicers as stated above. It should also be noted that while foreclosure attorneys execute foreclosure actions when necessary, foreclosure attorneys are also invaluable in initiating discussions with borrowers and facilitating loss mitigation agreements. Often a borrower does not respond to attempts from the servicer to contact the delinquent borrower, therefore borrower's first communication with the servicer is through a foreclosure attorney after receiving a demand or acceleration letter.

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## Conclusion

MBA's goal is to ensure consumers have easy access to their mortgage servicer when assistance is needed since the borrower and the servicer share similar objectives, including keeping the borrower in his or her home. Appropriately crafted exclusions will ensure consumers can obtain the help they need while at the same time regulating MARS providers to prevent consumers from being victims of financial fraud. If you have any further questions please do not hesitate to contact Andrew Szalay at (202) 557-2941 or [aszalay@mortgagebankers.org](mailto:aszalay@mortgagebankers.org).

Sincerely,

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v  
John A. Courson

President and Chief Executive Officer  
Mortgage Bankers Association