

## FTC Enforcement Policy: Real Estate Professionals and the Mortgage Assistance Relief Services Rule

On December 1, 2010, the Federal Trade Commission (“FTC” or “Commission”) published the Mortgage Assistance Relief Services Rule (“MARS Rule”) addressing the practices of providers of mortgage assistance relief services.<sup>1</sup> The MARS Rule covers persons or entities engaged in the marketing or provision of services to assist consumers in obtaining modifications of their mortgage loans or other help in avoiding foreclosure.<sup>2</sup> The Rule (1) prohibits MARS providers from making false or misleading claims,<sup>3</sup> (2) mandates that providers disclose certain information about their services,<sup>4</sup> (3) bars the collection of advance fees for these services (*i.e.*, prior to the completion of the provider’s services and the consumer’s acceptance of the results),<sup>5</sup> (4) prohibits any third party from providing substantial assistance or support to another whom they know or consciously avoid knowing is engaged in a violation of the Rule,<sup>6</sup> and (5) imposes recordkeeping and compliance requirements.<sup>7</sup> All of the provisions of the Rule, other than the advance fee ban, took effect on December 29, 2010. The advance fee ban became effective on January 31, 2011.

The Rule’s definition of covered MARS includes a number of specific services, including “[n]egotiating, [o]btaining, or [a]rranging . . . [a] short sale of a dwelling.”<sup>8</sup> A short sale refers to a sale by a consumer of his or her dwelling for an amount that is less than the balance the consumer owes under the mortgage loan. Typically, as part of a short sale transaction, the mortgage lender or servicer agrees to forgo pursuing foreclosure proceedings and, instead, accepts the proceeds of the home sale (although in some cases the lender or servicer may seek to obtain payment by the consumer of the difference between the sale price and the amount owing on the mortgage loan).

In recent months, a number of real estate brokers and agents (“real estate professionals”) and their representatives have contacted the Commission to question the applicability of certain provisions of the MARS Rule to real estate professionals who assist consumers in obtaining short sales. In particular, these persons have raised concerns about the accuracy and

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<sup>1</sup> 75 Fed. Reg. 75092 (Dec. 1, 2010). This FTC promulgated the MARS Rule pursuant to the 2009 Omnibus Appropriations Act, Pub. L. 111-8, 123 Stat. 524, as clarified by the Credit Card Accountability Responsibility and Disclosure Act of 2009, Pub. L. 111-24, 123 Stat. 1734.

<sup>2</sup> 16 C.F.R. § 322.2(i) (definition of “mortgage assistance relief services”).

<sup>3</sup> 16 C.F.R. § 322.3(b).

<sup>4</sup> 16 C.F.R. §§ 322.4 & 322.5(b)-(d).

<sup>5</sup> 16 C.F.R. § 322.5(a).

<sup>6</sup> 16 C.F.R. § 322.6.

<sup>7</sup> 16 C.F.R. § 322.9.

<sup>8</sup> 16 C.F.R. § 322.2(i)(6)(i).

comprehensibility of the disclosures mandated by the Rule, and the unintended consequences that might result from application of the advance fee ban, in the context of a real estate professional assisting a consumer in negotiating or obtaining a short sale.

Until further notice, the Commission will forbear from taking any enforcement action for violation of the MARS Rule with the exception of the Rule's prohibition against misrepresentations in Section 322.3(b) against a real estate professional who provides "any service, plan, or program, offered or provided to the consumer in exchange for consideration, that is represented, expressly or by implication, to assist or attempt to assist the consumer [in] . . . [n]egotiating, [o]btaining or [a]rranging . . . [a] short sale of a dwelling."<sup>9</sup> This forbearance of enforcement will only apply to real estate brokers (and real estate agents under their direction and control) who are:

- (1) licensed and maintain good standing pursuant to any applicable state law requirements;
- (2) in compliance with state laws governing the practices of real estate professionals; and
- (3) assisting or attempting to assist a consumer in negotiating, obtaining or arranging a short sale of a dwelling in the course of securing the sale of the consumer's home.

The Commission emphasizes, however, that it will continue to enforce Section 5 of the FTC Act, 15 U.S.C. § 45, which prohibits unfair or deceptive acts or practices in or affecting commerce, and Section 322.3(b) of the Rule against real estate professionals who assist consumers in negotiating or obtaining short sales. In addition, the Commission will continue to enforce the MARS Rule (as well as Section 5 of the FTC Act) against real estate professionals to the extent that they are providing other forms of mortgage assistance relief services. The Commission will closely monitor this industry and will bring enforcement actions, as appropriate and consistent with this statement, against real estate professionals who engage in unfair or deceptive acts or practices.

This forbearance of enforcement applies only to real estate brokers (and real estate agents under their direction and control) who assist consumers in negotiating or obtaining short sales and meet the above criteria. The Commission will continue to enforce the MARS Rule as to all other providers of mortgage assistance relief services. Additionally, on July 21, 2011, the Commission's rulemaking authority with respect to the MARS Rule will transfer to the Consumer Financial Protection Bureau (CFPB).<sup>10</sup> Thus, the CFPB will have the authority to determine whether any modification of the MARS Rule is warranted with respect to real estate professionals who assist a consumer in negotiating or obtaining a short sale

For questions regarding this enforcement policy, please contact agency staff at 202-326-3224.

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<sup>9</sup> 16 C.F.R. § 322.2(i)(6)(i).

<sup>10</sup> Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, §§ 1061-1062; 124 Stat. 1376, 2035-40 (2010); Dep't of the Treasury, *Bureau of Consumer Financial Protection; Designated Transfer Date*, 75 FR 57252, 57253 (Sept. 20, 2010).