

FEDERAL REGULATORS GET TOUGH ON SHORT SALE NEGOTIATORS

The Federal Trade Commission has issued a Federal Regulation governing the solicitation and performance of "short sale" services (16 CFR 322). The regulation was issued in response to numerous complaints from consumers about false, misleading and deceptive practices by "short sale" negotiators regarding the nature and scope of their services, the likelihood of success in negotiating short sales and the fees they would receive in connection with their services. The rule came into full force on January 31, 2011.

The Rule governs any individual or entity that "for consideration" negotiates, obtains or arranges "a short sale of a dwelling." This choice of words by the FTC is extremely important, as under Michigan law the concept of consideration is more expansive than the mere payment of fees. The Michigan Supreme Court has found consideration to exist where there is "a benefit on one side, [and] a detriment suffered, or **service** done on the other" (*General Motors Corp. v. Department of Treasury, Revenue Division* 466 Mich. 231, 238-239, 644 N.W.2d 734, 738) (emphasis added). This means that short sale providers providing "no fee" negotiations are covered by the rule where their "short sale" services are coupled with an agreement to provide brokerage, title insurance, closing or other services. See Section 322.5 of the Rule which makes it a violation to "Request or receive payment of any fee **or other consideration...**" until the consumer has concluded a short sale agreement with their lender. (emphasis added).

The Rule also requires extensive, prominent disclosures in communications with consumers, forbids virtually any type of misrepresentation with respect to the qualifications of the service provider, the services provided, the time it will take to obtain "short sale" approval or likelihood of approval, or their fees or charges. The Rule calls for extensive record keeping by short sale negotiators, including records as to their success rate, so the FTC can review their practices.

There is an exemption from the Rule for attorneys, but the exemption only applies if the attorney is duly licensed, "provides mortgage assistance relief services as part of the practice of law" and "complies with state laws..." Attorneys can collect up front fees, but they must be placed in their client trust account. The commentary to the Rule makes it clear that attorneys must actually provide services and cannot split legal fees with non-attorneys.

The Rule impacts Realtors in two ways. First, if they are receiving any "consideration" for providing short sale services, they must comply with all of the Rule's requirements. Because a listing contract may constitute "consideration" they should comply with the Rule. Second, it also makes it a violation of the Rule "for a person to provide substantial assistance or support to any ...provider when that person knows or **consciously avoids knowing** that the provider is engaged in any act or practice that violates this rule" (emphasis added). The commentary makes clear that anything more than "casual or incidental assistance" would be a basis for liability and that "Substantial assistance could include....customer referrals." This imposes on the Realtor a

duty to know that any short sale negotiator they consistently recommend does comply with the Rule. The "Sergeant Shultz Defense" ("I know nothing, nothing!") is not applicable when making short sale referrals.

You may want to develop an office policy regarding short sale referrals or at a minimum, caution your agents that they need to verify that any short sale negotiator that they recommend is in compliance with the Rule. The penalties for violating the Rule can range up to \$11,000 per day in fines. Violations of the Rule are also probably not covered under Errors and Omissions policies under the "willful act" exclusion. The only "safe harbor" would appear to be to recommend a reputable attorney or law firm that handles short sales.

I have attached a copy of the Rule for your review, as well as Greg McClelland's commentary posted on the MAR website. The commentary on the Rule can be found online at 16 CFR Part 3222, published on December 1, 2010 in Volume 75 of the Federal Register pages 75092-75-144.

Thomas Richardson

General Counsel

Liberty Title Agency

LIST OF COMMENTERS AND SHORT-NAMES/ACRONYMS—Continued

Short-name/Acronym	Commenter
SJMA	S.J. Mobley & Associates, LLC (Sara Mobley)
Schertzing	Eric Schertzing, Treasurer, Ingham County, MI
Seise	Char Seise
Shriver	Sargent Shriver National Center on Poverty Law
Shaw	Ann Shaw, Esq.
Smith	Stewart Smith
Sygit	Drew Sygit
TNLMA	The National Loss Mitigation Association
USHLA	US Home Loan Advocates
USHS	U.S. HomeSupport (Thomas Kim)
Wallace	Lawrence Wallace
WMC	Westside Ministers Coalition
WI Bar	Wisconsin State Bar

List of FTC MARS Law Enforcement Actions

- *FTC v. Residential Relief Found., Inc.*, No. 1:10-cv-3214-JFM (D. Md. filed Nov. 15, 2010)
- *FTC v. U.S. Homeowners Relief, Inc.*, No. SA-CV-10-1452 JST (PJWx) (C. D. Cal. filed Sept. 27, 2010)
- *FTC v. Nat'l Hometeam Solutions, LLC*, No. 4:08-cv-067 (E.D. Tex. filed Aug. 30, 2010) (contempt action)
- *FTC v. Dominant Leads, LLC*, No. 1:10-cv-00997-PLF (D. D.C. filed June 15, 2010)
- *FTC v. First Universal Lending, LLC*, No. 09-CV-82322 (S.D. Fla. filed Nov. 18, 2009)
- *FTC v. Truman Foreclosure Assistance, LLC*, No. 09-23543 (S.D. Fla. filed Nov. 23, 2009)
- *FTC v. Debt Advocacy Ctr, LLC*, No. 1:09CV2712 (N.D. Ohio filed Nov. 19, 2009)
- *FTC v. Kirkland Young, LLC*, No. 09-23507 (S.D. Fla. filed Nov. 18, 2009)
- *FTC v. 1st Guar. Mortgage Corp.*, No. 09-CV-61840 (S.D. Fla. filed Nov. 17, 2009)
- *FTC v. Washington Data Res., Inc.*, No. 8:09-cv-02309-SDM-TBM (M.D. Fla. filed Nov. 12, 2009)
- *FTC v. Fed. Housing Modification Dep't, Inc.*, No. 09-CV-01753 (D.D.C. filed Sept. 16, 2009)
- *FTC v. Infinity Group Servs., No. SACV09-00977 DOC (MLGx)* (C.D. Cal. filed Aug. 26, 2009)
- *FTC v. United Credit Adjusters, Inc.*, No. 3:09-cv-00798 (JAP) (D.N.J., Amend. Compl. filed Aug. 4, 2009)
- *FTC v. Apply2Save, Inc.*, No. 2:09-cv-00345-EJL-CWD (D. Idaho filed July 14, 2009)
- *FTC v. Loss Mitigation Servs., Inc.*, No. SACV09-800 DOC (ANX) (C.D. Cal. filed July 13, 2009)
- *FTC v. Cantkier*, No. 1:09-cv-00894 (D.D.C., Amend. Compl. filed June 18, 2009)
- *FTC v. LucasLawCenter "Inc."*, No. SACV09-770 DOC (ANX) (C.D. Cal. filed July 7, 2009)
- *FTC v. US Foreclosure Relief Corp.*, No. SACV09-768 JVS (MGX) (C.D. Cal. filed July 7, 2009)
- *FTC v. Freedom Foreclosure Prevention Specialists, LLC*, No. 2:09-cv-01167-FJM (D. Ariz. filed June 1, 2009)
- *FTC v. Data Med. Capital, Inc.*, No. SACV-99-1266 AHS (Eex) (C.D. Cal., App. Contempt filed May 27, 2009)
- *FTC v. Dinamica Financiera LLC*, No. 09-CV-03554 CAS PJWx (C.D. Cal. filed May 19, 2009)
- *FTC v. Fed. Loan Modification Law Ctr., LLP*, No. SACV09-401 CJC (MLGx) (C.D. Cal. filed Apr. 3, 2009)
- *FTC v. Ryan*, No. 1:09-00535 (HHK) (D.D.C., Amend. Compl. filed Mar. 25, 2009)
- *FTC v. Home Assure, LLC*, No. 8:09-CV-00547-T-23T-Sm (M.D. Fla. filed Mar. 24, 2009)
- *FTC v. New Hope Prop. LLC*, No. 1:09-cv-01203-JBS-JS (D.N.J. filed Mar. 17, 2009)
- *FTC v. Hope Now Modifications, LLC*, No. 1:09-cv-01204-JBS-JS (D.N.J. filed Mar. 17, 2009)
- *FTC v. Nat'l Foreclosure Relief, Inc.*, No. SACV09-117 DOC (MLGx) (C.D. Cal. filed Feb. 2, 2009)
- *FTC v. United Home Savers, LLP*, No. 8:08-cv-01735-VMC-TBM (M.D. Fla. filed Sept. 3, 2008)
- *FTC v. Foreclosure Solutions, LLC*, No. 1:08-cv-01075 (N.D. Ohio filed Apr. 28, 2008)
- *FTC v. Mortgage Foreclosure Solutions, Inc.*, No. 8:08-cv-388-T-23EAJ (M.D. Fla. filed Feb. 26, 2008)
- *FTC v. Nat'l Hometeam Solutions, LLC*, No. 4:08-cv-067 (E.D. Tex. filed Feb. 26, 2008)
- *FTC v. Safe Harbour Found. of Florida, Inc.*, No. 08-C-1185 (N.D. Ill. filed Feb. 27, 2008).

VI. Final Rule**List of Subjects in 16 CFR Part 322**

Consumer protection, Trade practices, Telemarketing.

■ For the reasons set forth in the preamble, the Federal Trade Commission amends title 16, Code of Federal Regulations, by adding a new part 322, to read as follows:

PART 322—MORTGAGE ASSISTANCE RELIEF SERVICES

- Sec.
- 322.1 Scope of regulations in this part.
 - 322.2 Definitions.
 - 322.3 Prohibited representations.
 - 322.4 Disclosures required in commercial communications.
 - 322.5 Prohibition on collection of advance payments and related disclosures.
 - 322.6 Assisting and facilitating.
 - 322.7 Exemptions.
 - 322.8 Waiver not permitted.
 - 322.9 Recordkeeping and compliance requirements.
 - 322.10 Actions by states.
 - 322.11 Severability.

Authority: Public Law 111-8, section 626, 123 Stat. 524, as amended by Public Law 111-24, section 511, 123 Stat. 1734.

§ 322.1 Scope of regulations in this part.

This part implements the 2009 Omnibus Appropriations Act, Public Law 111-8, section 626, 123 Stat. 524 (Mar. 11, 2009), as clarified by the Credit Card Accountability Responsibility and Disclosure Act of 2009, Public Law 111-24, section 511, 123 Stat. 1734 (May 22, 2009).

§ 322.2 Definitions.

For the purposes of this part:

(a) "Clear and prominent" means:

(1) In textual communications, the required disclosures shall be easily readable; in a high degree of contrast from the immediate background on which it appears; in the same languages that are substantially used in the commercial communication; in a format

so that the disclosure is distinct from other text, such as inside a border; in a distinct type style, such as bold; parallel to the base of the commercial communication, and, except as otherwise provided in this rule, each letter of the disclosure shall be, at a minimum, the larger of 12-point type or one-half the size of the largest letter or numeral used in the name of the advertised website or telephone number to which consumers are referred to receive information relating to any mortgage assistance relief service. Textual communications include any communications in a written or printed form such as print publications or words displayed on the screen of a computer;

(2) In communications disseminated orally or through audible means, such as radio or streaming audio, the required disclosures shall be delivered in a slow and deliberate manner and in a reasonably understandable volume and pitch;

(3) In communications disseminated through video means, such as television or streaming video, the required disclosures shall appear simultaneously in the audio and visual parts of the commercial communication and be delivered in a manner consistent with paragraphs (a)(1) and (2) of this section. The visual disclosure shall be at least four percent of the vertical picture or screen height and appear for the duration of the oral disclosure;

(4) In communications made through interactive media, such as the Internet, online services, and software, the required disclosures shall:

(i) Be consistent with paragraphs (a)(1) through (3) of this section;

(ii) Be made on, or immediately prior to, the page on which the consumer takes any action to incur any financial obligation;

(iii) Be unavoidable, *i.e.*, visible to consumers without requiring them to scroll down a webpage; and

(iv) Appear in type at least the same size as the largest character of the advertisement;

(5) In all instances, the required disclosures shall be presented in an understandable language and syntax, and with nothing contrary to, inconsistent with, or in mitigation of the disclosures used in any communication of them; and

(6) For program-length television, radio, or Internet-based multi-media commercial communications, the required disclosures shall be made at the beginning, near the middle, and at the end of the commercial communication.

(b) "Client trust account" means a separate account created by a licensed attorney for the purpose of holding client funds, which is:

(1) Maintained in compliance with all applicable state laws and regulations, including licensing regulations; and

(2) Located in the state where the attorney's office is located, or elsewhere in the United States with the consent of the consumer on whose behalf the funds are held.

(c) "Commercial communication" means any written or oral statement, illustration, or depiction, whether in English or any other language, that is designed to effect a sale or create interest in purchasing any service, plan, or program, whether it appears on or in a label, package, package insert, radio, television, cable television, brochure, newspaper, magazine, pamphlet, leaflet, circular, mailer, book insert, free standing insert, letter, catalogue, poster, chart, billboard, public transit card, point of purchase display, film, slide, audio program transmitted over a telephone system, telemarketing script, onhold script, upsell script, training materials provided to telemarketing firms, program-length commercial ("infomercial"), the Internet, cellular network, or any other medium. Promotional materials and items and Web pages are included in the term "commercial communication."

(1) "General Commercial Communication" means a commercial communication that occurs prior to the consumer agreeing to permit the provider to seek offers of mortgage assistance relief on behalf of the consumer, or otherwise agreeing to use the mortgage assistance relief service, and that is not directed at a specific consumer.

(2) "Consumer-Specific Commercial Communication" means a commercial communication that occurs prior to the consumer agreeing to permit the provider to seek offers of mortgage assistance relief on behalf of the consumer, or otherwise agreeing to use the mortgage assistance relief service, and that is directed at a specific consumer.

(d) "Consumer" means any natural person who is obligated under any loan secured by a dwelling.

(e) "Dwelling" means a residential structure containing four or fewer units, whether or not that structure is attached to real property, that is primarily for personal, family, or household purposes. The term includes any of the following if used as a residence: an individual condominium unit, cooperative unit, mobile home, manufactured home, or trailer.

(f) "Dwelling loan" means any loan secured by a dwelling, and any associated deed of trust or mortgage.

(g) "Dwelling Loan Holder" means any individual or entity who holds the dwelling loan that is the subject of the offer to provide mortgage assistance relief services.

(h) "Material" means likely to affect a consumer's choice of, or conduct regarding, any mortgage assistance relief service.

(i) "Mortgage Assistance Relief Service" means 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 with any of the following:

(1) Stopping, preventing, or postponing any mortgage or deed of trust foreclosure sale for the consumer's dwelling, any repossession of the consumer's dwelling, or otherwise saving the consumer's dwelling from foreclosure or repossession;

(2) Negotiating, obtaining, or arranging a modification of any term of a dwelling loan, including a reduction in the amount of interest, principal balance, monthly payments, or fees;

(3) Obtaining any forbearance or modification in the timing of payments from any dwelling loan holder or servicer on any dwelling loan;

(4) Negotiating, obtaining, or arranging any extension of the period of time within which the consumer may:

(i) Cure his or her default on a dwelling loan,

(ii) Reinstate his or her dwelling loan,

(iii) Redeem a dwelling, or

(iv) Exercise any right to reinstate a dwelling loan or redeem a dwelling;

(5) Obtaining any waiver of an acceleration clause or balloon payment contained in any promissory note or contract secured by any dwelling; or

(6) Negotiating, obtaining or arranging:

(i) A short sale of a dwelling,

(ii) A deed-in-lieu of foreclosure, or

(iii) Any other disposition of a dwelling other than a sale to a third party who is not the dwelling loan holder.

(j) "Mortgage Assistance Relief Service Provider" or "Provider" means any person that provides, offers to provide, or arranges for others to provide, any mortgage assistance relief service. This term does not include:

(1) The dwelling loan holder, or any agent or contractor of such individual or entity.

(2) The servicer of a dwelling loan, or any agent or contractor of such individual or entity.

(k) "Person" means any individual, group, unincorporated association,

limited or general partnership, corporation, or other business entity, except to the extent that any person is specifically excluded from the Federal Trade Commission's jurisdiction pursuant to 15 U.S.C. 44 and 45(a)(2).

(l) "Servicer" means the individual or entity responsible for:

(1) Receiving any scheduled periodic payments from a consumer pursuant to the terms of the dwelling loan that is the subject of the offer to provide mortgage assistance relief services, including amounts for escrow accounts under section 10 of the Real Estate Settlement Procedures Act (12 U.S.C. 2609); and

(2) Making the payments of principal and interest and such other payments with respect to the amounts received from the consumer as may be required pursuant to the terms of the mortgage servicing loan documents or servicing contract.

(m) "Telemarketing" means a plan, program, or campaign which is conducted to induce the purchase of any service, by use of one or more telephones and which involves more than one interstate telephone call.

§ 322.3 Prohibited representations.

It is a violation of this rule for any mortgage assistance relief service provider to engage in the following conduct:

(a) Representing, expressly or by implication, in connection with the advertising, marketing, promotion, offering for sale, sale, or performance of any mortgage assistance relief service, that a consumer cannot or should not contact or communicate with his or her lender or servicer.

(b) Misrepresenting, expressly or by implication, any material aspect of any mortgage assistance relief service, including but not limited to:

(1) The likelihood of negotiating, obtaining, or arranging any represented service or result, such as those set forth in § 322.2(i);

(2) The amount of time it will take the mortgage assistance relief service provider to accomplish any represented service or result, such as those set forth in § 322.2(i);

(3) That a mortgage assistance relief service is affiliated with, endorsed or approved by, or otherwise associated with:

- (i) The United States government,
- (ii) Any governmental homeowner assistance plan,
- (iii) Any Federal, State, or local government agency, unit, or department,
- (iv) Any nonprofit housing counselor agency or program,
- (v) The maker, holder, or servicer of the consumer's dwelling loan, or

(vi) Any other individual, entity, or program;

(4) The consumer's obligation to make scheduled periodic payments or any other payments pursuant to the terms of the consumer's dwelling loan;

(5) The terms or conditions of the consumer's dwelling loan, including but not limited to the amount of debt owed;

(6) The terms or conditions of any refund, cancellation, exchange, or repurchase policy for a mortgage assistance relief service, including but not limited to the likelihood of obtaining a full or partial refund, or the circumstances in which a full or partial refund will be granted, for a mortgage assistance relief service;

(7) That the mortgage assistance relief service provider has completed the represented services or has a right to claim, demand, charge, collect, or receive payment or other consideration;

(8) That the consumer will receive legal representation;

(9) The availability, performance, cost, or characteristics of any alternative to for-profit mortgage assistance relief services through which the consumer can obtain mortgage assistance relief, including negotiating directly with the dwelling loan holder or servicer, or using any nonprofit housing counselor agency or program;

(10) The amount of money or the percentage of the debt amount that a consumer may save by using the mortgage assistance relief service;

(11) The total cost to purchase the mortgage assistance relief service; or

(12) The terms, conditions, or limitations of any offer of mortgage assistance relief the provider obtains from the consumer's dwelling loan holder or servicer, including the time period in which the consumer must decide to accept the offer;

(c) Making a representation, expressly or by implication, about the benefits, performance, or efficacy of any mortgage assistance relief service unless, at the time such representation is made, the provider possesses and relies upon competent and reliable evidence that substantiates that the representation is true. For the purposes of this paragraph, "competent and reliable evidence" means tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area, that have been conducted and evaluated in an objective manner by individuals qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.

§ 322.4 Disclosures required in commercial communications.

It is a violation of this rule for any mortgage assistance relief service provider to engage in the following conduct:

(a) *Disclosures in All General Commercial Communications*—Failing to place the following statements in every general commercial communication for any mortgage assistance relief service:

(1) "(Name of company) is not associated with the government, and our service is not approved by the government or your lender."

(2) In cases where the mortgage assistance relief service provider has represented, expressly or by implication, that consumers will receive any service or result set forth in § 322.2(i)(2) through (6), "Even if you accept this offer and use our service, your lender may not agree to change your loan."

(3) The disclosures required by this paragraph must be made in a clear and prominent manner, and—

(i) In textual communications the disclosures must appear together and be preceded by the heading "IMPORTANT NOTICE," which must be in bold face font that is two point-type larger than the font size of the required disclosures; and

(ii) In communications disseminated orally or through audible means, wholly or in part, the audio component of the required disclosures must be preceded by the statement "Before using this service, consider the following information."

(b) *Disclosures in All Consumer-Specific Commercial Communications*—Failing to disclose the following information in every consumer-specific commercial communication for any mortgage assistance relief service:

(1) "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." For the purposes of this paragraph, the amount "you will have to pay" shall consist of the total amount the consumer must pay to purchase, receive, and use all of the mortgage assistance relief services that are the subject of the sales offer, including, but not limited to, all fees and charges.

(2) "(Name of company) is not associated with the government, and our service is not approved by the government or your lender."

(3) In cases where the mortgage assistance relief service provider has represented, expressly or by implication, that consumers will receive any service or result set forth in § 322.2(i)(2) through (6), "Even if you accept this offer and use our service, your lender may not agree to change your loan."

(4) The disclosures required by this paragraph must be made in a clear and prominent manner, and—

(i) In textual communications the disclosures must appear together and be preceded by the heading "IMPORTANT NOTICE," which must be in bold face font that is two point-type larger than the font size of the required disclosures; and

(ii) In communications disseminated orally or through audible means, wholly or in part, the audio component of the required disclosures must be preceded by the statement "Before using this service, consider the following information" and, in telephone communications, must be made at the beginning of the call.

(c) *Disclosures in All General Commercial Communications, Consumer-Specific Commercial Communications, and Other Communications*—In cases where the mortgage assistance relief service provider has represented, expressly or by implication, in connection with the advertising, marketing, promotion, offering for sale, sale, or performance of any mortgage assistance relief service, that the consumer should temporarily or permanently discontinue payments, in whole or in part, on a dwelling loan, failing to disclose, clearly and prominently, and in close proximity to any such representation that "If you stop paying your mortgage, you could lose your home and damage your credit rating."

§ 322.5 Prohibition on collection of advance payments and related disclosures.

It is a violation of this rule for any mortgage assistance relief service provider to:

(a) Request or receive payment of any fee or other consideration until the consumer has executed a written agreement between the consumer and the consumer's dwelling loan holder or servicer incorporating the offer of mortgage assistance relief the provider obtained from the consumer's dwelling loan holder or servicer;

(b) Fail to disclose, at the time the mortgage assistance relief service provider furnishes the consumer with the written agreement specified in paragraph (a) of this section, the following information: "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 [same amount as disclosed pursuant to § 322.4(b)(1)] for our services." The disclosure required by this paragraph must be made in a clear and prominent manner, on a separate written page, and preceded by the heading: "IMPORTANT NOTICE: Before buying this service, consider the following information." The heading must be in bold face font that is two point-type larger than the font size of the required disclosure; or

(c)(1) Fail to provide, at the time the mortgage assistance relief service provider furnishes the consumer with the written agreement specified in paragraph (a) of this section, a notice from the consumer's dwelling loan holder or servicer that describes all material differences between the terms, conditions, and limitations associated with the consumer's current mortgage loan and the terms, conditions, and limitations associated with the consumer's mortgage loan if he or she accepts the dwelling loan holder's or servicer's offer, including but not limited to differences in the loan's:

- (i) Principal balance;
- (ii) Contract interest rate, including the maximum rate and any adjustable rates, if applicable;
- (iii) Amount and number of the consumer's scheduled periodic payments on the loan;
- (iv) Monthly amounts owed for principal, interest, taxes, and any mortgage insurance on the loan;
- (v) Amount of any delinquent payments owing or outstanding;
- (vi) Assessed fees or penalties; and
- (vii) Term

(2) The notice must be made in a clear and prominent manner, on a separate written page, and preceded by heading: "IMPORTANT INFORMATION FROM YOUR [name of lender or servicer] ABOUT THIS OFFER." The heading must be in bold face font that is two-point-type larger than the font size of the required disclosure.

(d) Fail to disclose in the notice specified in paragraph (c) of this section, in cases where the offer of mortgage assistance relief the provider obtained from the consumer's dwelling loan holder or servicer is a trial mortgage loan modification, the terms, conditions, and limitations of this offer, including but not limited to:

- (1) The fact that the consumer may not qualify for a permanent mortgage loan modification; and

(2) The likely amount of the scheduled periodic payments and any arrears, payments, or fees that the consumer would owe in failing to qualify.

§ 322.6 Assisting and facilitating.

It is a violation of this rule for a person to provide substantial assistance or support to any mortgage assistance relief service provider when that person knows or consciously avoids knowing that the provider is engaged in any act or practice that violates this rule.

§ 322.7 Exemptions.

(a) An attorney is exempt from this part, with the exception of § 322.5, if the attorney:

- (1) Provides mortgage assistance relief services as part of the practice of law;
- (2) Is licensed to practice law in the state in which the consumer for whom the attorney is providing mortgage assistance relief services resides or in which the consumer's dwelling is located; and
- (3) Complies with state laws and regulations that cover the same type of conduct the rule requires.

(b) An attorney who is exempt pursuant to paragraph (a) of this section is also exempt from § 322.5 if the attorney:

- (1) Deposits any funds received from the consumer prior to performing legal services in a client trust account; and
- (2) Complies with all state laws and regulations, including licensing regulations, applicable to client trust accounts.

§ 322.8 Waiver not permitted.

It is a violation of this rule for any person to obtain, or attempt to obtain, a waiver from any consumer of any protection provided by or any right of the consumer under this rule.

§ 322.9 Recordkeeping and compliance requirements.

(a) Any mortgage assistance relief provider must keep, for a period of twenty-four (24) months from the date the record is created, the following records:

- (1) All contracts or other agreements between the provider and any consumer for any mortgage assistance relief service;
- (2) Copies of all written communications between the provider and any consumer occurring prior to the date on which the consumer entered into an agreement with the provider for any mortgage assistance relief service;
- (3) Copies of all documents or telephone recordings created in connection with compliance with paragraph (b) of this section;

(4) All consumer files containing the names, phone numbers, dollar amounts paid, and descriptions of mortgage assistance relief services purchased, to the extent the mortgage assistance relief service provider keeps such information in the ordinary course of business;

(5) Copies of all materially different sales scripts, training materials, commercial communications, or other marketing materials, including websites and weblogs, for any mortgage assistance relief service; and

(6) Copies of the documentation provided to the consumer as specified in § 322.5 of this rule;

(b) A mortgage assistance relief service provider also must:

(1) Take reasonable steps sufficient to monitor and ensure that all employees and independent contractors comply with this rule. Such steps shall include the monitoring of communications directed at specific consumers, and shall also include, at a minimum, the following:

(i) If the mortgage assistance relief service provider is engaged in the telemarketing of mortgage assistance relief services, performing random, blind recording and testing of the oral representations made by individuals engaged in sales or other customer service functions;

(ii) Establishing a procedure for receiving and responding to all consumer complaints; and

(iii) Ascertaining the number and nature of consumer complaints regarding transactions in which all employees and independent contractors are involved;

(2) Investigate promptly and fully each consumer complaint received;

(3) Take corrective action with respect to any employee or contractor whom the

mortgage assistance relief service provider determines is not complying with this rule, which may include training, disciplining, or terminating such individual; and

(4) Maintain any information and material necessary to demonstrate its compliance with paragraphs (b)(1) through (3) of this section.

(c) A mortgage assistance relief provider may keep the records required by § 322.10(a) through this section in any form, and in the same manner, format, or place as it keeps such records in the ordinary course of business.

(d) It is a violation of this rule for a mortgage assistance relief service provider not to comply with this section.

§ 322.10 Actions by states.

Any attorney general or other officer of a state authorized by the state to bring an action under this part may do so pursuant to Section 626(b) of the 2009 Omnibus Appropriations Act, Public Law 111-8, section 626, 123 Stat. 524 (Mar. 11, 2009), as amended by Public Law 111-24, section 511, 123 Stat. 1734 (May 22, 2009).

§ 322.11 Severability.

The provisions of this rule are separate and severable from one another. If any provision is stayed or determined to be invalid, it is the Commission's intention that the remaining provisions shall continue in effect.

By direction of the Commission.

Donald S. Clark,
Secretary.

The following statement will not appear in the Code of Federal Regulations.

Statement of Commissioner J. Thomas Rosch

Mortgage Assistance Relief Services Rule, File No. R911003

I support the Commission's adoption today of the final Mortgage Relief Services Rule ("MARS Rule") and its accompanying Statement of Basis and Purpose. I write this separate statement to explain my decision to vote in favor of the MARS Rule in light of my dissenting vote against the issuance of the debt relief services amendments to the Telemarketing Sales Rule ("the TSR").¹

Although I had concerns about certain aspects of the record in the TSR rulemaking proceeding relating to the need for an advance fee ban, I believe that the record in the MARS rulemaking proceeding supports a ban. In coming to this conclusion, I draw two distinctions. First, the business model for the provision of mortgage assistance relief services differs from debt relief services in that it does not require consumer participation in order to achieve a successful result. Rather, the likelihood of attaining a particular, promised result rests solely on the MARS provider's own efforts. Second, the length of time it takes to attain a mortgage assistance relief result (and hence the duration of the advance fee ban) is much shorter than the time it typically takes to obtain settlements of a consumer's debts.

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¹ My opinion as to the record in the debt relief services TSR rulemaking proceeding is limited to that rulemaking proceeding alone. Any individual case, alleging either violations of Section 5 or violations of the debt relief services amendments to the TSR, would have to be judged on the particular facts of that case.