



July 15, 2009

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

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

Ladies and Gentlemen:

The American Financial Services Association (“AFSA”) appreciates the opportunity to comment on the Mortgage Assistance Relief Services Advance Notice of Proposed Rulemaking (“ANPR”). AFSA is the national trade association for the consumer credit industry, protecting access to credit and consumer choice. Its 350 members include consumer and commercial finance companies, auto finance/leasing companies, mortgage lenders, mortgage servicers, credit card issuers, industrial banks and industry suppliers.

AFSA understands the problems facing consumers as a result of the economic downturn and supports the Federal Trade Commission’s (“FTC”) comprehensive effort to protect consumers. AFSA believes that a Mortgage Assistance Relief Services Rulemaking that is limited to regulating foreclosure rescue and loan modification entities,¹ not mortgage servicers, is appropriate.

AFSA shares FTC’s concern over the number of consumers who are having difficulty making mortgage payments during this challenging economic time. The rate of mortgage loan delinquency and foreclosure has risen to the highest level in three decades. AFSA members are helping consumers stay in their homes by offering a variety of standardized in-house hardship plans and workout programs. These programs require no third party involvement or negotiation. All a consumer has to do is contact his creditor or servicer, explain his situation and ask what options are available. However, getting consumers to admit that they are experiencing difficulty and make the first call or engage a creditor’s or servicer’s customer service or collections personnel can be problematic. Minimizing this problem requires educating consumers about their options and promoting financial literacy, both of which AFSA has been doing.

AFSA members also participate in the new programs instituted by government agencies to help homeowners in distress. AFSA member companies are working to assist eligible homeowners to refinance or modify their mortgage loans to an affordable payment. Many

¹ Foreclosure rescue and loan modification entities are defined as entities that offer to assist consumers in securing loan modifications and foreclosure rescue services in exchange for a fee. They are distinct from mortgage servicers who are the agents responsible for handling the day-to-day aspects of loans on behalf of the loans’ owners.

AFSA members, as well as AFSA itself, are members of the HOPE NOW Alliance, which provides homeowners with free foreclosure prevention assistance.

In addition to increased efforts by lenders and servicers to prevent foreclosures, there has been an increase in the number of foreclosure rescue and loan modification entities who offer, for a fee, to assist homeowners in obtaining a loan modification or to prevent a foreclosure. Some of these entities genuinely try to help the consumers who reach out to them. However, some scam consumers with fraudulent rescue programs. Distressed consumers are particularly susceptible to rosy claims of fraudulent foreclosure rescue and loan modification entities. They are lured by too-good-to-be-true claims of easy solutions to tough problems and empty promises of help when they feel overwhelmed.

Not only do such scams affect individual borrowers, they also affect creditors and the broader market to the extent that, among other things, they promote the removal of accurate and timely information from consumer credit reports. This results in inaccurate assessments of the true credit standing of consumers and therefore undermines legitimate efforts to assist consumers in resolving credit difficulties by promoting inaction and delay.

AFSA commends the FTC for its work protecting consumers from fraudulent foreclosure rescue and loan modification entities. AFSA believes that the FTC's and other federal agencies' efforts to advise consumers who are behind on their mortgage payments to contact their mortgage services about the possibility of a loan modification or another option is very beneficial. AFSA also supports the FTC's lawsuits against defendants for allegedly engaging in deceptive practices. In fact, AFSA has commended the FTC in testimony before Congress for its work in fraud prevention.

In the 2009 Omnibus Appropriations Act, Congress directed the FTC to initiate a rulemaking with respect to mortgage loans. AFSA understands that the FTC is implementing this directive with two rulemakings, the Mortgage Assistance Relief Services Rulemaking and the Mortgage Acts and Practices Rulemaking. AFSA supports the Mortgage Assistance Relief Services Rulemaking, provided it does not cover mortgage servicers, and will comment on the Mortgage Acts and Practices Rulemaking in a separate letter. The Mortgage Assistance Relief Services Rule should not be overly broad and should not encompass nor restrict current loss mitigation and loan modification practices engaged in by mortgage servicers, whether the servicer is a bank, thrift, federal credit union, operating subsidiary of a bank or thrift, mortgage banker, licensed lender, or entity or individual retained by those listed to provide loss mitigation services.

It is unclear in the ANPR whether the FTC intends to exempt mortgage servicers from the rulemaking. The FTC describes this proposed rulemaking in the summary section of the ANPR as addressing "the practices of entities (other than mortgage services)."² The FTC's other ANPR, the Mortgage Acts and Practices Rulemaking, addresses servicers, so addressing servicers in Mortgage Assistance Relief Services Rulemaking would be

² 74 Federal Register 103 (1 June 2009), p. 26131

duplicative. Under the section entitled, FTC Authority Over Mortgage Loans and Other Financial Services, the FTC express states that:

“...non-bank affiliates of banks, such as parent companies or subsidiaries, are subject to the Commission’s jurisdiction. Likewise, the FTC has jurisdiction over entities that have contracted with banks to perform certain services on behalf of banks, such as credit card marketing and other services, but which are not themselves banks. As a result, non-bank entities that provide financial services to consumers are subject to Commission jurisdiction, even if they are affiliated with, or are contracted to perform services for, banking entities...The Commission intends that any rules that it issues in this proceeding would apply only to the same types of entities over which the Commission has jurisdiction under the FTC Act.”³

It appears from that text that a rule proposed by the FTC would cover certain mortgage servicers. A rule this broad would not provide additional protections to consumers, but would restrict mortgage servicers’ loss mitigation activities. AFSA requests that when the FTC issues its proposed rules, it specifically exempt all mortgage servicers. The only entities that should be covered under the rule are foreclosure rescue and loan modification entities.

It is unnecessary to further regulate mortgage servicers. Banks, thrifts, federal credit unions and mortgage servicers all provide the same or similar loss mitigation services to consumers with mortgage loan accounts and are already subject to regulatory oversight at the state and federal level. Banks’ and thrifts’ operating subsidiaries are also subject to the same regulations as their parents, and for that reason, should likewise be excluded from the scope of an FTC rule. Banks, thrifts, federal credit unions, banks’ and thrifts’ operating subsidiaries, mortgage bankers, state-licensed lenders, or holders of mortgage loans may also retain third party entities to assist with servicing mortgage loans. These delegated mortgage servicers who act as agents for entities that are outside the scope of the FTC’s supervisory authority, should also be excluded from any mortgage servicers rule to the extent that they are providing loan modification and foreclosure avoidance services. Similarly, attorneys retained by mortgage servicers or mortgage loan customers to assist with loan modifications and options to avoid foreclosures should be outside the scope of the new rule because they are already regulated and subject to standards that exceed the FTC criteria for unfair or deceptive practices.

An overly broad rule could prohibit or limit practices engaged in by mortgage servicers. This would in no way benefit consumers who are in need of loss mitigation assistance. Mortgage servicers offer many of the same practices and services foreclosure rescue and loan modification entities offer. These include various forms of outreach efforts in order to offer loss mitigation options to distressed homeowners in the hope that foreclosure can be avoided. Mortgage servicers consider a variety of factors when both identifying a customer for loss mitigation efforts and considering that customer for a loan modification or other treatment. Mortgage servicers make no guarantees or promises with respect to results, require no upfront documentation to be completed with the expectation of a standard hardship application accompanied by supporting materials, and do not charge

³ 74 Federal Register 103 (1 June 2009), p. 26132

up-front fees. To benefit their customers who may be in need of such assistance, mortgage servicers use some of the same methods as foreclosure rescue and loan modification entities to make their customers aware of the existence of loan modifications and options to avoid foreclosure such as monthly account statements, written correspondence, e-mail, text messages, social media, such as providing contact information in response to specific blogs, and their Web sites on the Internet. Each of these communications is designed to make the consumer aware of the availability of possible loss mitigation options and to encourage the consumer to make contact with the mortgage servicer directly. If the FTC limits these practices in the rule, and does not specifically exempt mortgage servicers, it will limit the tools that servicers have to help consumers.

Specific Questions

Since AFSA's members are mortgage servicers, not foreclosure rescue and loan modification entities, not all of the questions posed are applicable to us. We will answer those that are to the best of our ability.

1. The Loan Modification and Foreclosure Rescue Industry

E. What roles do mortgage servicers play in the loan modification and foreclosure rescue industry? What are the costs and benefits of their conduct in the context of loan modification and foreclosure rescue services? Do the practices of mortgage servicers present consumer protection concerns? If so, how are these concerns the same as or different from those raised by third-party loan modification and foreclosure rescue entities?

Mortgage servicers play a large role in the loan modification and foreclosure rescue industry. They have programs to evaluate their customers' needs when they may be experiencing financial difficulties and provide relief when appropriate. They participate in outreach efforts in the community to advise consumers of programs to assist them when they encounter financial difficulties. They also make information about programs to assist customers when they encounter financial difficulties and how to contact loss mitigation agents available on their Web sites.

Unlike foreclosure rescue and loan modification entities, mortgage servicers do not make promises that every customer will qualify or avoid foreclosure if they contact their mortgage servicer. They also do not assess fees on their customers to explore those options or require their customers to sign agreements regarding an obligation to enter into any arrangement to modify or workout a mortgage loan until the terms are agreed to and the loan modification agreement documenting them is present to the customer for execution.

However, foreclosure rescue and loan modification entities may have a role to play. They do sometimes increase the successful modification and workout of customer mortgage

loans by providing the mortgage servicer with the information needed to review, approve and make changes to the customer's mortgage loan.

The practices of mortgage servicers do not present consumer protection concerns. Mortgage servicers' have no incentive to allow their mortgage loan customers to default and lose their homes to foreclosure because the mortgage servicers' compensation comes from ongoing payment processing and servicing. Therefore, mortgage servicers will assess the borrower's ability to pay when proposing to modify a mortgage loan, propose modification terms that are reasonable based on the customer's financial circumstances, and provide disclosures to mortgage loan customers of the terms of the loan modification in the loan modification and workout agreements so customers know what their obligations will be on the mortgage loan account. Investor requirements applicable to serviced loans provide objective criteria that mortgage services are required to follow and have become more uniform throughout the industry. Most recently, government programs to assist homeowners have provided more consistency and uniformity for loan modifications.

2. Need for FTC Rules

As mentioned above, AFSA would support an FTC rule addressing foreclosure rescue and loan modification entities, provided that the rule is not overly broad and does not encompass or restrict current loss mitigation and loan modification practices engaged in by mortgage servicers – whether the servicers are banks, thrifts, federal credit unions, operating subsidiaries or banks or thrifts, mortgage bankers, licensed lenders, or entities or individuals retained by those listed to provide loss mitigation services.

3. Scope of Covered Practices

B. Should conduct by loan modification and foreclosure rescue service providers or advertisers that states have declared unlawful by statute or regulation or have challenged in law enforcement actions be incorporated into a proposed FTC rule?

1. Some states require providers to create written contracts and include key disclosures in these contracts. Should the Commission impose the same or similar disclosure requirements in a proposed FTC rule? If so, what disclosures should be included and why?

2. Some states require providers to give consumers who enroll the right to rescind or cancel their agreements with the providers. Should the Commission include the same or similar rights of rescission or cancellation in a proposed rule? If so, what rescission and cancellation rights should be included and why?

3. Some states have restricted the type, amount, and timing of the fees charged and refunds given by providers or loan modification and foreclosure rescue services. In particular, some states ban advance fees until all services promised or contracted for are completed.

If mortgage servicers are exempted from the rule, it would be appropriate for the FTC to propose a rule requiring that mortgage assistance relief servicers enter into written contracts with specific information/disclosures with consumers, include a consumer's right to rescind or cancel such contracts in such written agreements, and place restrictions on the type and timing of the fees charged and refunds given. For example, upfront fees should be restricted, fees should be reasonable and only be permitted where services were actually provided.

It is unnecessary to apply these requirements to mortgage servicers since they are already subject to extensive federal and state regulation.

4. Scope of Covered Entities

A. To what extent to banks, thrifts, federal credit unions, and non-profits provide or advertise loan modification and foreclosure rescue services? To what extent do these entities compete with entities that an FTC proposed rule would cover and what effect would an FTC proposed rule have on such competition?

Mortgage servicers engage in numerous outreach efforts designed to inform customers about the availability of loan modifications and options to avoid foreclosure, such as monthly account statements, written correspondence, e-mail, text messages, social media which may include providing contact information in response to specific blogs, and Web sites on the Internet. An FTC rule regarding written agreements, rescission/cancellation rights for consumers entering into them, and restrictions on fees charged by mortgage assistance relief servicers that does not encompass or restrict current loss mitigation and loan modification practices engaged in by mortgage servicers as defined herein would be generally supported.

Conclusion

AFSA members strive to help their customers stay in their homes and appreciate the efforts the FTC has taken to protect consumers who have become delinquent on their mortgages or are at risk of foreclosure. AFSA believes that a rule regulating foreclosure rescue and loan modification entities may help further protect consumers, but only if it exempts mortgage servicers who are already regulated at both the federal and state level.

If you have any questions, please contact me at 202-966-5544 ext. 616 or bhimpler@afsamail.org.

Sincerely,



/Executive Vice President
American Financial Services Association