

**Comments of the
Center for Responsible Lending
to the Federal Trade Commission**

Notice of Proposed Rule-Making: Mortgage Assistance Relief
RIN 3084-AB18

March 29, 2010

The Center for Responsible Lending¹ is pleased that the FTC has proposed rules to address the practices of mortgage assistance relief service providers, specifically those for-profit entities, which in exchange for a fee, offer to work with lenders and servicers on behalf of consumers to modify the terms of mortgage loans or to avoid foreclosure on those loans.²

The FTC's NPRM addresses various elements of mortgage relief services, including the making of false or misleading claims, disclosures, as well as recordkeeping and compliance. CRL has signed on to the comments of the National Consumer Law Center which address the full proposal. In addition, CRL is writing a separate comment specifically to support the proposed prohibition on the collection of advance fees, the facet of the rule most critical to addressing the unfair and deceptive practices of mortgage assistance relief service (MARS) providers.³ Based on CRL's experience with borrowers,

¹ The Center for Responsible Lending (CRL) is a non-partisan, non-profit research and policy organization dedicated to combating abusive financial practices. It is affiliated with the Center for Self-Help, a non-profit community development institution based in Durham, N.C., dedicated to increasing wealth-building opportunities for low- and moderate-income and minority families and communities. Self-Help has provided over \$5 billion of financing to 55,000 low-wealth families, small businesses and non-profit organizations in North Carolina and around the country. It offers affordable loans, suited to the needs and circumstances of the borrower.

² See, 2009 Omnibus Appropriations Act (Omnibus Appropriations Act)(Pursuant to the its APA rulemaking authority, the FTS has issued a Notice of Proposed Rulemaking pursuant to the Omnibus Appropriations Act, which was later clarified by the Credit Card Accountability and Responsibility and Disclosure Act of 2009 (Credit CARD Act).

³ FTC, 16 CFR Part 322, Notice of Proposed Rulemaking, Mortgage Assistance Relief Services, at 124 ("§ 322.5. Prohibition on collection of advance payments. (a) It is a violation of this rule for any mortgage assistance relief service provider to request or receive payment of any fee or other consideration until the provider has: (1) achieved all of the results (i) the provider represented, expressly or by implication, to the consumer that the service would achieve, and (ii) that are consistent with consumers' reasonable expectations about the service; and (2) provided the consumer with documentation of such achieved results. (b) In cases where the provider has represented, expressly or by implication, that it will negotiate, obtain, or arrange a modification of any term of any dwelling loan, the provider shall not request or receive any payment or other consideration until it has: (1) obtained a mortgage loan modification for the consumer; and (2) provided the consumer documentation of the mortgage loan modification in the form of a written offer from the dwelling loan holder or servicer to the consumer. (c) For the purposes of paragraph (b) of this section, "mortgage loan modification" means: (1) the contractual change to one or more terms of an existing dwelling loan between the consumer and the owner of such debt that substantially reduces the consumer's scheduled periodic payments, where the change is (i) permanent for a period of five years or more; or (ii) will become permanent for a period of five years or more once the consumer successfully completes a trial period of three months or less.").

as well as information we have received from state Attorneys Generals and other organizations that provide direct assistance to borrowers, it is clear that there is a growing problem with MARS providers that take money from borrowers and fail to deliver on the promise of actual relief. This proposed rule is an important step in addressing these abuses.

Summary of Recommendations

In order to ensure that the abuses from the subprime mortgage origination market do not spill over into the market for mortgage assistance relief services, CRL supports the Federal Trade Commission's proposed standards for MARS providers that, at a minimum:

- Prohibit the collection of any fee or other consideration, including any set-up, initial, or intermediate fee;
- Condition payment on documentation of an offer of a permanent contractual change to the consumer's mortgage; and
- Allow for compensation only when modifications substantially reduce scheduled periodic payments.

Growing Demand for Mortgage Assistance Relief Services

The tremendous demand for foreclosure rescue services has resulted in a mass migration of actors, with the industry recruiting heavily from subprime brokerage houses.⁴ Characterized by some as the "hottest business since subprime lending," it is clear that some actors may perceive the foreclosure rescue industry as an opportunity to make a quick dollar at the expense of consumers.⁵

The widening gap between foreclosure starts and mortgage servicers' loss mitigation efforts suggests that the demand for assistance in dealing with foreclosure is real. The Mortgage Bankers Association and the Hope Now Alliance estimate between 2.2 and 2.3 million foreclosure starts occurred in 2009 alone.⁶ Nationwide, nearly one in

⁴ See, Peter S. Goodman, Subprime Brokers Resurface as Dubious Loan Fixers," New York Times (July 20, 2009) available at <http://www.nytimes.com/2009/07/20/business/20modify.html>. ("... many of the same people who dispensed risky mortgages during the real estate bubble have reconstituted themselves into a new industry focused on selling loan modifications.").

⁵ Lauren Saunders, National Consumer Law Center Before the U.S. House Financial Services Subcommittee on Housing and Community Opportunity, *"Legislative Solutions for Preventing Loan Modification and Foreclosure Rescue Fraud,"* at 9.

⁶ Mortgage Bankers Association National Delinquency Survey (2Q 2009) (This number is based on the annualized rate of foreclosure starts reported in the 1Q & 2Q2009 MBA National Delinquency Surveys, adjusted to reflect the entire mortgage market (the MBA survey covers 80%)).; *HOPE NOW Loss Mitigation National Data July 07 to August 09,*, Hope Now Alliance, available at

ten homeowners is either in foreclosure or more than 60 days past due on their mortgage payments, while nearly one in five homeowners is underwater.⁷

With few barriers to entry and little to no oversight, scams are flourishing in the current environment. As consumers' demand for relief outpaces the capacity of mortgage servicers and government programs alike, MARS providers hold out the false promise of results.⁸ To further complicate matters, many of the consumers that seek out MARS services are ineligible for Federal Making Home Affordable - Home Affordable Modification Program (HAMP) modifications, leaving them with fewer options and consequently fewer protections.

Advance Fees as an Unfair Act or Practice

As the FTC acknowledges in the NPRM, unearned advanced fees are an unfair practice under the analysis set forth in Section 5(n) of the FTC Act.⁹ It is the assessment of upfront fees which enable MARS providers to profit off of distressed consumers without performing any work on their behalf.¹⁰ The payment of advance fees is problematic not only because the consumer receives no benefit for their payment, but also because the fees deplete the financial resources that could have helped to resolve the underlying debt. Thus, many MARS providers collect their fees, provide no service, and

<http://www.hopenow.com/industry-data/HOPE%20NOW%20National%20Data%20July07%20to%20Aug09.pdf>

⁷ Mortgage Bankers Association National Delinquency Survey (2009 2Q); First American Core Logic (March 4, 2009).

⁸ E.g., Making Home Affordable - Home Affordable Modification Program (HAMP) February Loan Modification Report, released March 12, 2010, *available at* <http://www.treasury.gov/press/releases/reports/february%20hamp%20report.pdf> (The Federal Making Home Affordable - Home Affordable Modification Program (HAMP), which just celebrated its one-year anniversary, has to date yielded approximately one million trial loan modifications and only 170,000 permanent modifications).

⁹ 15 U.S.C. 45(n)(codifying the Commission's unfairness analysis)(An act or practice is unfair if: (1) it causes or is likely to cause substantial injury to consumers; (2) that injury is not outweighed by countervailing benefits to consumers or competition; and (3) the injury is not reasonably avoidable by consumers themselves.).

¹⁰ See, NAAG Comments to FTC MARS ANPRM (July 15, 2009)("[F]oreclosure rescue services companies result only in costs to consumers. There are no benefits. The companies collect an upfront fee that consumers can ill-afford to pay. . . In the majority of cases, the companies do nothing with the consumer's information."); National Consumer Law Center, *Dreams Foreclosed The Rampant Theft of Americans' Homes Through Equity-Stripping Foreclosure Rescue Scams* (June 2005) *available at* <http://www.consumerlaw.org/news/ForeclosureReportFinal.pdf> ("The predominant foreclosure "rescue" scams appear to come in three varieties. The first might be called "phantom help," where the "rescuer" charges outrageous fees either for light-duty phone calls and paperwork the homeowner could have easily performed, or on a promise of more robust representation that never materializes. In either event the homeowner is usually left without enough assistance to actually save the home but with little or no time left to prevent this grievous loss by the time s/he realizes it. The "rescuer" essentially abandons the homeowner to a fate that might well have been prevented with better intervention.")

deprive consumers of the opportunity to effectively modify their mortgages. In the end, consumers will have paid between hundreds and thousands of dollars to MARS providers, with little to show for it.

Recent FTC enforcement actions have brought to light the fact that MARS providers do not generally achieve the results that are promised consumers.¹¹ The most common service provided is a “token communication with the consumer’s mortgage lender or servicer,” which rarely yields a loan modification offer in the time necessary to avoid foreclosure.¹²

In order to ensure that MARS providers remain faithful to their charge in assisting distressed consumers, it is necessary to adopt bright line rules that realign the incentives of the market to ensure that abuses from the subprime market do not migrate as well.¹³ A ban on advance fees will rein in the most egregious scams in which MARS providers take large non-refundable payments while making no effort to obtain a loan modification on the consumer’s behalf.¹⁴

Aligning MARS Providers’ Incentives with Consumers’ Interests

To effectively align the incentives of MARS providers and consumers, the FTC’s final rule prohibiting advanced fees must include three components, which are currently addressed by Subsections (a), (b), and (c) of Section 322.5 respectively: a general prohibition advance fees which ties payment to performance;¹⁵ a specific prohibition of

¹¹ See, NAAG Comments to FTC MARS ANPRM (July 15, 2009); FTC MARS NPRM, at 43 (citing Data Med. Capital, Inc., No. SA-CV-99-1266 AHS (Eex), Rep. Temp. Receiver at 4 (C.D. Cal. filed June 19, 2009)(stating the defendants; records show that they provide loan modifications to only 0.37% – 3/8th of one percent – of their customers); FTC v. LucasLawCenter “Inc.,” No. SA-CV-09-770 DOC (ANX), Mem. Supp. App. TRO at 19 (C.D. Cal. Filed July 7, 2009)(“Nearly every consumer who is promised a loan modification never received any offer to modify their home loans.”); FTC v. Freedom Foreclosure Prevention Specialists, LLC, No. 2:09-cv-01167-FJM (D. Ariz. June 1, 2009)(alleging defendants only completed loan modifications for about 6% of consumers)).

¹² Philip Lehman, Assistant Attorney General, North Carolina Department of Justice Consumer Protection Division, *Debt Settlement and Foreclosure Assistance Schemes: Profiting Off Distress Debtors*, at 6, presented at The UNC School of Law 20th Annual Festival of Legal Learning (February 5, 2010).

¹³ Testimony of Michael Calhoun, Center for Responsible Lending Before the U.S. House of Representatives Committee on Financial Services, “*H.R. 1728, the Mortgage Reform and Anti-Predatory Lending Act of 2009*” at 1 (April 23, 2009), available at http://www.house.gov/apps/list/hearing/financialsvcs_dem/crl_-_calhoun.pdf.

¹⁴ Testimony of Lauren Saunders, National Consumer Law Center Before the U.S. House Financial Services Subcommittee on Housing and Community Opportunity, “*Legislative Solutions for Preventing Loan Modification and Foreclosure Rescue Fraud*,” at 3 (May 6, 2009), available at http://www.consumerlaw.org/issues/foreclosure/content/testimony_foreclosure050709.pdf.

¹⁵ FTC, 16 CFR Part 322, Notice of Proposed Rulemaking, Mortgage Assistance Relief Services, at 124 (“§ 322.5. Prohibition on collection of advance payments. (a) It is a violation of this rule for any mortgage assistance relief service provider to request or receive payment of any fee or other consideration until the provider has: (1) achieved all of the results (i) the provider represented, expressly or by implication, to the

advance fees in the absence of a loan modification, to the extent that it was the result promised expressly or implicitly;¹⁶ and a requirement that loan modifications be both permanent and affordable.¹⁷

As proposed, Section 322.5 will curb the most egregious abuses by MARS providers. Consistent with the proposed rule that would amend the Telemarketing Sales Rule for debt relief services, any and all fees should be prohibited in the absence of a documented offer of an affordable loan modification.¹⁸ Consumers who do not ultimately receive the offer of a sustainable loan modification are no better off for having contracted with a MARS provider, and may be worse off by reason of the delay and cost. For this reason, MARS providers that are unsuccessful in procuring the offer of a sustainable loan modification should not receive any fee.

We agree that no distinction should be made between an entity's mere offer of assistance to obtain a loan modification and a promise to deliver a loan modification; such tautology is meaningless to someone at risk of losing a home. MARS providers are, at least by implication, offering to assist borrowers in procuring a loan modification in order to avoid foreclosure. Any outcome short of an affordable permanent modification should be viewed as non-performance. Because we agree with the Commission's conclusion that the collection of advance fees absent performance is not only deceptive,

consumer that the service would achieve, and (ii) that are consistent with consumers' reasonable expectations about the service; and (2) provided the consumer with documentation of such achieved results.”)

¹⁶ *Id.* (“§ 322.5. Prohibition on collection of advance payments. (b) In cases where the provider has represented, expressly or by implication, that it will negotiate, obtain, or arrange a modification of any term of any dwelling loan, the provider shall not request or receive any payment or other consideration until it has: (1) obtained a mortgage loan modification for the consumer; and (2) provided the consumer documentation of the mortgage loan modification in the form of a written offer from the dwelling loan holder or servicer to the consumer.”)

¹⁷ *Id.* (“§ 322.5. Prohibition on collection of advance payments. (c) For the purposes of paragraph (b) of this section, “mortgage loan modification” means: (1) the contractual change to one or more terms of an existing dwelling loan between the consumer and the owner of such debt that substantially reduces the consumer's scheduled periodic payments, where the change is (i) permanent for a period of five years or more; or (ii) will become permanent for a period of five years or more once the consumer successfully completes a trial period of three months or less.”).

¹⁸ FTC, Notice of Proposed Rulemaking to amend the Telemarketing Sales Rule, 74 FR 41988 (Aug. 19, 2009)(Prohibits “requesting or receiving payment of any fee or consideration from a person for any debt relief service until the seller has provided the customer with documentation in the form of a settlement agreement, debt management plan, or other such valid contractual agreement, that the particular debt has, in fact, been renegotiated, settled, reduced, or otherwise altered.”) See also, e.g., 15 U.S.C. §1679(b); 16 C.F.R. §310.4(a)(2)-(4))(A prohibition on advance fees is not foreign to the regulation of consumer credit. Rather it is a key feature of many state laws governing credit services organizations, as well as federal laws and regulations governing credit repair.).

but also abusive under Section 5(n) of the FTC Act, the prohibition must operate independently of whether any express promise was or was not made to the consumer.¹⁹

Because not all loan modifications improve the consumer's situation, we agree that a loan modification will entitle a provider to payment only in the event that services result in a permanent contractual change to the mortgage substantially reducing the borrower's scheduled periodic payments.²⁰ As proposed, Section 322.5(c) counters the efforts of MARS providers to persuade consumers to accept repayment plans or forbearance agreements as a substitute for a loan modification.²¹

The advanced fee ban set forth in Section 322.5 will not only incent MARS providers to procure loan modifications, while protecting against the risk that expedience will come at the expense of the quality of the loan modification.

Conclusion

In conclusion, we are supportive of the comprehensive ban on advance fees proposed by the FTC, which would align the incentives of MARS providers and consumers. The rule establishes a much needed bright line, which is necessary to ensure that consumers are getting what they bargained for – meaningful foreclosure avoidance.

¹⁹ FTC, MARS NPRM at 41-42 (“The Commission proposes to ban MARS providers from requiring that consumers pay in advance for their services, i.e., prior to the provider doing or accomplishing what it promised. This remedy is justified on two independent grounds: (1) that the collection of advance fees by MARS providers is an unfair act or practice and (2) that the prohibition is reasonably related to the goal of preventing deception.”).

²⁰ FTC, MARS NPRM at 56.

²¹ *Id.*