American Financial Services Association

March 29, 2010

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, Rule No. R911003

Ladies and Gentlemen:

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

AFSA strongly supports the issuance of a rule by the Federal Trade Commission ("FTC") governing the activities of for-profit mortgage assistance relief service ("MARS") providers, in view of the FTC's numerous enforcement actions against such MARS providers. AFSA recognizes that many MARS providers charge large up-front fees, often in the thousands of dollars, without providing any meaningful service to consumers. Members of AFSA have repeatedly stated that any modification to the terms of a mortgage obligation worked out between a MARS provider and a lender or servicer could also be made, at no cost to the consumer, between the consumer and lender or servicer without any help from a third-party. AFSA agrees with the FTC that MARS providers "frequently neglect to commence negotiations or have substantive discussions with the consumer's lender or servicer."[1] AFSA also agrees with the FTC that, "In many cases, the consumer harm from this failure to perform as promised is exacerbated because MARS providers often instruct consumers to stop communicating with their lenders. Because consumers sever their contact with lenders and servicers, they . . . may never learn of concessions that their lender or servicer is willing to make; or, worst of all, may never

[1] *Mortgage Assistance Relief Services, Notice of Proposed Rulemaking*, Federal Trade Commission, 75 Fed. Reg. 10711 (March 9, 2010).

discover that foreclosure is imminent."[2] Consumers must be protected from these harmful practices.

In the Advance Notice of Proposed Rulemaking, it was unclear whether or not the FTC intended to exempt mortgage lenders and servicers from the rule. AFSA argued for an explicit exemption for mortgage lenders and servicers since lenders and servicers do not engage in the types of unfair and deceptive conduct the FTC is trying to regulate and because an overly broad rule would restrict mortgage servicers' loss mitigation activities. AFSA commends the FTC for excluding loan holders, servicers, and the agents of such holders and servicers, from the definition of a MARS provider. However, AFSA recommends modifying the exemption slightly, as explained below.

Although AFSA agrees with many of the FTC's assertions in the Proposed Rule, AFSA takes exception to the statement, "Apart from these programs, lenders and servicers often are unwilling to modify the terms of mortgage loans or forgive fees and penalties as an alternative to foreclosure." In fact, lenders and servicers have every reason to modify loans in default. Lenders and servicers lose money in foreclosures. AFSA member companies have implemented loss mitigation programs that include loan modification consideration and are working to assist eligible homeowners to refinance or modify their mortgage loans to affordable payments. In addition, many AFSA members, as well as AFSA itself, are members of the HOPE NOW Alliance, which provides homeowners with free foreclosure prevention assistance.

General Questions for Comment

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

B. *1. (3) Proposed §§ 322.2(i)(1) and (2) generally exempt loan holders and servicers, as well as their agents, from the definition of "mortgage assistance relief service providers." Is this exemption appropriate? Why or why not? Do these entities promote or sell MARS to consumers? If so, what types of services are offered to consumers and how are fees collected for these services? Are there concerns that loan holders and servicers engage in deceptive or unfair conduct addressed by the proposed Rule? If so, please provide a detailed explanation.*

The proposed exemption for loan holders and servicers, as well as their agents, is appropriate. First, this rule is not intended to regulate mortgage holders and servicers, but to stop for-profit MARS providers from harming consumers. The FTC is currently drafting proposed rules for mortgage acts and practices. That rule, not the Proposed Rule,

[2] *Id.*, 75 Fed. Reg. 10711

is the appropriate place to consider additional regulations for mortgage holders and servicers.

Second, without the exemption, the Proposed Rule could prohibit or limit practices engaged in by mortgage servicers. To benefit consumers who may be in need of assistance, mortgage servicers use some of the same methods that reputable foreclosure rescue and loan modification entities use to make their consumers aware of the existence of loan modifications and options to avoid foreclosure, such as monthly account statements, written correspondence, social media (providing contact information in response to specific blogs, for example), and their Web sites on the Internet. Each of these communications is designed to make the consumer aware of the availability of possible loss mitigation options and to encourage the consumer to contact the mortgage servicer directly, which is a critical component of any loss mitigation policy by a mortgage servicer to assist consumers. Without the exemption, mortgage servicers may be bereft of important tools to help consumers.

Third, further regulation of mortgage servicers is redundant. Banks, thrifts, federal credit unions and other mortgage servicers all provide the same or similar loss mitigation services to consumers with mortgage loan accounts and are already subject to regulatory oversight at the state and federal level. Banks' and thrifts' operating subsidiaries are also subject to the same regulations as their parents.[3]

Fourth, regulation of mortgage holders and servicers under the Proposed Rule is not necessary because the Proposed Rule focuses on MARS providers that offer services to consumers, on behalf of consumers, not on behalf of mortgage holders or servicers. The holder or servicer of a dwelling-secured loan could not offer MARS services to consumers, on behalf of consumers, in connection with loans so held or serviced – that would effectively require the holder or servicer of the loan to act against its own economic interests (and in breach of applicable loan servicing contracts).

As stated above, AFSA supports the proposed exemption for mortgage lenders and servicers, but we believes this exemption needs to be modified slightly. Otherwise, employee incentive programs with commissions and/or collection attorneys representing servicers or loan holders could be impacted as they sometimes work on a contingency, as demands for loan payments could fall under "collect, or receive any money or other valuable consideration from the consumer for the agent's benefit."[4]

[3] The FTC has acknowledged that its MARS regulation would not apply to banks, thrifts, federal credit unions, or certain nonprofits. (See, e.g., Proposed Rule, Section 322.2(i)(3).)

[4] *Id.*, 75 Fed. Reg. 10736

AFSA recommends either dropping the clause "provided that any such agent does not claim, demand, charge, collect, or receive any money or other valuable consideration from the consumer for the agent's benefit,"[5] or rewriting it as follows: "provided that any such agent does not claim, demand, charge, collect, or receive any money or other valuable consideration from the consumer other than as permitted under the terms of the loan agreement." It is unclear why it would be acceptable for a servicer or loan holder to "claim, demand, charge, collect, or receive any money or other valuable consideration from the consumer,"[6] but not an agent. As long as the agent is acting for and in the interests of the servicer or loan holder, and is not seeking to personally enrich herself using the context of her agency, without simultaneously benefiting the principal (the loan holder or servicer), there is no violation of the agency principle. No actual agent for a servicer or loan holder would engage in the types of misrepresentations perpetuated by some for-profit MARS providers.

B. 2. (1) Proposed § 322.3(a) bans providers from advising consumers not to contact or communicate with their lenders or servicers. What are the costs and benefits of banning these types of statements? Should additional statements relating to MARS be prohibited? Are there alternative approaches to banning such advice that would allow such advice to be given but would still protect consumers from the risk arising from not communicating with servicers or lenders?

AFSA strongly supports proposed § 322.3(a). MARS providers should be banned from advising consumers not to contact or communicate with their lenders or servicers. If lenders and servicers are unable to contact borrowers, they are unable to offer workouts or loan modifications. Additionally, lenders and servicers would be unable to warn a borrower of a potential foreclosure. Telling a borrower not to contact a lender or servicer is the *worst* advice someone can give a borrower at risk or in default.

B. 3. (1) Are the disclosures required by proposed § 322.4 appropriate to address current and prospective harms to consumers in connection with the sale of MARS? Why or why not? How could the disclosures be modified to better address these harms? Is the proposed language of each disclosure readily understandable by consumers? If not, is there alternative language that would be more effective? If so, provide the suggested disclosure language and discuss why it would be more effective.

The disclosures required by proposed § 332.4 are appropriate to address current and prospective harms to the consumer. AFSA believes that including the statement, "(Name of company) is a for-profit business not associated with the government. This offer has

[5] *Id.*, 75 Fed. Reg. 10736
[6] *Id.*, 75 Fed. Reg. 10736

not been approved by the government or lender," will help consumers to better understand what they are being offered by a MARS provider.

B. *4. (1) Proposed § 322.5 specifically prohibits the collection of any fee or other consideration for MARS until after the provider has achieved all of the results the provider represented, expressly or by implication, to the consumer that the service would achieve, and that is consistent with consumers' reasonable expectations about the service. Should MARS providers be required to achieve these results to receive payment? Why or why not? Would an alternative standard for receiving payment be more appropriate? If so, describe the alternative standard and discuss its relative costs and benefits.*

Yes, AFSA believes that MARS providers should be required to achieve results before they receive payment. Banning upfront fees is the best way for the FTC to ensure that MARS providers do really provide consumers with a beneficial service.

B. *6. (1) Proposed § 322.7 exempts attorneys from proposed § 322.3(a)'s ban on instructing consumers not to communicate with their lenders or servicers, so long as the attorneys are licensed to practice in the state where the consumer resides. Is this exemption appropriate? Why or why not? What are the costs and benefits of allowing attorneys to make these types of statements? Are there other types of entities that should be exempted from this provision? If so, identify which entities and explain why.*

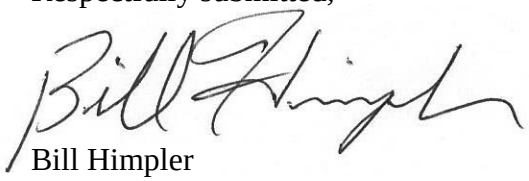
This exemption is not appropriate. Most of the letters that AFSA member receive are from licensed attorneys acting as MARS providers, so creating an exemption for these attorneys will harm consumers. Often, an out-of-state attorney will involve an in-state attorney in name only, just to qualify as an in-state attorney. For example, the out-of-state attorney may just add the name of an in-state attorney to the out-of-state attorney's letterhead, but may never actually talk with the in-state attorney. The lender or servicer will never actually deal with the in-state attorney. If this exemption remains in the final rule, lenders and servicers will still be unable to offer workouts or loan modifications to these consumers or warn them of an impending foreclosure.

In situations where the advice not to contact or communicate with the lender or servicer is implied, such as when a consumer signs a power of attorney ("POA"), the MARS provider should be required to give a disclosure warning consumers of the risks arising from not communicating with their servicer or lender.

Conclusion

AFSA strongly supports the issuance of a rule by the FTC governing the activities of MARS providers. In addition, we believe the proposed exemption for loan holders and servicers, as well as their agents, is appropriate but needs slight modifications. We thank the FTC for the opportunity to comment on the Proposed Rule and commend the Commission for its work in protecting consumers. Please feel free to contact me with any questions at 202-296-5544, ext. 616 or bhimpler@afsamail.org.

Respectfully submitted,



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