

The New York City Department of Consumer Affairs'
Comments to Mortgage Assistance Relief Services Rulemaking,
Rule No. R911003,
Submitted to the Federal Trade Commission

March 29, 2010

INTRODUCTION

On behalf of the City of New York and Mayor Michael R. Bloomberg, the Department of Consumer Affairs (DCA) and its Office of Financial Empowerment (OFE) appreciate the opportunity to comment on the proposed rulemaking regarding mortgage assistance relief services (MARS).

The foreclosure crisis has eroded the financial stability of households across the country. The national foreclosure rate reached an all-time high of 8.85 percent in 2009, and millions of additional foreclosures are expected in coming years.¹ In New York, the rate is near 7.78 percent,² Last year, there were more than 20,000 *lis pendens* filings in New York City.³

The crisis has also fostered a growing industry capitalizing on vulnerable households struggling to stay in their homes. Foreclosure rescue businesses not only prey upon those already in crisis, they undermine critical federal, state and municipal efforts to prevent foreclosures and avoid further destabilization of our neighborhoods and economy.

DCA supports an outright ban on fee-for-service mortgage assistance services. Desperate homeowners do not have to pay for-profit entities to negotiate with servicers or lenders on their behalf. In New York City, for example, residents can call 311 to receive free foreclosure prevention services through the City-funded Center for New York City Neighborhoods. CNYCN coordinates and expands services to New York City residents at risk of losing their homes to foreclosure through a network of more than 19 non-profit legal services and housing counseling organizations throughout the City and to which it refers thousands of New Yorkers. In less than two years, the Center has helped approximately 6,800 homeowners access the programs for which they qualify and to modify the loans that will keep them in their homes, as appropriate.

Nationwide, free HUD-certified counselors are available to perform services far superior to those offered by MARS providers.⁴ A certified HUD counselor, an attorney acting in a legal capacity or an individual homeowner acting on her/his own behalf is better positioned to work with mortgage servicers than a for-profit enterprise. Further, as the Obama administration works to

¹ Loan Scam Alert Campaign Fact Sheet. Accessed online on March 17, 2010 at <http://www.loanscamalert.org/pdf/campaign-factsheet.pdf>.

² Ibid., Loan Scam Alert Campaign Fact Sheet.

³ January 2009 through June 2009: PropertyTrac.™ July 2009 through December 2009: PropertyShark.™ This count includes *lis pendens* filings for mortgage and tax liens for residential properties, excluding all others. Repeat/duplicate filings are treated as follows: If a *lis pendens* is filed on the same borough/block/lot (BBL), with the same defendant name, and within the same 365-day timeframe, the *lis pendens* is counted once, on the first occurrence of the filing.

⁴ Consumers may also seek assistance as appropriate through bankruptcy court, as required by 11 U.S.C. § 109(h)(1) by non-profit budget and credit counseling agencies, as described in 11 U.S.C. § 111. The problem of mortgage assistance scams underscores the need for bankruptcy courts to have jurisdiction over loan modifications.

provide greater relief to homeowners and as banks increase their willingness to perform modifications, the value of for-profit mortgage assistance services is increasingly doubtful. Akin to banning of for-profit credit counseling services in the state of New York⁵, the FTC should work with Congress to curb these abusive services immediately with the enactment of an outright ban on fee-for-service foreclosure prevention businesses.

Short of a full ban, DCA commends the Federal Trade Commission (FTC) proposed rulemaking for prohibiting fees in advance of successful completion of a loan modification, banning deceptive and misleading representations, requiring robust disclosures and enabling strong enforcement. As discussed below, we also urge the FTC to work with states and localities to engage in coordinated and aggressive enforcement and to ensure that stronger state and local laws will not be preempted by these regulations. We submit the following specific recommendations for enhancing the proposed rules.

BACKGROUND ON DCA AND OFE

The New York City Department of Consumer Affairs (DCA) aggressively enforces the City's strong Consumer Protection Law and several other business regulations.⁶ To ensure a fair and vibrant marketplace for the City's businesses, its 8.3 million inhabitants, and its 47 million annual visitors, DCA licenses over 71,000 businesses in 57 different industries; enforces municipal laws, including the strongest local unfair and deceptive practices act in the nation; mediates thousands of individual consumer complaints annually; and educates consumers and businesses through public hearings and public marketing and outreach campaigns. DCA also works with other city, state and federal law enforcement agencies to protect consumers from deceptive practices and ensure a fair marketplace.

DCA regularly prosecutes businesses engaged in illegal and misleading conduct, including cell phone companies, tax preparers, process servers, employment agencies, and dozens of other industries. DCA stops illegal practices, garners millions of dollars in fines and recovers millions of dollars more in restitution to consumers. In fact, DCA enforces the City's recently passed law regulating the disclosures required in print advertisements used by MARS providers, or distressed property consultants, in New York City.⁷

In February, Mayor Bloomberg and DCA launched the national "Loan Modification Scam Alert" campaign in New York City with Neighborworks America, to provide City residents facing the possibility of foreclosure with vital information to guard against loan modification scams, find reliable help and report illegal activity to authorities. "Loan Modification Scam Alert" campaign advertisements were posted on an animated billboard in Times Square, encouraging City residents to call 311 to access free foreclosure counseling services and file complaints against businesses using illegal and deceptive practices to sell loan modification services. Campaign street teams continue to distribute informational fliers in five languages in some of the hardest hit foreclosure neighborhoods to spread the word about the campaign and free foreclosure services offered in New York City.

In addition to protecting against unfair and predatory practices, the Department's Office of Financial Empowerment (OFE) spearheads an array of financial empowerment efforts, each designed with a focus on scale. Among its many large-scale initiatives, DCA's OFE implements

⁵ NY CLS Bank Article 12-c.

⁶ New York City Charter, Chapter 64, § 2203(a).

⁷ New York City Administrative Code, Title 20, § 20-723.3.

innovative asset-building strategies and coordinates a dynamic network of the City's many financial education service providers. And OFE has a citywide network of Financial Empowerment Centers that offer the "gold standard" of financial education: free one-on-one financial counseling and coaching.

Leading the way in the municipal financial empowerment movement, Mayor Bloomberg also created the Cities for Financial Empowerment (CFE) Coalition that identifies innovative cities across the country that partner and coordinate at the national level efforts similar to the work OFE does locally.

This combination of strong enforcement and public education is exactly what is needed to intervene and disrupt the tide of foreclosure prevention and loan modification scams sweeping across our cities and stripping those who can least afford it of their last chance to save their homes and keep their family finances stable.

RECOMMENDATIONS

In the absence of an outright ban on for-profit mortgage assistance relief services, DCA supports the adoption of strong federal curbs on abusive MARS practices. DCA submits the following specific recommendations to maximize the clarity and efficacy of, and ensure compliance with, the FTC's rule.

I. Prohibition on Advance Payments

- A. Prohibit the collection of any fees from a consumer until all purported results are achieved.

In its notice of proposed rulemaking, the FTC correctly decided that an advance fee ban is justified.⁸ DCA strongly supports the FTC's proposed § 322.5, which prohibits MARS providers from requesting or receiving any fees until all of its promised results are achieved and proper documentation of such results is provided to consumers. Collecting fees in advance gives scammers an easy opportunity to swindle consumers by failing to provide adequate service or by not providing any service at all. Even when these services are not outright scams, the purported results are, in many cases, not likely to be achieved. As noted by the National Association of Attorneys General, "In our experience, we have found that services provided by foreclosure rescue services companies result only in costs to consumers. There are no benefits."⁹

In response to the widespread abuse in the mortgage assistance industry, in November 2009, the FTC announced a federal-state crackdown involving 26 agencies and 118 actions.¹⁰ These actions document the typical abuses of MARS providers. For example, the actions charge that, after taking fees in advance, MARS providers "...often did little or nothing to help homeowners renegotiate their mortgages" and some falsely promised to give consumers refunds if they failed to modify their mortgages.¹¹ Given the poor track record of successful mortgage modifications

⁸ Federal Register, Vol. 75, No. 45, Federal Trade Commission, Notice of Propose Rulemaking: Mortgage Assistance Relief Services, 16 CFR Part 322, March 9, 2010. P. 10717.

⁹ Cuevas, Dennis P., National Association of Attorneys General Comments to the Federal Trade Commission's Mortgage Assistance Relief Services Rulemaking, Rule No. R911003, July 31, 2009.

¹⁰ FTC, Press Release, "Federal and State Agencies Target Mortgage Relief Scams," November 24, 2009. Accessed online on March 15, 2010 at <http://www.ftc.gov/opa/2009/11/stolenhope.shtm>.

¹¹ Ibid., FTC Press Release

and the numerous examples of deceptive practices by MARS providers, upfront fees are likely to cause significant harm to consumers. As the FTC notes in the proposed rulemaking, MARS providers' frequent misrepresentations of services or failure to achieve purported results often leads to consumers' losing the thousands of dollars they pay to the providers, may damage their credit scores, and can result in foreclosures.¹² A number of states, including New York¹³, have banned upfront fees in this context, and the FTC should apply these same protections to consumers nationwide.

The collection of advance fees has also been recognized as abusive in other contexts. For example, federal law prohibits credit repair organizations from collecting payments in advance.¹⁴ Recently, the FTC proposed also banning debt relief services from collecting upfront fees.¹⁵ At the local level, DCA enforces numerous laws that protect consumers from paying fees before services are rendered. For example, employment agencies in New York City generally may not collect fees until a job applicant has obtained employment.¹⁶ If a job applicant does not find work through a particular employment agency, he or she does not owe the employment agency any money. Financially strapped homeowners should similarly not have to pay for MARS unless the service is actually provided and appropriate relief achieved.

- B. Clarify the definition of "mortgage loan modification" to prohibit the collection of fees until the modification has become permanent.

The definition proposed in § 322.5(c)(1) treats trial modifications, changes to a borrower's mortgage that will become permanent for at least five years as the point of success at which MARS providers can collect their fees.

This creates a serious potential loophole in allowing a MARS provider to receive thousands of dollars in payments from a consumer before lasting results are achieved. The Los Angeles Times recently reported that only about 15% of homeowners who have started trial modifications have had them made permanent.¹⁷ And a consumer using a MARS provider is inherently financially squeezed. Coupled with the burden of fees for MARS services, the odds of a consumer successfully achieving a permanent loan modification after a trial modification period are slim. The definition of a "mortgage loan modification" should be amended as follows to ban the collection of fees until any trial period is successfully completed:

(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 reduced the consumer's scheduled payments, where the change is 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.~~

It is appropriate for fees to be collected only once a trial modification becomes permanent.

¹² Federal Register, Vol. 75, No. 45, Federal Trade Commission, Notice of Propose Rulemaking: Mortgage Assistance Relief Services, 16 CFR Part 322, March 9, 2010. P. 10710-10711

¹³ NY CLS Real P § 265-b (2)(b).

¹⁴ 15 U.S.C. § 1679(b).

¹⁵ Federal Register, Vol. 74, No. 159, Federal Trade Commission, Notice of Propose Rulemaking: Debt Relief Services, 16 CFR Part 310, August 19, 2009. P. 42005-42009.

¹⁶ NY Gen. Bus. Law, Article 11, §§ 184(4) and 185(3).

¹⁷ Puzanghera, Jim, "Permanently modified mortgages grow by 45%, government says," Los Angeles Times, March 13, 2010.

- C. Prohibit the collection of fees in escrow before all purported results are achieved.

The FTC should not permit MARS providers to collect fees in escrow accounts. Under the proposal set forth by the FTC, an escrow agent administers the escrow account to ensure that MARS providers receive payment only upon successfully providing results. Although escrow agents are traditionally fiduciaries, they present an added cost that must be absorbed by either the MARS provider or the consumer. Consumers seeking MARS providers are generally in financial hardship and do not need the added cost of an escrow agent.

The FTC recognizes, however, that MARS providers may improperly obtain access to MARS funds in escrow accounts. New York City laws recognize that escrow accounts are not effective when a business is inherently untrustworthy.¹⁸ Given the high cost and potential for improper access to funds by MARS providers, the FTC should apply the prohibition on collection of fees in advance of permanent loan modifications to payments held in escrow accounts.

II. Required Disclosures

- A. Broadly apply all disclosure requirements to all communications, rather than limiting application to communications immediately prior to a sale.

Proposed § 322.4(b) inappropriately limits the application of many of the disclosure requirements to communications that are “directed at a specific consumer” and occur “prior to a consumer entering into any agreement for the purchase of such service.” Limiting the disclosure requirements of this subsection, which include important warnings to consumers, to these circumstances undercuts their potential impact. These disclosures can have their greatest effects before consumers are directly engaging with MARS providers about a purchase agreement. Further, absent strong requirements, MARS providers are likely to stretch the limits of the law to promote their services.¹⁹ Accordingly, the FTC should curb potential abuse by ensuring consumers receive all required disclosures before direct pre-contract communications. DCA recommends that the FTC clarify that all disclosure requirements apply to all forms of commercial communications, whether or not a communication is directed at a specific consumer.

- B. Strengthen the disclosure requirements to include additional relevant information key to informed consumer choice.

Proposed § 322.4(a), which requires that MARS providers include in commercial communications a disclaimer regarding lack of government affiliation and status as a for-profit business, does not adequately enable consumers to make an educated choice. All commercial communications should be required to clearly and prominently disclose the potential cost of MARS services, the potential for no results to be achieved and the availability of free assistance from other sources. Requiring disclosure of the availability of free, government-certified

¹⁸ DCA has observed widespread violation of NYC Administrative Code § 20-393(14), requiring home improvement contractors to place funds received from a homeowner prior to substantial completion of services in an escrow account. Home improvement contractors overwhelmingly fail to place funds in an escrow account, leading DCA to create a trust fund for defrauded consumers. To that end, New York City laws instead require businesses catering to vulnerable consumers, such as employment agencies or immigration service providers, to obtain bonds. (NY Gen. Bus. Law, Article 11, §§ 177 and 178 require bond for employment agencies; New York City Administrative Code, Title 20, § 20-776 requires bond for immigration service providers).

¹⁹ In the context of fee-based overdraft, for example, financial institutions are exploiting gaps in the rules to aggressively market overdraft services in a manner that flouts the intent of the Federal Reserve’s regulations.

assistance is consistent with New York State's distressed property consultant law²⁰ and federal bankruptcy law.²¹ The FTC should require MARS providers to include the following statement in every commercial communication with consumers:

"IMPORTANT NOTICE:

(Name of company) is a for-profit business not associated with the government. This offer has not been approved by the government or by your lender. Even if you buy our service, we may produce no results.

These services will cost you as much as \$ (*maximum of all potential fees charged to a consumer by the MARS provider*). Free mortgage assistance services by not-for-profit, government-approved housing counselors are available by calling (800) 569-4287 or visiting [URL of domain set up by FTC linking to HUD-certified counselors]. You may also contact your mortgage servicer directly."

Requiring this important disclosure in all commercial communications, including oral and telephone communications, will help consumers make educated choices regarding mortgage relief prior to corresponding directly with MARS providers.

C. Specifically mandate the content requirements for MARS contracts.

MARS providers should be required to use contracts containing specific requirements enumerated by the FTC through the creation of model contracts. In particular, the required contract should specify exactly which services will be provided and delineate the substantive changes to the mortgage terms that would require the consumer to make payment to the MARS provider. Contracts must also include a specific, clear and prominent disclosure in close proximity to the stated fees that payment of such fees will not be applied to mortgage arrears. Mandating contract disclosure requirements is consistent with New York State's law regarding mortgage relief providers.²² Uniform disclosure standards requiring the inclusion of specific information about the services to be performed have also been required in a number of contexts, including DCA's requirements regarding the content of contracts given by home improvement contractors, employment agencies, and immigration service providers.²³ Mandating content requirements creates expectations and awareness of rights and choices regarding mortgage assistance services, fostering informed choice and consumer empowerment.

D. Create a Consumer Bill of Rights Regarding Mortgage Assistance and require MARS providers to distribute it to consumers prior to any discussion of services.

Consumers considering using mortgage assistance services deserve a fair explanation of their rights under the law. The FTC should create a consumer-friendly, plain-language Consumer Bill of Rights Regarding Mortgage Assistance to explain consumers' legal rights, the potential risks of for-profit mortgage assistance services and tips on obtaining mortgage assistance at no cost.

²⁰ NY CLS Real P § 256-b (3)(a)(viii).

²¹ 11 U.S.C. § 109(h)(1).

²² NY CLS Real P § 256-b (3)(a)

²³ Rules of the City of New York, Title 6, § 2-221, available at

http://www.nyc.gov/html/dca/downloads/pdf/home_improvement_law_rules.pdf; NY Gen. Bus. Law, Article 11, § 181, available at http://www.nyc.gov/html/dca/downloads/pdf/employment_agency_statelaws_rules.pdf; New York City Administrative Code, Title 20, § 20-772, available at http://www.nyc.gov/html/dca/downloads/pdf/ISP_combined.pdf.

MARS providers should be mandated to provide the bill of rights to consumers before any discussion regarding mortgage assistance services. DCA has developed a similar consumer document regarding paid tax preparation (*Attached as Appendix A*), which describes consumers' legal rights regarding tax preparation and refund anticipation loans.²⁴ All paid preparers in New York City are statutorily required to provide the disclosure prior to any discussion with a consumer.²⁵ Consumer bills of rights have also proven useful in other contexts. The California Car Buyer's Bill of Rights Act, for example, requires car buyers to be given a separate document from the contract, with itemized descriptions and prices for each component of the purchase, which has to be signed by the consumer before the sale.²⁶ DCA views informed choice as the cornerstone of a fair transaction. We work to inform consumers of their rights and encourage them to ask questions to ensure they are being given a fair deal. To this end, DCA has observed firsthand the benefits of the bill of rights in advancing these goals. Distressed homeowners should be given the same opportunity to be informed consumers empowered to protect their own legal rights.

- E. Require each MARS provider to include a physical address and landline phone number in all commercial communications.

The FTC should require MARS providers to include in all commercial communications the physical address of the business and a landline phone number at which a live person can be reached. DCA has proposed similar requirements for debt collectors in New York City.²⁷ It is important that the FTC specifically requires the MARS providers to include a landline telephone number, as allowing a cell phone number to fulfill this requirement could stymie enforcement efforts, given their disposability and the difficulty of identifying the owner of a prepaid number. The inclusion of reliable contact information helps to discourage fly-by-night operations and facilitates efficient enforcement by state and local regulators, as well as the FTC.

- F. Require disclosures be given in the same languages used in advertising.

The FTC should require MARS providers to offer all mandated disclosures (including those suggested here) in the languages used in their advertising. MARS providers marketing to non-English speakers must be required to provide all disclosures in the same languages used in advertising. For example, tax preparers and immigration service providers in New York City must provide consumers with disclosures made in English and any other language the tax preparer or immigration service provider used to attract business.²⁸ DCA also recently petitioned the New York State Public Service Commission to require Energy Service Companies to provide information to customers in the language in which the representative speaks to the

²⁴ See New York City Department of Consumer Affairs' Consumer Bill of Rights Regarding Tax Preparers at <http://www.nyc.gov/html/dca/downloads/pdf/consumerbillofrights.pdf>.

²⁵ New York City Administrative Code, Title 20, § 20-740.1. Available at http://www.nyc.gov/html/dca/downloads/pdf/tax_prep_law.pdf.

²⁶ Cal Civ Code § 2982.2 (2009) DCA also incorporates bill of rights in settlement agreements. For example, DCA requires home improvement contractors resolving violations with the Department to provide consumers with a "Consumer Bill of Rights on Contracting for Home Improvements."

²⁷ DCA's proposed rules governing debt collection require debt collectors to disclose to consumers a call-back number to a phone answered by a natural person, the name of the debt collection agency, the originating creditor of the debt, the name of the person to call back, and the amount of the debt at the time of the communication. New York City Administrative Code, Title 20, § 20-493.1.

²⁸ Rules of the City of New York, Title 6, § 5-66, available at http://www.nyc.gov/html/dca/downloads/pdf/tax_prep_law.pdf;

customer or in which a contract is negotiated.²⁹ The FTC should hold MARS providers to the same standard.

- G. Use municipal 311 and 211 call systems to direct consumers to legitimate rescue resources.

The FTC should work with municipal governments to direct consumers seeking mortgage assistance to call their local municipal helpline. While MARS providers are located throughout the country, their targeting and marketing is usually local in nature. In New York City, the neighborhoods most dramatically impacted by the foreclosure crisis are papered with flyers offering rescue from foreclosure – on lampposts, on trees, at grocery stores, and at local businesses. To combat this flood of marketing, the national response needs to be clear and simple in messaging, yet local in delivery. Simplifying the conduit to well-trusted and tamper-proof “311’s” or “211’s” is an ideal “fix”. More than 60 cities across the U.S. – covering 78% of the American population – have ‘311’ or ‘211’ information and referral systems, generally available 24 hours a day, seven days a week, and in dozens, if not hundreds, of languages. Local governments have invested millions of dollars to popularize these free and multi-purpose hotlines as safe, reliable information sources and stand ready to utilize this incredible resource for the present crisis.

III. Scope

- A. Subject mortgage brokers to the MARS rules

DCA supports the FTC’s application of the proposed rules to mortgage brokers. Mortgage brokers offering for-profit mortgage assistance services are likely to be engaged in the same problematic practices as other MARS providers and must be subject to the rule. As the National Association of Attorneys General noted in its comments to the FTC in July, there have already been complaints about situations in which “...mortgage brokers charge consumers for mortgage consulting services and then failed to provide services or provided fewer services than originally promised. The trend of mortgage brokers providing services is likely to continue, especially if the market for mortgage loan origination remains soft.”³⁰ New York State has recognized the need to restrict abusive mortgage assistance services provided by mortgage brokers. In December 2009, the State expanded the ban on upfront fees for distressed property consultants to cover services offered by mortgage brokers.³¹ It is essential that the FTC ensures mortgage brokers, many of whom originated the very kind of subprime, exotic mortgages that are contributing to the current foreclosure crisis, play by the same set of rules as other MARS providers.

- B. Enact rules that cover the full range of mortgage assistance and foreclosure rescue services.

A variety of types of foreclosure rescue and mortgage assistance related scams have emerged in the wake of the current crisis. The FTC should issue rules that proactively address the full breadth of such insidious practices, including, for example, deed theft, title transfer, refinancing scams and sale-leasebacks. While the proposed rules are not tailored to protect consumers

²⁹ Petition of the New York State Consumer Protection Board and the New York City Department of Consumer Affairs Regarding the Marketing Practices of Energy Services Companies, December 19, 2007. Available at http://www.nysconsumer.gov/pdf/electricity/consumer/esco_petition.pdf.

³⁰ Cuevas, Dennis P., National Association of Attorneys General Comments to the Federal Trade Commission’s Mortgage Assistance Relief Services Rulemaking, Rule No. R911003, July 31, 2009.

³¹ New York, Laws 2009, Ch. 504, § 19.

from all of these types of businesses, the FTC should continue to complement its enforcement efforts with strong rulemaking in these areas.

IV. Assisting and Facilitating

- A. Ensure those involved in advertising or generating leads for MARS services are appropriately covered.

DCA supports the application of the MARS rule to those assisting and facilitating MARS providers. However, the current regulatory language includes a potential loophole by only holding those assisting MARS providers accountable if they know or consciously avoid knowing a provider is violating the rules. The FTC should amend proposed § 322.6 to affirmatively require those generating leads and providing direct advertising support to MARS providers to proactively ensure the providers for whom they are working have taken reasonable steps to maintain full compliance with the rules. To effectively meet the regulatory intent of holding facilitators accountable, those involved in advertising and generating leads must be required to seek to know if the MARS providers they are supporting are in compliance with the law. It is essential that the FTC adequately applies the same standards to companies providing material support to MARS providers. DCA has observed companies that assist MARS providers with targeted direct mail campaigns. These companies target vulnerable homeowners with communications that promise help with mortgage payments or foreclosure prevention. Consumers are asked to call a toll-free telephone number that will connect them to a MARS provider. In other situations, MARS providers join forces with other entities preying on financially strapped individuals to generate leads, such as debt settlement services.³² Advertisers of MARS services scouring *lis pendens* lists and former mortgage brokers using their client lists of subprime borrowers to generate leads for MARS providers should be held culpable for the foreclosure rescue services they are directly enabling.

V. Recordkeeping and Compliance

- A. Require records to be kept electronically and in an organized manner searchable by key criteria, including zip code.

Proposed § 322.9 is overly broad in its allowance for MARS providers to keep records “in any form, and in the same manner, format, or place as they keep such records in the ordinary course of business. The FTC should specifically require that all of the mandated records are maintained in a manner that is readily searchable by the name, address and zip code of the consumer.³³ Robust record-retention requirements are crucial to effectively enforcing the MARS rules.

- B. Require comprehensive records of all consumers contacted, as well as all employees, independent contractors and subcontractors.

Proposed § 322.9 should be amended to include requirements that MARS providers maintain records of all consumers receiving direct marketing, through telemarketing, electronic mail, text messages, or other means. Such records facilitate strong enforcement by allowing regulators to verify that the marketing materials received by consumers are in compliance with the rules and

³² See, e.g. <http://www.usmortgagebailout.com/index.html>.

³³ DCA's proposed rules for debt collectors, for example, require records to be kept in a manner that is searchable or retrievable

are consistent with the copies of such materials maintained by the MARS provider. Further, easy access to MARS providers' target market enables government agencies to maximize the impact of public awareness efforts by focusing outreach on those being marketed costly foreclosure prevention services.

In addition to the requirements for monitoring employees and independent contractors mandated by proposed § 322.9(b), the FTC should also require all MARS providers to maintain records of all employees, independent contractors and subcontractors. Maintaining such records enable regulators to better enforce the rule, ensures those in violation are held accountable and can aid in tracking patterns of violations by individuals shifting from firm to firm.

- C. Require recording of verbal representations made during communications with consumers.

Proposed § 322.9(b)(1) requires MARS providers to monitor the oral representations made by all employees and independent contractors by performing random, blind tape recording and testing or oral representations made by persons engaged in sales and other customer service functions. DCA strongly supports this requirement and the inclusion of such recordings in the proposed recordkeeping requirements. Requiring auditable records of phone conversations will help to ensure consumers receive the legally mandated disclosures and are not deceived into paying for mortgage assistance services.³⁴

VI. Rescission

- A. Require, at a minimum, a fifteen business day right to cancel at no penalty.

Consumers using mortgage assistance services are often under duress when seeking help from for-profit providers to prevent their homes from being foreclosed. Given the emotional distress associated with the situation, consumers must be given a fair opportunity to review and understand the terms and conditions of a contract with a MARS provider. The FTC should require MARS providers to grant consumers, at a minimum, a fifteen business day right to cancel at no penalty, and this time period should be extended if any aspect of the sale of the mortgage assistance service is not in full compliance with the law. As noted by the National Consumer Law Center, most state laws afford consumers the right to cancel a MARS contract without penalty³⁵, recognizing the importance of cooling off periods in this context.

Cooling off periods are frequently required in other contexts. For example, in New York City, home improvement contractors must provide consumers with a three-day right of cancellation and may not perform any work or service until the cancellation period has expired.³⁶ Similarly, consumers of immigration service providers in New York City have the right to cancel their contract within three business days after execution of the contract, without fee or penalty.³⁷ Given the likelihood a consumer entering into a MARS contract is in distress, a longer cooling off period of fifteen business days is appropriate. The FTC should grant consumers nationwide this protection by requiring a fifteen business day cooling off period.

³⁴ DCA's proposed rules for recordkeeping requirements for debt collection agencies in New York City include such a provision.

³⁵ Saunders, Lauren K., Andrew G. Pizor, and Tara Tworney, "Desperate Homeowners: Loan Mod Scammers Step in When Loan Servicers Refuse to Provide Relief," National Consumer Law Center, July 2009.

³⁶ Rules of the City of New York, Title 6, Title 20, Chapter 2, Subchapter 22. Available at http://www.nyc.gov/html/dca/downloads/pdf/home_improvement_law_rules.pdf.

³⁷ New York City Administrative Code, Title 20, § 20-772.

VII. Actions by States

- A. Authorize local governments, as well as states, to enforce the MARS rules.

The FTC should amend proposed § 322.10 to explicitly permit local government entities to bring action under the rule. In New York City, DCA engages in local enforcement, creates local rules and works with other law enforcement agencies to curb abusive mortgage assistance services. Around the country, local authorities like DCA have on-the-ground experience protecting consumers in areas most relevant to their jurisdiction. As fly-by-night foreclosure rescue scams continue to proliferate, successfully curbing mortgage relief scams hinges upon effective enforcement. New York City and an increasing number of other local governments across the country are working on comprehensive programs to financially empower residents. Through these efforts in New York, DCA learns first-hand about emerging scams from consumers receiving financial counseling and coaching at our Financial Empowerment Centers. Authorizing local governments to enforce these rules increases the number of cops on the beat and leverages this local expertise to better protect consumers.

- B. Do not preempt stronger state and local protections.

The proposed regulation is silent on the question of the power of states and localities to maintain and set stronger laws. As a result, the rule sets up a possible dangerous outcome whereby existing consumer protections might be undermined by the rule. Many state and local law enforcement agencies around the country, including DCA, make and enforce consumer protection laws and regulations. A number of state and local governments have already implemented strong, effective laws and regulations applicable to this industry, and other states may do so in the future. Further, a recent report by the National Consumer Law Center suggests that the preemption of state laws in the mortgage area is a significant underlying cause of the current crisis.³⁸

It is critical that the proposed MARS regulations act as a floor, not a ceiling. Given the FTC's lack of jurisdiction over not-for-profit MARS providers, strong state laws play an important role in preventing the likely scenario of mortgage rescue businesses converting to non-profit status to evade regulation.³⁹ If states are able to enact strong protections that are broadly applicable, state legislatures are more likely to focus on this industry and enact laws that close loopholes, including those arising as a result of jurisdictional issues. The FTC should issue new rules to protect homeowners in states and localities that have not enacted sufficient protections. However, the FTC must make clear that federal regulations do not prevent states and localities from acting to further curb abusive MARS practices affecting their citizens.

VIII. Prohibited Representations

- A. Prohibit abusive representations, including a specific ban on MARS providers' disparaging the potential to obtain a successful mortgage renegotiation without using for-profit services.

³⁸ Saunders, Lauren K., "Preemption and Regulatory Reform: Restore the States' Traditional Role as 'First Responder'," National Consumer Law Center, September 2009.

³⁹ DCA supports the application of a ban on any fees in advance of results beyond a nominal fee to not-for-profits offering MARS services.

Proposed § 322.3 prohibits a number of abusive representations frequently used by MARS providers to deceptively sell their services. DCA supports the FTC's proposed prohibitions of representations. The rules should, however, be strengthened by adding a specific ban on providers' representing, expressly or by implication, that negotiations with servicers by not-for-profit counselors or directly by consumers are not likely to be successful. This deceptive practice is quite common; for example, advertising targeted at New York City consumers routinely touts the purported failed efforts of individual homeowners to renegotiate mortgage terms as a reason to pay for MARS.⁴⁰ This information is misleading and undermines the efficacy of disclosures required by proposed § 322.4. The FTC should therefore amend proposed § 322.3 to specifically curb this misleading practice.

CONCLUSION

As the foreclosure crisis continues to devastate communities in New York City and nationwide which are struggling with joblessness and economic insecurity, scammers and profiteers have seized upon this vulnerability to drain more money from consumers on the verge of losing their homes.

DCA urges the FTC to enact strong rules to curb abusive for-profit foreclosure rescue businesses. MARS providers must be banned from collecting upfront fees, required to make clear and thorough disclosures in all communications with consumers and prohibited from misrepresenting the services they provide and the alternatives available. The rules must set standards that hold all relevant parties accountable and facilitate strong enforcement. Most importantly, states and local governments must be able to enforce the rules and enact stronger law where the situation necessitates.

This unnecessary industry is kept alive by the failure of servicers to modify mortgages and successfully mitigate foreclosures. As of February, only 29% of 60-day delinquent loans eligible for the Home Affordable Modification Program (HAMP) were in active modifications,⁴¹ As the National Consumer Law Center documents, servicers' compensation generally does not offer appropriate incentives for modifications and may actually reward their pushing loans into foreclosure.⁴² In addition to strong rules governing MARS providers, the FTC should work with Congress to align financial incentives with keeping consumers in their homes and effectively hold servicers accountable for actively working with consumers to prevent foreclosures.

Strong FTC rules preventing abusive mortgage assistance relief services, combined with laws to ensure servicers actually work with consumers, comprehensive consumer education efforts and strong state and local laws, can significantly curb this abusive industry that is destabilizing already devastated communities and preying on the desperation of struggling consumers.

⁴⁰ See, e.g. <http://www.usmortgagebailout.com/index-5.html>, (stating in its 'frequently asked questions' section, "I have contacted my lender and they will not work with me, can you still help? Yes, we hear this question all the time. Because we work with lenders all the time, we have developed the credibility with key contacts at most lenders and they are more receptive to us and our clients."); see also, <http://www.keepmyhouse.com/tag/maxine-waters/>, (stating "You've probably heard the expression that an individual who represents himself in court has a fool for a lawyer. This often applies to loan modification, too. While you may be able to achieve some level of success by dealing directly with a reputable and cooperative lender, you can save time, effort, and anguish by hiring a qualified attorney or loan modification professional.").

⁴¹ Making Home Affordable Program, Servicer Performance Report Through February 2010. Available at <http://www.makinghomeaffordable.gov/docs/Feb%20Report%20031210.pdf>.

⁴² Thompson, Diane E., "Why Servicers Foreclose When They Should Modify and Other Puzzles of Servicer Behavior: Servicer Compensation and its Consequences," National Consumer Law Center, October 2009.

Respectfully submitted,



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Appendix A – DCA’s Consumer Bill of Rights Regarding Tax Preparers

Consumer Bill of Rights Regarding Tax Preparers

**By law, the tax preparer must give you a free, current, and legible copy of this document before any discussions about tax preparation services.*

If you are hiring a tax preparer, you have a right to know:

- **The individual tax preparer's qualifications.** A notice of a tax preparer's qualifications must be posted in the office, and a preparer must maintain records showing the qualifications are real, including whether the preparer is an accountant or an attorney.
- **How fees are calculated, including minimum fees and any additional charges.** You must be given an itemized receipt for each tax return. The receipt must list the address and phone number where the tax preparer may be contacted throughout the year.
- **Whether or not the tax preparer will represent you at a government audit.** Failure to make this disclosure shall mean that the tax preparer agrees to represent you or to provide representation.

You are also entitled to:

- (Receive a copy of every tax return prepared at the time the original is given to you for filing.
- (Receive all personal papers upon request, when the original tax return is given to you for filing (unless the tax preparer is specifically permitted to retain such papers under state law).
- (Receive an estimate of the total cost of each service offered by the tax preparer; an estimation of the interest rate of any Refund Anticipation Loan (RAL) or other loan service offered by the tax preparer; and an estimate of how long you may reasonably have to wait for a tax refund or other tax preparation service offered by the preparer.
- (Have the tax preparer sign every tax return prepared on your behalf.

It's illegal for a tax preparer to:

- (Charge any fee, including tax preparation, service, or processing fees, for preparing a RAL.
- (Ask you to sign a blank or incomplete tax return, or alter a tax return after it has been signed by you, without your written consent.
- (Claim to give you an "instant tax refund" that is actually an interest-bearing loan unless that fact is disclosed to you in accordance with federal and state law.
- (Charge a fee based upon the amount of tax owed or refund due.
- (Guarantee a specific refund amount, or guarantee that you will not be audited by any government tax agency.
- (Request that you assign to the preparer any portion of the refund due.

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Michael R. Bloomberg
Mayor

**Department of
Consumer Affairs**

Jonathan Mintz
Commissioner

It's also illegal for a tax preparer to:

- (Reveal any information on or related to your tax return to any person or business other than you or your authorized designee.
- (Use the tax preparer's addresses on a tax return as the place to which your refund should be mailed, unless you have signed a power of attorney containing such authorization.
- (Induce or attempt to induce you to violate any governmental law, rule, or regulation.
- (Use the word "accountant" in any advertisement unless at least one Certified Public Accountant or Public Accountant is present at the tax preparation location during all business hours, and controls all tax returns prepared at the location.
- (Use any term describing a specialty or expertise in an advertisement, unless the tax preparer's relevant education or experience is also disclosed in the advertisement.

Information about Refund Anticipation Loans (RALs)

- (A Refund Anticipation Loan is not a tax refund, but is in fact a high-interest loan against an anticipated tax refund.
- (Any advertisement for a RAL must state conspicuously that it is a loan, that the lender will charge a fee or interest, and it must identify the lender bank.
- (If you do not understand English or Spanish, a tax preparer must orally explain the information about a RAL in a language you understand.
- (If you are eligible for an Earned Income Tax Credit (EITC) refund, you should ask the tax preparer about electronic and other filing options to speed up payment of refunds and to avoid using RALs.

Before entering into a RAL, a tax preparer must disclose in writing in English and Spanish:

- That you are not required to take out a RAL.
- The gross amount of the refund you are eligible to receive without taking out a RAL.
- The fees you will have to pay for taking out a RAL.
- The approximate loan amount you will receive.
- The estimated annual percentage rate to be paid for the loan based on the amount of time the loan will be outstanding.
- The approximate date by when you could expect to receive the loan amount or the approximate date by when you can expect to receive your tax refund if you do not take out a RAL.

For more information or to file a complaint against an individual offering tax preparation services, call 311 or visit nyc.gov/consumers