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April 5, 2010

By Electronic Mail

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

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

Dear Sir/Madame:

We are writing in response to the Notice of Proposed Rulemaking for Mortgage Assistance Relief Services issued by the Federal Trade Commission (“FTC”) on February 4, 2010. This comment is submitted on behalf of the attorneys general of the following jurisdictions: Alaska, Arizona, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, North Carolina, North Dakota, Commonwealth of the Northern Mariana Islands, Ohio, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Washington, West Virginia, and Wyoming (collectively, “Attorneys General”). We write as the primary state law enforcement officials in the United States who handle consumer complaints against companies offering mortgage assistance relief services and who enforce laws designed to help protect consumers from unfair and deceptive practices perpetrated by these companies.

We previously submitted comments on July 15, 2009 on behalf of the attorneys general of 43 jurisdictions advocating for a nationwide rule regulating companies that promise to obtain mortgage loan modifications or other assistance for homeowners who are having difficulty paying their mortgage loans.¹ We believe that the any such rule, in order to be effective, must

¹ The participating jurisdictions were Alabama, Arizona, California, Colorado, Connecticut, Delaware, Florida, Georgia, Guam, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Michigan,

prohibit mortgage consultants from soliciting and collecting fees before completing all promised services. We also believe that the rule should broadly define mortgage relief services and extend protections to as many consumers as possible. We support the FTC's proposed rule, which has both a strong prohibition on advance fees and only limited exceptions to the rule's coverage. Our comments below reiterate the position in our initial submission and address some of the issues and questions raised in the Notice of Proposed Rule-Making.

The Proposed Rule's Prohibition on the Collection of Advance Fees is Critical.

We are in strong support of prohibiting rescue consultants from requesting or receiving payment until the completion of all services promised or reasonably expected by the consumers based on the consultant's representations. The advance fee ban is the linchpin of effective deterrence of fraudulent practices by providers of mortgage relief services. The collection of advance fees virtually ensures that consumers will have no recourse when consultants fail to perform promised services, as is generally the case. In our experience, refund policies, escrow accounts and progress payments are all inadequate substitutes for the protections offered by the prohibition on advance fees.

Refund Policies

Consultants generally ignore their own refund policies. In the vast majority of complaints received by our offices, consumers were unable to get refunds even though the consultants performed little or no work and had promised consumers money-back guarantees. In some cases, the companies had closed or changed locations by the time the consumers discovered there was a problem, thereby preventing the consumers from even requesting a refund. When consumers could reach the companies, their requests for refunds were typically ignored. In those few cases where the companies responded to the consumers' refund requests, the consultants frequently claimed the consumers breached the consulting agreement by contacting their own lenders and were therefore not entitled to a refund.

Escrow Accounts

Likewise, third-party escrow accounts will not protect consumers' interests in the same manner as an advance fee prohibition. Indeed, there is evidence that third-party escrow accounts are subject to manipulation that renders their purported protections ineffective. This is exemplified by the Illinois Attorney General's November 2009 lawsuit against Loan Mod One, LLC.

Loan Mod One charged consumers advance fees prior to the completion of services and partnered with an attorney who deposited consumers' payments in an escrow account. Although consumers did not pay Loan Mod One directly, the attorney's escrow account provided them no greater protection. Loan Mod One simply reported to the attorney that it had completed work on a loan modification – even though that was not the case – and the attorney transferred the consumer's payment from escrow to the company. As consumers believed that Loan Mod One

Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Vermont, Virginia, Washington, West Virginia, and Wyoming.

was working on their loan modifications, they did not contact the attorney to request a refund until long after the payments had been released from escrow. At that point, the attorney refused to provide any refunds, since the consumers' money had already been released to Loan Mod One. The consumers then unsuccessfully attempted to get refunds from Loan Mod One. As this case illustrates, depositing payments in escrow accounts provides illusory protection and gives consumers a false sense of security.

Progress Payments

Allowing consultants to charge their fees piecemeal or as progress payments is also an inadequate protection for consumers. As we noted in our original comment, we have seen companies attempt to split agreements for loan modification services into a number of contracts for supposedly discrete stages of the process. Not surprisingly, these companies charge most of their fees for the initial steps of the process, such as a short intake phone review or sending the consumer preliminary forms. In response to the FTC's question, we have not seen examples of companies charging nominal or modest set-up fees. In any event, consumers are extremely unlikely to recover these initial payments if the company fails to render adequate services.

The importance of the advance fee prohibition cannot be overstated. Defrauded consumers who are already struggling financially will have little ability to recover money paid to rescue consultants. Although the sums at stake are significant for consumers, they are not large enough to justify consumers' pursuing individual lawsuits against the companies. Even if the consumer did bring a lawsuit against the consultant, in all likelihood it would end in an uncollectible judgment against a defunct out-of-state company. The only guaranteed protection for consumers is a prohibition on the solicitation or payment of fees prior to the completion of services.

Broad Coverage and Limited Exemptions are Essential Elements of the Proposed Rule.

Along with the prohibition on advance fees, we strongly advocate for a rule that has broad coverage and limited exceptions. We support broad application of the rule to cover all homeowners, regardless of whether they are in foreclosure or have defaulted on their loans. As we noted in our previous comment, many consumers who are experiencing difficulty paying their mortgages may not yet be in default, but recognize that they soon will be. There is no reason that these consumers should be without the protections afforded to homeowners who are already in default on their loans or in the foreclosure process.

It is important that exemptions to the rule's coverage be limited and narrow. As detailed in our earlier submission, companies are now exploiting exemptions in state mortgage rescue statutes in order to evade compliance with state laws. The exemption for attorneys has been particularly abused. As an example, the Office of the Illinois Attorney General received complaints about 12 mortgage rescue consultant companies on March 18 and 19, 2010. Attorneys were involved with half of these companies. These complaints ranged from companies that had attorneys on staff to mortgage foreclosure rescue companies directly operated by attorneys. Some of the attorneys involved were licensed in states other than Illinois and are therefore subject to Illinois' Mortgage Rescue Fraud Act. Other attorneys were licensed in Illinois and may be exempt from Illinois' Mortgage Rescue Fraud Act if they are engaged in the practice of law – a difficult and fact-

intensive inquiry. We expect the trend of using attorneys as fronts for mortgage rescue companies to continue. We have noticed that national companies are recruiting for attorney “partners” or “local counsel” in all of the states they work in to evade states’ mortgage rescue fraud statutes.

The FTC’s proposed rule still provides a workable exemption for attorneys engaged in traditional legal activities, such as representing consumers in bankruptcy, foreclosure or other court or administrative proceedings. It is crucial that the rule not contain a broad, status-based exemption that categorically excludes attorneys from its coverage. Based on the continued – and increasing – number of complaints we are receiving against companies exploiting the attorney exemption, we support only a narrowly-crafted exemption for attorney services.

While we agree with the exemption for not-for-profits, we caution the FTC to ensure that such an exemption is not exploited. We have noticed some for-profit companies attempt to gain not-for-profit status in order to evade state mortgage foreclosure rescue laws. We anticipate that for-profit companies will continue to attempt to use this exemption to evade state laws and the proposed rule. The FTC may want to consider limiting the not-for-profit exemption to entities that have been in business for a certain number of years or that are HUD-certified housing counseling agencies.

The Proposed Disclosures Can Be Strengthened to Make Consumers’ Rights and Options Clearer.

Although disclosures are not a substitute for the advanced fee prohibition as we discussed in our initial comments, we do generally support enhanced disclosure requirements for mortgage assistance relief service providers. We have the following suggestions to strengthen the FTC’s proposed disclosures. First, in Section 322.4(b)(1), the FTC requires consultants disclose the exact amount that the consumer must pay for mortgage assistance relief services. We suggest this disclosure include the statement that “This amount will not be due until all promised results have been achieved.” It is important for consumers to understand that rescue consultants are prohibited from collecting up-front fees, which is addressed in other sections of the rule.

Along the same line, we would suggest making clear that consultants may not advise consumers not to pay their mortgages. This is implied in Section 322.3(a), which prohibits consultants from telling consumers they should not or cannot contact their lenders, and Section 322.3(b)(4), which states that consultants may not misrepresent a consumer’s obligation to make mortgage payments. We are aware of a number of rescue consultants who incorrectly claim that consumers’ lenders will not work with them until they are behind on their mortgage payments. We are also aware of consultants who advise consumers not to make mortgage payments so that they will be able to afford mortgage loan modification fees. In light of these issues, we suggest Section 322.3(a) include the statement that consultants are prohibited from representing that a consumer “should stop making mortgage payments.”

Finally, our experience has shown that many consumers are unaware they can obtain mortgage loan modification assistance through not-for-profit HUD-approved housing counseling agencies. This important information could be disseminated to consumers as part of the required

disclosures under Section 322.4. We would propose including a new subsection under Section 322.4(b) that “Free or low-cost mortgage loan modification services are available by contacting the U.S. Department of Housing and Urban Development at 1-800-569-4287.”

The Proposed Rule Would Work Harmoniously With Existing State Laws.

In its Notice, the FTC asked about the interplay between the proposed rule and state statutes that govern sale-leaseback or title-reconveyance transactions. We believe that the proposed rule will not interfere with state laws, but instead will complement existing state laws that address sale-leaseback transactions. Under the rule, companies engaged in all types of foreclosure rescue schemes would be subject to a minimum standard of conduct regarding payment of fees and disclosures, leaving the particular issues raised by companies that orchestrate sale-leaseback transactions to be addressed by state law. A number of states have mortgage foreclosure rescue statutes that cover consulting work in general and then provide more in-depth protections for consumers involved in sale-leaseback transactions. In these states, the two provisions are used harmoniously and there is every expectation that would be the case with the FTC’s proposed rule too.

In closing, we believe that the Federal Trade Commission’s proposed rule will provide much needed nationwide protections for consumers from mortgage foreclosure rescue consultant scams. We strongly support the rule as drafted and hope that the FTC finds our comments useful in achieving its consumer protection goals.

Very truly yours,

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