CONSUMER MORTGAGE COALITION

July 15, 2009

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
Docket No. R911003

Dear Sir or Madam:

The Consumer Mortgage Coalition (CMC), a trade association of national mortgage lenders, servicers, and service providers, appreciates the opportunity to submit its comments in response to the Federal Trade Commission (FTC or Commission) Advance Notice of Proposed Rulemaking (ANPR) regarding mortgage assistance relief services (MARS).

The CMC strongly supports the concept of prohibiting specific unfair or deceptive practices of MARS providers. MARS resembles the field of "credit repair" in that, while it is theoretically possible that a company could offer a service of helping consumers in negotiating loan modifications and finding other ways of avoiding foreclosure, in practice the industry is rife with fraud and misrepresentation and there are few, if any, legitimate providers. CMC members and other mortgage servicers have found that MARS providers consistently misrepresent their ability to obtain concessions from servicers, raise spurious disputes about the validity of loans, and abuse the dispute-resolution procedures provided for consumers under the Real Estate Settlement Procedures Act (RESPA) and Fair Credit Reporting Act (FCRA). The effect of these practices is to increase servicers' costs without providing any benefit for their consumer clients and indeed to make it less likely that the borrower will achieve a satisfactory resolution of his or her difficulties. This problem also resembles the experience of the consumer-reporting industry in dealing with self-described credit-repair companies, which threatened to destroy that industry until they were brought under control by the Credit Repair Organizations Act (CROA).

While we support the concept of a regulation, any such rule should apply only to MARS providers that are compensated by borrowers, not to lenders, mortgage servicers, or entities that they engage to assist them in loss-mitigation.

101 Constitution Ave., NW, 9th Floor West; Washington, DC 20001
TEL: (202) 742-4366 FAX: (202) 403-3926

Background

Section 626(a) of the Omnibus Appropriations Act, 2009[1] (Appropriations Act) requires the Commission to initiate a rulemaking "with respect to mortgage loans in accordance with section 553 of title 5, United States Code." Section 511 of the Credit Card Accountability Responsibility and Disclosure Act of 2009[2] (CARD Act), amended Section 626(a) to clarify that:

> Such rulemaking shall relate to unfair or deceptive acts or practices regarding mortgage loans, which may include unfair or deceptive acts or practices involving loan modification and foreclosure rescue services.

The FTC's general rulemaking authority requires an extensive, trial-like proceeding conducted by an independent hearing officer.[3] By contrast, the FTC may issue rules under the Appropriations Act following normal notice-and-comment procedures.[4]

The present advance notice of proposed rulemaking (ANPR) is one of two ANPRs the Commission has published pursuant to this new Congressional mandate. In this ANPR, the Commission addresses the practices of entities (other than mortgage servicers) who offer assistance to consumers in dealing with owners or servicers of their loans, to modify them or to avoid foreclosure. The Commission is seeking public comment with regard to the unfair or deceptive acts or practices that should be prohibited or restricted. The other ANPR, not the subject of this letter, addresses activities that occur throughout the lifecycle of a mortgage loan, including advertising and marketing, origination, appraisals, and servicing. In both ANPRs, the Commission states that any rules adopted will apply to entities other than banks, thrifts, federal credit unions, and non-profit institutions. In addition, Section 511 of the CARD Act clarifies that the rulemaking authority "shall not be construed to authorize the Federal Trade Commission to promulgate a rule with respect to an entity that is not subject to enforcement of the Federal Trade Commission."[5] Therefore, the rule would not apply to banks, thrifts, federal credit unions,[6] or *bona fide* non-profit organizations.[7]

Under Section 626(b) as amended by the CARD Act, a state attorney general who has reason to believe that residents of the state are being adversely affected by a violation of an FTC rule issued under Section 626(a) by an entity subject to FTC jurisdiction may bring an action to enforce the rule. The state may obtain an injunction, damages, or restitution, as well as penalties and other relief provided by the FTC Act, and, if

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[1] Pub. L. No. 111-8, 123 Stat. 524, 678.

[2] Pub. L. 111-24, 123 Stat. 1734, 1763-64.

[3] *See* 15 U.S.C. § 57a(b)(1)(C), (c).

[4] Pub. L. No. 111-8, 123 Stat. 524, 678.

[5] *Id.*, 123 Stat. at 1764.

[6] *See* 15 U.S.C. § 45(a)(2).

[7] *See* 15 U.S.C. § 44 ("corporation" subject to FTC jurisdiction includes an entity "which is organized to carry on business for its own profit or that of its members").

successful, may be awarded reasonable costs and attorney's fees.[8] The FTC must be notified at least 60 days before the state commences the action and may intervene in the action and remove it to federal district court.[9]

Discussion

We strongly support the Commission's efforts to eradicate unfair and deceptive acts and practices from the MARS industry. The Commission has alleged in a series of settlements that many firms have charged fees for assistance that did not take place, while others have made false statements to consumers about their services, results, and prices. Consumers have been harmed by these practices.

From the perspective of mortgage servicers, MARS firms create serious impediments to achieving good results for the borrowers whom they purport to represent. In the experience of CMC members and other servicers, MARS firms often abuse the dispute-resolution procedures provided for consumers under RESPA and FCRA, increasing the servicer's costs without providing any benefit to the consumer. Communications from MARS firms rarely specify any basis for a dispute, making it impossible for the servicer to address any legitimate issues that the consumer might have. Contrary to representations commonly made by MARS companies, servicers generally do not have any special relationship with those companies and using the services of such a company does not improve a consumer's prospects of obtaining a loan modification or other relief.

Thus, the CMC would support a regulation that focuses on specific abuses engaged in by MARS firms. In order for such a regulation to achieve its intended purpose, it should apply only to firms that are compensated by the consumer. Servicers and their agents, employees, and service-providers should be exempt from the rule.

We have answered the specific questions raised by the ANPR in the context of CMC members' concerns (*i.e.*, not necessarily in the same order that they were posed in the *Federal Register* notice).

<u>Any Rule Should Not Apply to Servicers</u>

1. The Loan Modification and Foreclosure Rescue Industry

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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?

[8] Pub. L. 111-24, 123 Stat. 1734, 1764.

[9] Pub. L. No. 111-8, 123 Stat. 524, 679.

As the Commission recognizes,[10] in the course of fulfilling their responsibility to service a loan, mortgage loan servicers engage in some activities that resemble the activities of MARS firms, including soliciting borrowers who are in default for possible loan modification, informing borrowers of their options for modification or other assistance, and exploring additional alternatives such as short sales and deeds in lieu of foreclosure.

Mortgage servicers, however, have different economic incentives than MARS firms. Mortgage servicers are compensated by the investor and do not charge upfront fees for their services. In fact, the servicer's compensation comes from the ongoing flow of loan payments, and if the payments stop, so does the servicer's income. Servicers, therefore, have an incentive to seek payment arrangements that are consistent with the servicer's agreement with the investor but affordable to the borrower.

Mortgage servicers do not have an incentive to engage in the unfair or deceptive acts or practices that the Commission has addressed in enforcement actions and that are the subject of this rulemaking, such as—

- Making misleading representations that every customer who calls will qualify for a modification or will avoid foreclosure;

- Requiring a customer to execute a binding loan modification contract before the modification terms are known; or

- Encouraging default.

Unlike third-party MARS providers, mortgage servicers have a strong economic incentive to bring the loan back to performing status.

The ANPR states that this rulemaking "addresses the practices of entities (other than servicers) who offer assistance to consumers in dealing with owners and servicers of their loans to modify them or avoid foreclosure."[11] We agree with the Commission that the regulation should not apply to mortgage loan servicers. It would be highly inappropriate and contrary to the apparent intent of Congress in enacting Section 626 for the MARS rule to cover mortgage loan servicers. As the ANPR notes:

> Pursuant to guidelines or agreements with the owners of loans, many servicers provide loss mitigation options for distressed homeowners. Owners of loans often have an incentive to consider such options because of the cost associated with foreclosure proceedings.[12]

If servicers are found to engage in unfair and deceptive acts or practices, those practices should be addressed either on a case-by-case basis under the Commission's general authority under 15 U.S.C. § 45(a)(1), or, when they are common and can be defined in a

[10] *See* 74 Fed. Reg. at 26133-34.

[11] 74 Fed. Reg. 26130, 26131 (June 1, 2009).

[12] *Id.* at 26134.

rule, in the Commission's general mortgage practices regulation. As recognized in the quotation from the ANPR above, owners of loans have a strong incentive to consider loss-mitigation options and should be exempt when they service their own loans.

Servicers are increasingly turning to third-party service-providers to assist them in processing loan modifications and in other loss-mitigation activities. Because these companies are hired and compensated by the lender or servicer, they do not present the same risks as MARS providers and should not be subject to any MARS rule. In some circumstances, such firms may fall within the definition of a "debt collector" in the Fair Debt Collection Practices Act (FDCPA); in others, their practices can be addressed under the FTC's general authority or in the mortgage practices regulation. To ensure that the rule is focused on the loan modification and foreclosure rescue industry, the definition of a MARS provider should apply only to persons who receive compensation from the borrower. It should also not extend to an organization that assists borrowers in refinancing their loan.

In addition, any rule should include an explicit exemption for "servicers" and their agents and service-providers. The definition of a "servicer" could be based on the definition in the Department of Housing and Urban Development's Regulation X, which implements RESPA, such as:

> [T]he person responsible for the servicing of a mortgage loan (including the person who makes or holds a mortgage loan if such person also services the mortgage loan), or an agent, employee, or service-provider of such person.[13]

The definition of "servicing" could also be based on the Regulation X definition, such as:

> [R]eceiving any scheduled periodic payments from a borrower pursuant to the terms of any mortgage loan, including amounts for escrow accounts, and making the payments to the owner of the loan or other third parties of principal and interest and such other payments with respect to the amounts received from the borrower as may be required pursuant to the terms of the mortgage servicing loan documents or servicing contract. In the case of a home-equity conversion mortgage or reverse mortgage, servicing includes making payments to the borrower.[14]

<u>MARS Providers Disrupt the Loss-Mitigation Process and Do Not Add Value</u>

1. The Loan Modification and Foreclosure Rescue Industry

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F. What empirical data are available concerning the performance of loan modification and foreclosure rescue entities in obtaining promised results? Please

[13] *See* 24 C.F.R. § 3500.2.

[14] *See id.*

identify any such data (broken down by business model, if possible) used to provide loan modification and foreclosure rescue services, including but not limited to data addressing the following:

> **1. The percentage or proportion of consumers enrolled in loan modification or foreclosure rescue services who successfully obtain a loan modification or foreclosure relief.**
>
> **2. For the consumers described in (F)(1), the percentage who, after successfully obtaining the modification or foreclosure relief, remain current on their mortgage payments for a substantial period of time (*e.g.*, six months, one year, or two years).**

While our members do not collect separate statistics on the performance of MARS providers, our experience has been that use of such a provider does not improve the consumer's chances of obtaining a successful resolution. On the contrary, MARS providers often take an extremely adversarial approach that makes it more difficult for the servicer to identify options that might allow the borrower to avoid foreclosure.

It is common for a MARS provider to submit a purported "qualified written request" under RESPA that includes requests for copies of all the underlying documents associated with a loan as well as a blanket statement that the amount due is disputed because of violations in the origination of the loan of the Truth in Lending Act or other laws. Sometimes the information request resembles an extensive set of interrogatories in litigation. MARS providers also sometimes submit "debt validation" requests under the FDCPA, although the servicer often is not a "debt collector" under the FDCPA because the debt was not in default when it began servicing it. They may also state that the loan should be reported to credit bureaus as disputed under the FCRA without stating any basis for the dispute.

A "qualified written request" is defined in Regulation X as:

> [A] written correspondence (other than notice on a payment coupon or other payment medium supplied by the servicer) that includes, or otherwise enables the servicer to identify, the name and account of the borrower, and includes a statement of the reasons that the borrower believes the account is in error, if applicable, or that provides sufficient detail to the servicer regarding information relating to the servicing of the loan sought by the borrower.

24 C.F.R. § 3500.21(e)(2)(i). A request for loan documents or a claim of a law violation in the origination of the loan does not relate to loan servicing, and, therefore, such requests and claims are outside of the definition of a "qualified written request" and a servicer does not have to respond to them under RESPA. [cite] Because of the potential for litigation, however, servicers must devote high-level resources to responding to such requests, often involving compliance and legal personnel as well as customer-service representatives. Resources expended in responding to such spurious requests from

MARS providers could be better deployed in working directly with borrowers, or with a legitimate MARS provider, to find alternatives to foreclosure.

While purported qualified written requests and other communications from MARS providers often make extensive claims of law violations in the origination and servicing of a loan, they rarely if ever point to any specific practice of the lender or servicer that violates those laws. Borrowers who use MARS services may be losing the opportunity to raise a legitimate defense to payment or a valid claim of a servicing error.

Need for and Scope of Rule

2. Need for FTC Rule

A. Given that many states have enacted and enforced laws concerning loan modification and foreclosure services and that the FTC has brought law enforcement actions against providers of these types of services under Section 5 of the FTC Act, should the FTC promulgate a rule to address these services? Why or why not?

The CMC would support a rule focused on specific abuses that are prevalent in the MARS industry. Many MARS providers operate nationwide and it is difficult for a state to control the practices of an out-of-state provider. A violation of a regulation would subject the violator to civil penalties under the FTC Act, which is a greater deterrent than the potential for an administrative order or injunction. In addition, the Commission or a state attorney general would not have to demonstrate in each case that a practice specifically prohibited by the rule met the general definition of an unfair or deceptive act or practice.

By the same token, it is important that any rule describe the prohibited practices with specificity, particularly because it would be enforced by state attorneys general as well as the FTC. If the FTC adopts a rule, it should also adopt a procedure to provide interpretations similar to the Federal Reserve Board's procedure for issuing Official Staff Commentaries under laws such as the Truth in Lending Act and Equal Credit Opportunity Act. Those interpretations should provide a safe harbor against liability in an FTC or state enforcement action.

3. Scope of Covered Practices

A. Should conduct by loan modification and foreclosure rescue service providers or advertisers that the FTC has challenged as unfair or deceptive in violation of Section 5 of the FTC Act in its law enforcement actions be incorporated into a proposed FTC rule? If so, what conduct should be included, how should it be addressed, and why?

See the discussion of the misrepresentation of non-profit status, below.

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? Why or why not? If so, what prohibitions and restrictions should be incorporated in 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?**

The CMC would support a requirement for a written contract that describes the services to be provided and applicable fees, and discloses key information such as the fact that the MARS provider has no special relationship with any servicer (assuming that it does not have such a relationship).

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> **3. Some states have restricted the type, amount, and timing of the fees charged and refunds given by providers of loan modification and foreclosure rescue services. In particular, some states ban advance fees until all services promised or contracted for are completed.**
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> > **(i) Should the Commission address in a proposed FTC rule any fee or refunds practices of providers of loan modification and foreclosure rescue services? If so, what practices should be addressed, how they should be addressed, and why?**
> >
> > **(ii) Should the Commission ban the payment of advance fees for loan modification and foreclosure rescue services in a proposed FTC rule? If so, why or why not? What effect, if any, would an advance fee ban have on the willingness or ability of loan modification and foreclosure rescue services providers to do business?**

The CMC would support a ban or limitation on the collection of advance fees by MARS providers. Such restrictions have been helpful in reducing abuses in the credit-repair industry. While an advance fee ban would likely result in a substantial reduction in the number of MARS providers, those that remained would be more likely to be providing a useful service.

4. Some states have foreclosure rescue laws which, in whole or in part, only apply once a consumer has received a notice of default. At what stage or stages of the process should a proposed FTC rule protect consumers? Should it take effect before consumers receive a notice of default, after the notice of default is received, or once foreclosure proceedings have begun? Why?

Many of the abuses that servicers have encountered have occurred before the consumer has received a notice of default. MARS providers sometimes solicit customers who are not in default but who live in areas with high numbers of distressed borrowers. Any rule should apply to MARS providers at any stage of the process.

C. Are there any unfair or deceptive acts and practices by providers or advertisers of loan modification and foreclosure rescue services that neither the FTC nor the states have addressed that a proposed FTC rule should address? If so, how should these acts and practices be addressed and why?

As discussed above, MARS providers often raise purported disputes on behalf of their clients under the RESPA, FCRA, and FDCPA without providing any basis for the dispute. This practice wastes the resources of servicers and provides little or no legitimate benefit to borrowers. Raising a dispute in bad faith or without providing a basis for the dispute should be defined as a violation of the rule.

Possible restrictions on abuse of non-profit or attorney status are discussed below.

4. Scope of Covered Entities

A. As described in the text, an FTC proposed rule would not cover banks, thrifts, federal credit unions, and non-profits. To what extent do these types of entities 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?

As discussed above, banks, thrifts, and federal credit unions, like other lenders and loan services, do not provide the type of MARS services that appear to be targeted by a potential FTC rule. Assuming that the FTC exempts loan originators and servicers from the rule, the fact that banks, thrifts, and federal credit unions are not covered should have no impact on competition.

On the other hand, although the FTC does not have jurisdiction over *bona fide* non-profits, it has asserted jurisdiction over self-described non-profits, including MARS providers, that are, in fact, operated for the benefit of their members. Abuse of non-profit status appears to be common in the industry. While we assume that the FTC would treat such an entity as being subject to the rule, the Commission should consider going farther and making misrepresentation of non-profit status, in itself, a violation of the rule. Such a misrepresentation should be considered a violation regardless of whether an entity has obtained Section 501(c)(3) status from the Internal Revenue Service.

B. As described in the text, many states have exempted attorneys from laws (e.g., foreclosure consultant laws) which regulate the conduct of providers and advertisers of loan modification and foreclosure rescue services. What are the costs and benefits of exempting attorneys from these laws? What has been the effect of such exemptions on competition between attorneys and non-attorneys in providing or advertising loan modification and foreclosure rescue services? Should an FTC proposed rule include an exemption for attorneys or any other class of persons or entities? Why or why not?

Mortgage servicers often receive communications from attorneys operating as MARS providers. These attorneys are often not licensed to practice in either the borrower's or the servicer's state, and the communications are generally "boilerplate" that does not appear to reflect any considered review by an attorney.

Attorneys operating as MARS providers gain significant competitive advantages. As the FTC notes, in many states an attorney is exempt from foreclosure-consultant and other laws (such as mortgage broker or real-estate broker laws) that prohibit or limit advance fees, among other practices. In addition, the FDCPA requires a debt collector that knows a consumer is represented by an attorney to deal with the attorney rather than the consumer. Servicers are sometimes treated as "debt collectors" under the FDCPA, and even servicers that do not meet the definition often comply with the substantive provisions of the FDCPA to avoid accusations of unfair or deceptive acts or practices.

Therefore, although it may be appropriate to provide an exception for *bona fide* legal representation, any such exception should be narrowly drawn so that attorneys who are in the business of providing MARS are covered by the rule. For example, the Uniform Debt-Management Services Act, which is the basis for debt-management services laws in a number of states, provides an exemption for "legal services provided in an attorney-client relationship by an attorney licensed or otherwise authorized to practice law in this state." Uniform Debt-Management Services Act § 2(9)(A), *available at* http://www.law.upenn.edu/bll/archives/ulc/ucdc/2005final.htm. As with non-profits, because of the prevalence of abuse of the attorney exemptions in state laws, the Commission should also consider making such abuse itself a violation of the rule.

Conclusion

We strongly support the Commission's efforts to issue a regulation focused on preventing specified unfair or deceptive acts or practices in the mortgage assistance and relief services industry. Such a regulation should clearly exempt lenders and mortgage servicers and entities that provide services to them.

Sincerely,

Anne C. Canfield
Executive Director