

## **UNDERSTANDING THE NEW FTC REGULATION OF “MORTGAGE ASSISTANCE RELIEF SERVICES” PROVIDERS**

### **I. INTRODUCTION**

The Federal Trade Commission (“FTC”) has issued what it refers to as the “Mortgage Assistance Relief Services” Rule (the “Rule”) designed to protect distressed homeowners from mortgage relief scams – what the FTC describes as “bogus operations that falsely claim that, for a fee, they will negotiate with the consumers’ mortgage lender or servicer to obtain a loan modification, a short sale or other relief from foreclosure.” The Rule is actually a series of regulations aimed at protecting consumers from these scams.

“Mortgage Assistance Relief Services” (“MARS”) providers are broadly defined to include providers of any of the following services, if such service is provided in exchange for consideration:

- (1) Stopping, preventing or postponing foreclosure;
- (2) Negotiating a loan modification, foreclosure or extension; and/or
- (3) Negotiating a short sale or deed in lieu arrangement.

The Rule also covers sale-leaseback transactions marketed as a way to save a consumer’s home from foreclosure. As will be discussed in more detail below, under the Rule, MARS providers are required to make certain disclosures and, in addition, are prohibited from collecting any fees in advance. The Rule prohibits MARS providers from making false or misleading claims about the services they provide. The FTC is particularly concerned about false claims as to the likelihood of success or

the provider's affiliation with various governmental programs. MARS providers are expressly prohibited from advising consumers that they should not communicate with their own lender. "Assisting or facilitating" in the violation of these requirements is also a violation of the Rule. Finally, the Rule contains detailed recordkeeping requirements.

## II. DISCUSSION

### A. Disclosure Regulations

Unlike for example, Michigan's agency disclosure requirement, MARS disclosures are not a one-time requirement. Instead, the mandated disclosures must be made by a MARS provider in each and every communication it has with a consumer. The type of the disclosure that must be made depends on the nature of the communication.

Every communication that takes place prior to the time a consumer agrees to use the MARS provider's service (whether the communication is directed to the general public or to a specific consumer) must include the following statements:

**[Name of Company] is not associated with the government, and our service is not approved by the government or your lender.**

**Even if you accept this offer and use our service, your lender may not agree to change your loan.**

In addition, if the communication is directed to a specific consumer, the communication must also include the following statement:

**You may stop doing business with us at any time. You may accept or reject the offer of mortgage assistance we obtain from your lender [or servicer]. If you reject the offer, you do not have to pay us. If you accept the offer, you will have to pay us [insert amount or method for calculating the amount] for our services.**

In situations where the MARS company advises the consumers to stop paying their mortgage, the following disclosure must be made:

**If you stop paying your mortgage, you could lose your home and damage your credit rating.**

When the consumers are finally presented with an offer from the consumers' lender, the following disclosure must be made:

**This is an offer of mortgage assistance we obtained from your lender [or servicer]. You may accept or reject the offer. If you reject the offer, you do not have to pay us. If you accept the offer, you will have to pay us [insert amount which must be the same as previously disclosed] for our services.**

In addition, when the MARS provider presents an offer from the consumers' lender, it must be accompanied by a notice prepared by the lender that describes all the material differences between the consumers' current loan and the new proposal, including but not limited to, differences in the loan's:

1. principal balance;
2. interest rate;
3. payment amount and number;
4. monthly escrow amounts;
5. amount of delinquent payments;

6. assessed fees and penalties; and
7. term.

If the lender's offer is only for a trial modification of the loan, then the disclosure must include a warning that the consumers may not qualify for a permanent modification and describe any amounts that the consumers may owe if they do qualify for a permanent modification.

The disclosure requirements apply whether the communication is written or through audio or video means. The Rule contains extremely detailed requirements as to type style, size and placement, the manner of speech (*e.g.*, “in a slow and deliberate manner in a reasonably understandable volume and pitch”) and the visual display.

#### B. Advance Fee Prohibition

In addition to the disclosure requirements, the Rule prohibits MARS providers from collecting any fees until they have provided the consumers with a written offer from their lender that is acceptable to the consumers. A MARS provider cannot accept advance payment of funds to be held in escrow or collect fees for “piecemeal services.” Again, as stated above, the offer from the lender must be accompanied by a statement that the consumers may reject the offer, in which case they will not have to pay the MARS provider. In addition, the offer must include a notice from the lender that outlines the differences between the existing loan and the proposed modification.

### C. Assisting and Facilitating

The Rule expressly states that a person may not provide “substantial assistance” to any MARS provider if he or she knows or “consciously avoids knowing” that the provider is violating these requirements of the Rule.

In its comments, the FTC has stated this standard prohibits a person from turning a “blind eye” to a Rule violation. If someone who is providing substantial assistance or support to a MARS provider receives or becomes aware of information that calls into question the legality of the MARS provider’s practices, he will be liable if he continues to assist and support that MARS provider.

According to the FTC, providing “substantial assistance” to a MARS provider includes such things as customer referrals, marketing support or acting as a “lead generator.”

### D. Miscellaneous

The Rule prohibits false and misleading claims and contains detailed recordkeeping requirements. A consumer may not be told not to speak to their lender directly. Moreover, the protections contained in the Rule cannot be waived by the consumers. For example, if a MARS provider has promised a principal reduction and delivers only an interest rate reduction, the fact that the consumers agreed to the interest rate reduction instead will not protect the MARS provider.

The Rule contains an exemption for nonprofit organizations that provides these services as well as a more limited exemption for attorneys.

### E. Penalties

Anyone violating the new MARS Rule is liable for civil penalties of up to \$11,000 for each violation, or in the case of continual violations, \$11,000 for each day that the person or company fails to comply with the law. Either the FTC or certain state officials can bring an action under the Rule; there is no private cause of action.

### **III. CONCLUSION**

In its commentary, the FTC expresses frustration at the fact that despite the various programs offered by federal, state and local governmental entities and nonprofit organizations, homeowners in financial distress continue to seek assistance from, and are taken advantage of by, for-profit companies. The FTC states that based on the information available to it, it appears that “the vast majority of consumers do not receive the results MARS providers promise.” Instead, the FTC points out:

After collecting their upfront fees, MARS providers often fail to make initial contact with the consumer’s lender or servicer for months, if at all, or to have substantive discussions or negotiations with the lender or servicer. In many cases, MARS providers fail to perform even the most basic promised services or achieve any beneficial results.

The Rule was designed to make MARS providers more accountable.

This article is intended as an overview of the new MARS Rule. Any person or entity who provides MARS services for a fee should consult an attorney for assistance in complying with these various requirements.