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Part VI

Federal Trade Commission

16 CFR Part 322

Mortgage Assistance Relief Services; Final Rule

FEDERAL TRADE COMMISSION

16 CFR Part 322

RIN 3084–AB18

Mortgage Assistance Relief Services

AGENCY: Federal Trade Commission (FTC or Commission).

ACTION: Final rule.

SUMMARY: Pursuant to the 2009 Omnibus Appropriations Act (Omnibus Appropriations Act), as clarified by the Credit Card Accountability Responsibility and Disclosure Act of 2009 (Credit CARD Act), the Commission issues a Final Rule and Statement of Basis and Purpose (SBP) concerning the practices of for-profit companies that, in exchange for a fee, offer to work on behalf of consumers to help them obtain modifications to the terms of mortgage loans or to avoid foreclosure on those loans. The Final Rule, among other things, would: prohibit providers of such mortgage assistance relief services from making false or misleading claims; mandate that providers disclose certain information about these services; bar the collection of advance fees for these services; prohibit anyone from providing substantial assistance or support to another they know or consciously avoid knowing is engaged in a violation of the Rule; and impose recordkeeping and compliance requirements.

DATES: This final rule is effective on December 29, 2010, except for § 322.5, which is effective on January 31, 2011.

ADDRESSES: Requests for copies of this Rule and this Statement of Basis and Purpose (SBP) should be sent to: Public Reference Branch, Federal Trade Commission, 600 Pennsylvania Avenue, NW., Room 130, Washington, DC 20580. The complete record of this proceeding is also available at that address. Relevant portions of the proceeding, including the Final Rule and SBP, are available at (*http://www.ftc.gov*).

FOR FURTHER INFORMATION CONTACT: Laura Sullivan or Evan Zullow, Attorneys, Division of Financial Practices, Federal Trade Commission, 600 Pennsylvania Avenue, NW., Washington, DC 20580, (202) 326–3224.

SUPPLEMENTARY INFORMATION:

I. Background

A. Statutory Authority

On March 11, 2009, President Obama signed the Omnibus Appropriations Act of 2009.[1] Section 626 of the Act directed the Commission to commence, within 90 days of enactment, a rulemaking proceeding with respect to mortgage loans.[2] Section 626 also directed the FTC to use notice and comment procedures under Section 553 of the Administrative Procedure Act (APA), 5 U.S.C. 553, to promulgate these rules.[3]

On May 22, 2009, President Obama signed the Credit CARD Act.[4] Section 511 of this statute clarified the Commission's rulemaking authority under the Omnibus Appropriations Act. First, Section 511 specified that the rulemaking "shall relate to unfair or deceptive acts or practices regarding mortgage loans, which may include unfair or deceptive acts or practices involving loan modification and foreclosure rescue services."[5] The Omnibus Appropriations Act, as clarified by the Credit CARD Act, does not specify any particular types of provisions that the Commission should include, or refrain from including, in a rule addressing loan modification and foreclosure rescue services, but rather directs the Commission to issue rules that "relate to" unfairness or deception.[6] Accordingly, the Commission interprets the Omnibus Appropriations Act to allow it to issue rules that prohibit or restrict conduct that may not be unfair or deceptive itself, but that are reasonably related to the goal of preventing unfairness or deception.[7]

Second, Section 511 of the Credit CARD Act clarified that the Commission's rulemaking authority was limited to entities that are subject to enforcement by the Commission under the FTC Act.[8] The rules the Commission promulgates to implement the Omnibus Appropriations Act, therefore, cannot cover the practices of banks, thrifts, Federal credit unions,[9] or certain nonprofits.[10]

The Omnibus Appropriations Act, as clarified by the Credit CARD Act, also permits both the Commission and the states to enforce the rules the FTC issues.[11] The Commission can use its powers under the FTC Act to investigate and enforce the rules, and the FTC can seek civil penalties under the FTC Act against those who violate them. In addition, states can enforce the rules by bringing civil actions in Federal district court or another court of competent jurisdiction to obtain civil penalties and other relief. Before bringing such an action, however, states must give 60 days advance notice to the Commission or other "primary federal regulator" of the proposed defendant, and the regulator has the right to intervene in the action.

On July 21, 2010, President Obama signed the Dodd-Frank Wall Street Reform and Consumer Protection Act.[12] The Dodd-Frank Act made substantial changes in the federal regulatory framework for providers of financial services. Among the changes, the Dodd-Frank Act will transfer the Commission's rulemaking authority under the Omnibus Appropriations Act to a new Bureau of Consumer Financial Protection (BCFP)[13] on July 21, 2011, which is the "designated transfer date" that the Treasury Department has set.[14] In addition, on the designated transfer date, the FTC's authority to "prescribe rules" and "issue guidelines" under the Omnibus Appropriations Act will transfer to the BCFP.[15] Both the Commission and the BCFP, however, will have authority to bring law enforcement actions to enforce the rules promulgated under the Omnibus Appropriations Act, including the Final Rule in this Proceeding.

B. The Rulemaking and Public Comments Received

On June 1, 2009, the Commission published in the **Federal Register** an Advance Notice of Proposed

[1] Omnibus Appropriations Act, 2009, Public Law 111–8, 123 Stat. 524 (Omnibus Appropriations Act).

[2] *Id.* § 626(a).

[3] *Id.* Because Congress directed the Commission to use these APA rulemaking procedures, the FTC did not use the procedures set forth in Section 18 of the FTC Act, 15 U.S.C. 57a.

[4] Credit Card Accountability Responsibility and Disclosure Act of 2009, Public Law 111–24, 123 Stat. 1734 (Credit CARD Act).

[5] *Id.* § 511(a)(1)(B).

[6] *Id.*

[7] Unlike Section 18 of the FTC Act, 15 U.S.C. 57a, *see Katharine Gibbs Sch.* v. *FTC,* 612 F.2d 658 (2d Cir. 1979), the Omnibus Appropriations Act, as clarified by the Credit CARD Act, does not require that the Commission identify with specificity in the rule the unfair or deceptive acts or practices that the prohibitions will prevent. Omnibus Appropriations Act § 626(a); Credit CARD Act § 511(a)(1)(B).

[8] Credit CARD Act § 511(a)(1)(C).

[9] 15 U.S.C. 45(a)(2).

[10] 15 U.S.C. 44. Bona fide nonprofit entities are exempt from the jurisdiction of the FTC Act. Sections 4 and 5 of the FTC Act confer on the Commission jurisdiction over persons, partnerships, or corporations organized to carry on business for their profit or that of their members. 15 U.S.C. 44, 45(a)(2). The FTC does, however, have jurisdiction over for-profit entities that provide mortgage-related services as a result of a contractual relationship with a nonprofit organization. *See Nat'l Fed'n of the Blind* v. *FTC,* 420 F.3d 331, 334–35 (4th Cir. 2005). In addition, the Commission has jurisdiction over sham non-profits that in fact operate as for-profit entities. *See infra* note 176.

[11] Omnibus Appropriations Act § 626(b); Credit CARD Act § 511(a)(1)(B).

[12] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111–203, 124 Stat. 1376 (2010) (Dodd-Frank Act).

[13] *Id.* § 1061.

[14] Dep't of the Treasury, *Bureau of Consumer Financial Protection; Designated Transfer Date,* 75 FR 57252, 57253 (Sept. 20, 2010); *see also* Dodd-Frank Act § 1062.

[15] Dodd-Frank Act § 1061.

Rulemaking (ANPR) addressing the acts and practices of for-profit companies that offer to work on behalf of consumers to help them modify the terms of their loans or to avoid foreclosure. The ANPR described these services generically as "Mortgage Assistance Relief Services," or "MARS."[16] On March 9, 2010, the Commission published[17] a Notice of Proposed Rulemaking (NPRM) and proposed rule addressing Mortgage Assistance Relief Services (MARS).[18] Among other things, the proposed rule included provisions that would:

- Prohibit MARS providers from making false or misleading claims;
- Mandate that providers disclose certain information about their services;
- Bar the collection of advance fees for the provision of MARS, except in certain circumstances for attorneys who collect them in connection with preparing or filing documents in bankruptcy, court, or administrative proceedings;
- Prohibit anyone from providing substantial assistance or support to another they know or consciously avoid knowing is engaged in a violation of the rule; and
- Impose recordkeeping and compliance requirements.

In response to the NPRM, the Commission received 75 comments from stakeholders, including for-profit MARS providers, state law enforcers, consumer and community groups, state bars and bar associations, and financial service providers.[19] The largest number of comments—a total of 30—were submitted either by attorneys who provide MARS[20] or entities representing attorneys, including the American Bar Association and several state bar associations.[21] These comments focused on the scope of the proposed rule's exemption for attorneys, asserting that the Commission should expand the exemption. Other commenters, including some consumer groups and a coalition of state bank examiners, also advocated that the proposed exemption for attorneys be broadened, although to a lesser extent than the attorneys and their representatives advocated.[22] By contrast, comments from NAAG[23] and others[24] urged the Commission not to change the attorney exemption in the proposed rule.

Apart from comments that focused on the coverage of attorneys, most comments supported the proposed rule and its specific provisions. Most significantly, these comments generally supported an advance fee ban,[25] although a few non-attorney MARS providers opposed it.[26]

II. Mortgage Assistance Relief Services

A. The Mortgage Crisis and Assistance for Consumers

As discussed in the ANPR and NPRM, historically high levels of consumer debt, increased unemployment, and a stagnant housing market have contributed to high rates of mortgage loan delinquencies, which in many cases lead to foreclosures.[27] As a result, many consumers struggling to make their mortgage payments have been searching for ways to avoid default and foreclosure. There are a number of options that may be available to them, including: (1) Short sales or deeds-in-lieu of foreclosure transactions, in which the proceeds of a sale of the home or the receipt of the deed to the home, respectively, are treated by the mortgage lender as repayment of the outstanding mortgage balance; (2) forbearance or repayment plans that do not reduce the amount that consumers must pay but give them more time to bring their balance current; and (3) loan modifications that reduce consumers' indebtedness or the amount of their monthly payments. Because loan modifications allow consumers to stay in their homes and reduce their debt, this possible solution often has great appeal to them. The Commission's law enforcement experience suggests that loan modifications are the type of MARS most frequently marketed and sold.[28]

In response to the mortgage crisis, government and private sector programs have been initiated to assist distressed homeowners.[29] In March 2009, the Obama Administration launched the Making Home Affordable (MHA) program and the MHA's Home Affordable Modification Program (HAMP), through which the government provides mortgage owners and servicers with financial incentives to modify and refinance loans.[30] Under the program,

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[16] *See Mortgage Assistance Relief Services,* 74 FR 26130 (June 1, 2009) *(MARS ANPR).* In response to the ANPR, the Commission received a total of 46 comments, which are *available at http://www.ftc.gov/os/comments/mars/index.shtm.* Notably, a wide spectrum of these commenters, including a consortium of over 40 state attorneys general, consumer and community organizations, and financial service providers, strongly urged the Commission to propose a rule prohibiting or restricting the collection of fees for mortgage relief services until the promised services have been completed. Additionally, a majority of the comments expressed concern regarding pervasive deception and abuse in the marketing of MARS, including misrepresentations regarding the services MARS providers will perform and regarding their affiliation with the government, nonprofits, lenders, or loan servicers.

This SBP cites to comments submitted in response to both the ANPR and the NPRM. To distinguish the comments submitted in response to the ANPR, the notation "(ANPR)" is included in any citations to them.

[17] *See* Press Release, FTC, *FTC Proposes Rule That Would Bar Mortgage Relief Companies From Charging Up-Front Fees* (Feb. 4, 2010), *available at http://www.ftc.gov/opa/2010/02/mars.shtm.*

[18] *See Mortgage Assistance Relief Services,* 75 FR 10707 (Mar. 9, 2010) (*MARS NPRM*).

[19] The comments submitted in response to the NPRM are available at *http://www.ftc.gov/os/comments/mars-nprm/index.shtm.* A list of those who submitted comments appears following Section V of this SBP.

[20] *See, e.g.,* Deal; Greenfield.

[21] *See, e.g.,* Am. Bar Ass'n (ABA); ME BA at 1–2; OR Bar at 1; WI Bar at 1; GA Bar at 1; FL Bar at 1.

[22] *See, e.g.,* NCLC at 10–13; CSBS at 4–5.

[23] *See* NAAG at 3–4.

[24] *See, e.g.,* CUUS at 8–9.

[25] *See, e.g.,* MN AG at 3; OH AG at 1; MBA at 2–3 (supporting "strict prohibition" of advance fees); NAAG at 2 ("The advance fee ban is the linchpin of effective deterrence of fraudulent practices by providers of mortgage relief services."); NCLC at 3 ("The single most important provision is section 322.5, which prohibits the collection of any fee before providing tangible results of real value to consumers."); AFSA at 5 ("Banning upfront fees is the best way for the FTC to ensure that MARS providers do really provide consumers with a beneficial service."); *see also* CSBS at 3; CUUS at 6; NYC DCA at 3.

[26] *See, e.g.,* Metropolis; RMI; Hirsch.

[27] *See, e.g., MARS NPRM,* 75 FR at 10708–09; MBA, *Delinquencies, Foreclosure Starts Increase in Latest MBA National Delinquency Survey* (May 19, 2010) ("The delinquency rate for mortgage loans on one-to-four-unit residential properties increased to a seasonally adjusted rate of 10.06 percent of all loans outstanding as of the end of the first quarter of 2010, an increase of 59 basis points from the fourth quarter of 2009, and up 94 basis points from one year ago."), *available at http://www.mbaa.org/NewsandMedia/PressCenter/72906.htm;* NCLC at 2; Press Release, Realtytrac, *Year-end Report Shows Record 2.8 Million U.S. Properties With Foreclosure Filings in 2009* (Jan. 14, 2010), *available at http://www.realtytrac.com/contentmanagement/pressrelease.aspx?itemid=8333;* Credit Suisse Fixed Income Research 2 (2008) (forecasting a total of 9 million foreclosures for the period 2009 through 2012), *available at http://www.chapa.org/pdf/ForeclosureUpdateCreditSuisse.pdf.*

[28] *See* List of MARS Law Enforcement Actions, following Section V of the SBP, for a list of cases that the FTC has prosecuted ("FTC Case List"). Unless otherwise specified, all citations to FTC actions in this SBP refer to the complaints in these lawsuits.

[29] *See, e.g.,* HOPE NOW, *About Us* ("HOPE NOW is an alliance between counselors, mortgage companies, investors, and other mortgage market participants. This alliance will maximize outreach efforts to homeowners in distress to help them stay in their homes and will create a unified, coordinated plan to reach and help as many homeowners as possible."), *available at http://www.hopenow.com/hopenow-aboutus.php.*

[30] For example, the program offers servicers that modify loans according to its guidelines an up-front fee of $1,000 for each modification, "pay for success" fees on still-performing loans of $1,000 per year, and one-time bonus incentive payments of $1,500 to lender/investors, and $500 to servicers, for a modification made while a borrower is still current on his or her mortgage payments. Dep't of the Treasury, *Making Home Affordable Summary of Guidelines* 2 (March 4, 2010), *available at*

Continued

lenders and servicers have approved roughly 500,000 permanent loan modifications.[31] The Treasury Department has also recently expanded the MHA program to assist more borrowers, for example, by introducing additional incentives for servicers to write down the outstanding principal balance for borrowers who are "under water," that is, who owe more on their mortgages than the value of their homes.[32]

On April 5, 2010, the Administration launched the Home Affordable Foreclosure Alternatives (HAFA) Program, which provides servicers with incentives to enter into short sales or deeds-in-lieu of foreclosure transactions with consumers who do not qualify for a loan modification under the MHA program.[33] In addition, state and local governments, nonprofit organizations, housing counselors, and private sector entities[34] have offered a variety of other programs and services to help homeowners in financial distress.[35]

Despite these public and private programs and services, consumers also continue to seek assistance from for-profit companies who act as intermediaries between consumers and their lenders or servicers in obtaining mortgage assistance relief services—including loan modifications. This may be happening for a number of reasons. First, MARS have been advertised and marketed widely in mass media and online, with the result that consumers may be more aware of the services offered by for-profit entities than they are of other available programs. Second, many consumers who are seeking loan modifications or other relief are not eligible for the MHA program or other government and private assistance programs. While the Treasury Department has estimated that the MHA program will help 3–4 million borrowers by February 2012,[36] industry reports estimate that roughly twice that number of mortgage loans currently are in delinquency or foreclosure.[37] Third, even among consumers who may be eligible to obtain a temporary loan modification under the MHA program, many do not qualify for a permanent loan modification.[38] Fourth, even if consumers are eligible for government programs or assistance directly from their servicers or lenders, many housing counselors and servicers have struggled to respond in a timely manner to the extraordinary number of consumers who are seeking loan modifications.[39] Finally, the Treasury Department also has observed that some servicers have not adequately met consumer demand for loan modifications under the HAMP program.[40]

Many consumers who have been unable to obtain mortgage assistance relief services through their own efforts have turned to for-profit MARS providers for help. Providers promoting their ability to negotiate with lenders and servicers to obtain loan modifications or some other type of mortgage relief have proliferated in the past few years.[41] Responding to consumer demand, many providers have promised to obtain loan modifications,[42] but others have begun

http://www.ustreas.gov/press/releases/reports/guidelines_summary.pdf.

[31] *See, e.g.,* Dep't of the Treasury, *Making Home Affordable Program: Servicer Performance Report Through September 2010* (Oct. 25, 2010), *available at http://www.financialstability.gov/docs/Sept%20MHA%20Public%202010.pdf.* Further, if trial modifications are added to permanent modifications, over 1.6 million modifications have been approved. *Id.,* Testimony of Herbert M. Allison, Dep't of the Treasury, "Foreclosure Prevention: Is the Home Affordable Modification Program Preserving Homeownership?," before the H. Comm. on Oversight and Gov't Reform, at 5 (Mar. 25, 2010), *available at http://oversight.house.gov/images/stories/Hearings/Committee_on_Oversight/2010/032510_HAMP/TESTIMONY-Allison.pdf.*

[32] *See* Press Release, Making Home Affordable ("MHA") *Housing Program Enhancements Offer Additional Options for Struggling Homeowners* (Mar. 26, 2010), *available at http://makinghomeaffordable.gov/pr_03262010.html.*

[33] *See* MHA, Home *Affordable Foreclosure Alternatives (HAFA) Program, available at http://makinghomeaffordable.gov/hafa.html.*

[34] Loan holders also have exhibited a growing willingness to modify loan terms for borrowers who do not qualify for loan modifications under government programs such as HAMP. These are known as "proprietary loan modifications." *See* Press Release, HOPE NOW, *HOPE NOW Reports More Than 476,000 Loan Modifications in the First Quarter of 2010* (May 10, 2010), *available at http://www.hopenow.com/press_release/files/1Q%20Data%20Release_05_10_10.pdf* (reporting that the industry completed 312,329 proprietary loan modifications in the first quarter of 2010).

[35] *See, e.g.,* Freddie Mac, *Foreclosure Prevention Workshops for Consumers, http://www.freddiemac.com/avoidforeclosure/workshops.html* (describing local credit counseling events by local governments and nonprofits); FTC, *Mortgage Payments Sending You Reeling? Here's What to Do* (2009), *available at http://www.ftc.gov/bcp/edu/pubs/consumer/homes/rea04.pdf* (describing various credit counseling alternatives).

[36] *See, e.g.,* Press Release, MHA, *Making Home Affordable Program on Pace to Offer Help to Millions of Homeowners* (Aug. 4, 2009) *available at http://www.makinghomeaffordable.gov/pr_08042009.html;* Dep't of the Treasury, *Making Home Affordable Program: Servicer Report Through June 2010* at 7 n.2 (June 2010) ("Selected Outreach Measures" table), *available at http://www.financialstability.gov/docs/June%20MHA%20Public%20Revised%20080610.pdf.*

[37] *See* Alan Zibel, *Foreclosures Down 2 Percent From Last Year,* Associated Press, May 13, 2010 (noting that as of March 2010, "[n]early 7.4 million borrowers, or 12 percent of all households with a mortgage, had missed at least one month of payments or were in foreclosure"), *available at http://abcnews.go.com/Business/wireStory?id=10632332; see also* Press Release, Mortgage Bankers Ass'n, *Delinquencies, Foreclosure Starts Fall in Latest MBA National Delinquency Survey* (Feb. 19, 2010) (noting that roughly 15% of mortgage loans were delinquent or in foreclosure and that "[t]he percentages of loans 90 days or more past due and loans in foreclosure set new record highs"), *available at http://www.mbaa.org/NewsandMedia/PressCenter/71891.htm;* Stephanie Armour, *Home Foreclosure Rates Posts First Annual Decline in Five Years,* USA Today (May 13, 2010) (noting that nearly one-fourth of borrowers owe more on their mortgages that the value of their homes).

[38] *See, e.g.,* Dep't of the Treasury: MHA Servicer Report June 2010 at 1; NCRC, *NCRC Home Affordable Modification Program Survey 2010,* at 2 (noting that, as of February 2010, only 12.5% of trial modifications had been converted into permanent modifications), *available at http://www.ncrc.org/images/stories/mediaCenter_reports/hamp_report_2010.pdf; Foreclosure Prevention: Is the Home Affordable Modification Program Preserving Homeownership: Hearing Before the H. Comm. on Oversight & Gov't Reform,* 111th Cong. (2010) (statement of Gene Dodaro, Acting Comptroller General, Government Accountability Office) (prepared statement at 7), *available at http://oversight.house.gov/images/stories/Hearings/Committee_on_Oversight/2010/032510_HAMP/TESTIMONY–Dodaro.pdf* (noting that 32% of trial modifications lasting three months or more had been approved for conversion into permanent modifications).

[39] *See, e.g.,* CRL at 3 (noting that MARS have flourished as "consumers' demand for relief outpaces the capacity of mortgage servicers and government programs alike"); *The Recently Announced Revisions to the Home Affordable Modification Program (HAMP): Hearing Before the Subcomm. on Hous. & Cmty. Opportunity of the H. Comm. on Fin. Servs.,* 111th Cong. 131 (2010) (statement of Alan White, Assistant Professor, Valparaiso Univ.), *available at http://financialservices.house.gov/Media/file/hearings/111/Printed%20Hearings/111-122.pdf.* ("Modification requests are languishing for as long as a year, servicers repeatedly ask borrowers to resubmit documentation that has been lost or become outdated, and housing counselors and mediators are unable to get timely information and responses from servicers."); NCLC (ANPR) at 2 (noting that servicers have failed to meet borrower demand for loan modifications); NAAG (ANPR) at 7 (noting that borrowers have had difficulty reaching servicers and obtaining their assistance).

[40] *See, e.g., Holding Banks Accountable: Are Treasury and Banks Doing Enough to Help Families Save Their Homes?: Hearing Before the S. Subcomm. on Fin. Servs. & Gen. Gov't of the S. Comm. on Appropriations,* 111th Cong. (2010) (statement of Timothy Geithner, Sec'y, Dep't of the Treasury) ("[W]e do not believe that servicers are doing enough to help homeowners.")

[41] *See MARS ANPR,* 74 FR at 26134–35.

[42] *See, e.g., Safe Mortgage Licensing Act: HUD Responsibilities Under the Safe Act, Proposed Rule,* 74 FR 66548, 66554 (Dec. 15, 2009) ("HUD has seen a substantial increase in the number of third-party actors (*i.e.,* individuals other than lenders and loan servicers) offering their services as intermediaries putatively to work on behalf of borrowers to negotiate modifications of existing loan terms."); NAAG (ANPR) at 2 ("[T]he [loan modification] consulting business model is dominating the marketplace. Consultants are by far the most common source of consumer complaints received by our offices in the area of mortgage assistance services."); OH AG (ANPR) at 2 ("For those companies that actually do put some effort into helping the consumer, the most common business model is an offer to negotiate a loan modification or repayment plan with the consumer's servicer."); CRC (ANPR) at 1 ("In California, advertisements promising loan modification success are inescapable."); FinCEN, *Loan Modification and Foreclosure Rescue Scams—Evolving Trends and*

to market short sales and other forms of relief.[43] The Commission's law enforcement experience shows that MARS providers typically are small and relatively new businesses,[44] and thus it is difficult to estimate their numbers.[45] Based on the law enforcement actions brought by the FTC and the states, however, it appears that there are over 500 such providers in the United States.[46]

Typically, MARS providers charge consumers hundreds or thousands of dollars[47] in advance fees, *i.e.,* fees prior to providing their services. In its law enforcement actions, the FTC has observed that some providers collect their entire fee at the beginning of the transaction,[48] while others collect two to three large installment payments from consumers.[49] NAAG and other commenters also stated that many MARS providers have begun to offer their services piecemeal, collecting fees upon reaching various stages in the process, such as assembling the documentation required by the lender or servicer, mailing paperwork to the lender or servicer, and negotiating with a lender's loss mitigation department.[50]

As discussed in the ANPR and NPRM, MARS providers often claim to possess specialized knowledge of the mortgage lending industry,[51] sometimes touting their hiring of former mortgage brokers and real estate agents[52] to bolster their claims of purported expertise. In addition, some attorneys—including solo practitioners and small law firms that represent financially distressed individuals—increasingly have been offering MARS in connection with their legal practice.[53]

A number of non-attorney MARS providers are employing or affiliating with lawyers, with the providers representing that they are offering traditional legal services.[54] Although these providers often tout the expertise of these attorneys in negotiating with lenders and servicers, in many instances the attorneys do little or no *bona fide* legal work.[55] In some cases, MARS

Patterns in Bank Secrecy Act Reporting 10 (May 2010), *available at http://www.fincen.gov/news_room/rp/files/MLFLoanMODForeclosure.pdf* (FinCEN Report) ("Reports of foreclosure rescue scams increased substantially in the last eight months of calendar year 2009.").

[43] Although the dominant trend among MARS providers is to offer loan modifications, over the past few years some providers also have offered other purported types of loss mitigation and foreclosure avoidance. *See, e.g., FTC* v. *Foreclosure Solutions, LLC,* No. 1:08–cv–01075 (N.D. Ohio filed Apr. 28, 2008) (alleging that provider offered to stop foreclosure proceedings and secure workout plans with consumers' lenders or servicers); *FTC* v. *Mortgage Foreclosure Solutions, Inc.,* No. 8:08-cv-388–T–23EAJ (M.D. Fla. filed Feb. 26, 2008) (same). Providers may adjust their marketing to offer newly-minted forms of mortgage relief—for example, the possibility of entering a short sale under the HAFA program. *See, e.g., Illinois* v. *Home Foreclosure Solutions LLC,* No. 08CH43259 (Ill. Cir. Ct. Cook County 2008) (alleging MARS provider offered to assist consumers to enter short sales). Another new variation of MARS is charging an advance fee to purportedly "eliminate" mortgage debts by challenging the legality of the original mortgages. *See* FinCEN, *Foreclosure Rescue Fraud Report May 2010, supra* note 42 at 9. MARS providers also have offered "sale-leaseback" or "title reconveyance" transactions. In these transactions, MARS providers instruct consumers to transfer title to their homes to the providers and then the consumers rent the homes from them. The providers promise to reconvey title at some later date, yet often do not do so, thereby taking the equity in the homes. Sale-leaseback and title reconveyance transactions appear to have become less prevalent, in part because many consumers do not have sufficient equity in their homes to make this strategy profitable. *See, e.g.,* FinCEN, *Foreclosure Rescue Fraud Report* May 2010, *supra* note 42 at 4.

[44] *See* FTC Case List. Some of these small and relatively new businesses are law firms. For example, NCLC surveyed members of the National Association of Consumer Advocates (NACA) and the National Association of Consumer Bankruptcy Attorneys (NACBA); 298 attorneys responded that they provided some form of MARS. NCLC at 5; *see also* IRELA at 1 (stating that many of the 2,000 members of the Illinois Real Estate Lawyers Association are "engaged in the process of trying to assist their consumer clients in dealing with foreclosures, mortgage loan workouts, and related matters").

[45] *See, e.g.,* U.S. Gov't Accountability Office, GAO–10–787, *Federal Efforts to Combat Foreclosure Rescue Schemes are Under Way, but Improved Planning Elements Could Enhance Progress* 12–16 (July 2010) ("GAO Report") (noting that data on MARS providers is limited); NAAG (ANPR) at 3 ("It is difficult to gather exact empirical data on companies providing loan modification and foreclosure rescue services due to the predominance of Internet-based companies and their ephemeral nature."); OH AG (ANPR) at 2 ("There is little reliable data about the foreclosure rescue industry."); CRL at 3 ("With few barriers to entry and little to no oversight, scams are flourishing in the current environment.").

[46] *See* NAAG (ANPR) at 4 (noting that state attorneys general have investigated more than 450 MARS providers); FTC Case List, *supra* note 28; Press Release, FTC, *Federal and State Agencies Crack Down on Mortgage Modification and Foreclosure Rescue Scams* (Apr. 6, 2009), *available at http://www.ftc.gov/opa/2009/04/hud.shtm* (reporting that the Commission sent warning letters to 71 companies offering MARS).

[47] *See, e.g., infra* notes 48–49; GAO Report, *supra* note 45, at 7 (noting that MARS typically charge a fee of thousands of dollars); Dargon at 2 ("We charge $2,500 as a flat fee" in advance.); CRC (ANPR) at 2 ("The average fee that we are seeing borrowers charged is $3,000; we have seen fees as high as $9,500. In nearly every instance, these fees are charged up front, before any services have been rendered."); NCRC (ANPR) at 3 (noting that "[t]ypically, loan modification companies request a significant fee upfront" and that a study performed by NCRC "documented a median fee of $2,900," although "[f]ees ranged as high as $5,600"); NCLR (ANPR) at 1 (observing fees as high as $8,000); NCLC (ANPR) at 5–6 (estimating typical advance fees to be between $2,000 and $4,000).

[48] *See, e.g., supra* note 47; *FTC* v. *Infinity Group Servs.,* No. SACV09–00977 DOC (MLGx) (C.D. Cal. filed Aug. 26, 2009); *FTC* v. *Freedom Foreclosure Prevention Specialists, LLC,* No. 2:09–cv–01167–FJM (D. Ariz. June 1, 2009); *FTC* v. *Fed. Loan Modification Law Ctr., LLP,* No. SACV09–401 CJC (MLGx) (C.D. Cal. filed Apr. 3, 2009).

[49] *See, e.g., FTC* v. *Truman Foreclosure Assistance, LLC,* No. 09–23543 (S.D. Fla. filed Nov. 23, 2009); *FTC* v. *Washington Data Res., Inc.,* No. 8:09-cv-02309–SDM–TBM (M.D. Fla. filed Nov. 12, 2009); *FTC* v. *First Universal Lending, LLC,* No. 09–CV–82322, Mem. Supp. TRO at 5 (S.D. Fla. filed Nov. 24, 2009); *see also, e.g.,* Dargon at 2; Rogers at 13.

[50] *See, e.g.,* LFSV at 2 ("[W]e have seen MARS providers who are effectively evading the advance fee prohibition in California law by charging for their 'services' in 'phases.'"); NAAG at 3; LCCR at 5; *see also FTC* v. *Debt Advocacy Ctr., LLC,* No. 1:09CV2712 (N.D. Ohio filed Nov. 19, 2009).

[51] *See, e.g.,* NCLC (ANPR) at 3 ("Some modification firms claim superior expertise even though there are no recognized qualifications other than the training programs offered by HUD to certified agencies. Instead, some for-profit entities tout their experience as mortgage industry insiders."); NAAG (ANPR) at 4; *FTC* v. *Fed Housing Modification Dep't,* No. 09–CV–01759 (D.D.C. filed Sept. 15, 2009) (alleging defendants' Web sites state that many of their "skilled negotiators" have "worked for the lenders they are dealing with"); *FTC* v. *US Foreclosure Relief Corp.,* No. SACV09–768 JVS (MGX), Mem. Supp. TRO. at 4–5 (C.D. Cal. filed July 7, 2009) (alleging that defendants "boasted of twenty years' experience" and that they had "extensive experience in the industry"); *FTC* v. *Truman Foreclosure Assistance, LLC,* No. 09–23543, Mem. Supp. P.I. at 20 (S.D. Fla. filed Nov. 23, 2009) (alleging that defendants' Web sites represented that they have "extensive loss mitigation experience" and that "they are led by a seasoned and proven team of professionals"); *see also FTC* v. *LucasLawCenter "Inc.",* No. 09–CV–770 (C.D. Cal filed July 7, 2009).

[52] *See, e.g.,* NCLC (ANPR) at 11 ("Mortgage brokers—often cited as one of the driving forces in the growth of bad subprime loans—are in demand to work for loan modification companies. One MARS advertised for consultants with mortgage and real estate experience to join its cadre of loan modification specialists."); GAO Report, *supra* note 45, at 10 ("Federal and state officials and representatives of nonprofit organizations told us that persons who have conducted foreclosure rescue schemes include former mortgage industry professionals who had been involved in the subprime market. * * *").

[53] *See generally* Greenfield; Deal; Giles. *See also* NCLC at 4.

[54] *See, e.g.,* NAAG at 3–4 ("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."); IL AG at 1; *FTC* v. *Loss Mitigation Servs., Inc.,* No. SACV09–800 DOC (ANX), Mem. Supp. Pls. Ex Parte App. at 3 (Aug. 3, 2009) (alleging that defendants engaged in "misrepresentations prohibited by the TRO, behind a new facade: the 'Walker Law Group,'" which was "nothing more than a sham legal operation designed to evade state law restrictions on the collection of up-front fees for loan modification and foreclosure relief"); *FTC* v. *LucasLawCenter "Inc.",* No. SACV–09–770 DOC (ANX) (C.D. Cal. filed July 7, 2009); *FTC* v. *Data Med. Capital Inc.,* No. SA–CV–99–1266 AHS (Eex) (C.D. Cal., contempt application filed May 27, 2009); *FTC* v. *US Foreclosure Relief Corp.,* No. SACV09–768 JVS (MGX) (C.D. Cal. filed July 7, 2009); *FTC* v. *Fed. Loan Modification Law Ctr., LLP,* No. SACV09–401 CJC (MLGx) (C.D. Cal. filed Apr. 3, 2009); *see also Cincinnati Bar Assoc.* v. *Mullaney,* 119 Ohio St. 3d 412 (2008) (disciplining attorneys involved in mortgage assistance relief services).

[55] *See supra* note 54. The experiences detailed in one comment from an attorney illustrate the role

Continued

providers also offer "forensic audits," during which attorneys purportedly conduct a legal analysis of mortgage loan documents to find law violations, thereby supposedly helping consumers acquire leverage over their lenders or servicers to obtain a better loan modification.[56] Providers offering forensic audits also assert that, because of their relationships with attorneys, state laws that prohibit non-attorneys from collecting advance fees for loan modification services do not apply to them.[57] For example, California law previously imposed a number of restrictions on "foreclosure consultants," but allowed "licensed attorneys * * * [to] charge advance fees under certain limited circumstances."[58] The State Bar of California subsequently observed that "foreclosure consultants may be attempting to avoid the statutory prohibition on collecting a fee before any services have been rendered by having a lawyer work with them in foreclosure consultations."[59] California has since passed a new law that removes this attorney exemption.[60]

B. Unfair or Deceptive Practices in the Marketing of MARS

The FTC, state attorneys general, and other law enforcement agencies, have extensive experience with MARS providers. In the past three years, the Commission has filed 32 law enforcement actions against providers of loan modification and foreclosure rescue services.[61] State attorneys general have investigated at least 450 MARS providers and sued hundreds of them for alleged state law violations.[62] Additionally, the Department of Justice and other agencies, working both individually and jointly, have pursued MARS providers for illegal conduct.[63] As discussed in more detail below, the evidence in the record, including extensive law enforcement experience, demonstrates that the unfair or deceptive practices of MARS providers are widespread and are causing substantial consumer harm.[64] Indeed, one recent survey of state and local consumer agencies found that the fastest growing category of consumer complaints concerned the failure of MARS providers to fulfill their promises to help save consumers' homes from foreclosure.[65]

MARS providers commonly initiate contact with prospective customers through Internet, radio, television, or direct mail advertising.[66] Although MARS providers did not submit information for the record relating to the extent and cost of their marketing efforts, they appear to use a variety of media to target large numbers of consumers who are struggling to pay their mortgages. For example, one MARS provider that was the subject of an FTC enforcement action spent $9 million in one year to broadcast deceptive advertisements nationwide on major television and cable networks, as well as on radio stations and the Internet.[67] Typical MARS advertisements instruct consumers to call a toll-free telephone number or to e-mail the provider. One provider's advertisements allegedly yielded 1,500 inbound calls per day.[68] Another such provider disseminating direct mail advertisements reported receiving approximately 500 inbound calls per day.[69]

Customary representations in the ads and ensuing telemarketing and email pitches claim that the MARS provider (1) will obtain for the consumer a substantial reduction in a mortgage loan's interest rate, principal amount, or monthly payments; (2) will achieve these results within a specific period of time;[70] (3) has special relationships

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that attorneys play or have been asked to play in connection with MARS:

> I had numerous non-attorney modification companies ask me to serve as their lawyer and accept a flat fee on each file. I would get this money and do little or no work for it. In some cases I would take in the advance fee and then disburs[e] a share to the loan officer producing the deal and a share to the company actually doing the work. Or I would be collecting the advance fee and then holding all or part of it in my trust account until the modification was completed. I declined to get involved in such arrangements.

Deal at 6.

[56] *See, e.g.,* MN AG at 2 ("Recently, so-called forensic loan auditors have emerged as a new type of mortgage assistance relief 'service.'"); 1st ALC at 3 (MARS provider stating it engages in forensic audits); Dargon at 2 (same); *see also FTC* v. *Debt Advocacy Ctr., LLC,* No. 1:09CV2712 (N.D. Ohio Am. Compl. filed May 14, 2010) (alleging defendants purporting to offer forensic audits misrepresented that "between 80–90% of all loans [they] have audited have some form of rights violations"); *FTC* v. *Data Med. Capital Inc.,* No. SA–CV–99–1266 AHS (Eex), Mem. Supp. App. Contempt at 18 (C.D. Cal. filed May 27, 2009); *FTC* v. *Fed. Loan Modification Law Ctr.,* LLP, No. SACV09–401 CJC (MLGx) (C.D. Cal. filed Apr. 3, 2009).

Since publication of the NPRM, the Commission has released an alert to warn consumers about entities purporting to provide forensic audits. FTC, *Forensic Mortgage Loan Audit Scams: A New Twist on Foreclosure Rescue Fraud* (Mar. 2010), *available at http://www.ftc.gov/bcp/edu/pubs/consumer/alerts/alt177.shtm; see also, e.g.,* Cal. Dep't of Real Estate, Consumer Alert 6 (Mar. 2009) (warning consumers of "forensic loan reviews"), *available at http://www.dre.ca.gov/pdf_docs/FraudWarningsCaDRE03_2009.pdf.*

[57] *See supra* notes 51–56; *see also* IL AG (ANPR) at 2 ("Attorneys are using the [state] exemption to market and sell the same mortgage consulting services provided by non-attorneys.").

[58] Press Release, Office of the Att'y Gen., Cal. Dep't of Justice, *Brown Alerts Homeowners that New Law Prohibits Up-front Fees for Foreclosure Relief Services* (Oct. 15, 2009), *available at http://ag.ca.gov/newsalerts/release.php?id=1821.*

[59] *See* State Bar of Cal., *Ethics Alert: Legal Services to Distressed Homeowners and Foreclosure Consultants on Loan Modifications* ("Cal. State Bar Ethics Alert") 2, Ethics Hotliner (Feb. 2, 2009), *available at http://www.calbar.ca.gov/calbar/pdfs/ethics/Ethics-Alert-Foreclosure.pdf ; see also Florida Bar, Ethics Alert: Providing Legal Services to Distressed Homeowners 1, available at http://www.floridabar.org/TFB/TFBResources.nsf/Attachments/872C2A9D7B71F05785257569005795DE/$FILE/loanModification20092.pdf?OpenElement* ("The Florida Bar's Ethics Hotline recently has received numerous calls from lawyers who have been contacted by non-lawyers seeking to set up an arrangement in which the lawyers are involved in loan modifications, short sales, and other foreclosure-related rescue services on behalf of distressed homeowners. * * * The [Florida] Foreclosure Rescue Act * * * imposed restrictions on non-lawyer loan modifiers to protect distressed homeowners. The new statute appears to be the impetus for these inquiries.").

[60] Cal Civ. Code § 2944.7; *see also* Press Release, Office of the Att'y Gen.l, Cal. Dep't of Justice, *Brown Alerts Homeowners that New Law Prohibits Up-front Fees for Foreclosure Relief Services* (Oct. 15, 2009), *available at http://ag.ca.gov/newsalerts/release.php?id=1821.*

[61] *See* FTC Case List, *supra* note 28.

[62] NAAG (ANPR) at 4; IL AG (ANPR) at 1 (noting that Illinois has over 240 open investigations of MARS providers and filed 28 lawsuits against them); Press Release, FTC, *Federal and State Agencies Target Mortgage Relief Scams* (Nov. 24, 2009) (announcing 118 actions by 26 federal and state agencies), available at *http://www.ftc.gov/opa/2009/11/stolenhope.shtm;* Press Release, FTC, *Federal and State Agencies Target Mortgage Foreclosure Rescue and Loan Modification Scams* (July 15, 2009) (announcing operation involving 189 actions by 25 federal and state agencies), *available at http://www.ftc.gov/opa/2009/07/loanlies.shtm; Press Release, Financial Fraud Enforcement Task Force, Financial Fraud Enforcement Task Force Announces Results of Broadest Mortgage Fraud Sweep in History (June 17, 2010), available at http://www.stopfraud.gov/news/news-06172010–02.html.*

[63] *See infra* notes 92–96 and accompanying text.

[64] *See, e.g.,* LFSV at 1 ("During the recent mortgage crisis, we have been dealing with a flood of borrowers whose mortgages are distressed and who have been subject to abuses by companies and individuals promising assistance with obtaining modification of those loans.")

[65] *See* Consumer Fed'n of Am. *et al.,* 2009 Consumer Complaint Survey Report 3 (July 27, 2010), *available at http://www.consumerfed.org/elements/www.consumerfed.org/File/Consumer_Complaint_Survey_Report2009.pdf.*

[66] The FTC procured information from a media monitoring company on the occurrence of broadcast advertising for MARS. The company located 68 radio ads and 71 television and cable ads containing the terms "save your home," "mortgage modification," or "loan modification." These ads aired between the dates of September 1, 2008 and September 1, 2010. These ads were attributable to 139 different companies.

[67] *See FTC* v. *Fed. Loan Modification Law Ctr.,* LLP, No. SACV09–401 CJC (MLGx), Mem. Supp. Ex Parte TRO at 6–7 (C.D. Cal. filed Apr. 6, 2009).

[68] *Id.* at 6–8.

[69] *See FTC* v. *Loss Mitigation Servs., Inc.,* No. SACV–09–800 DOC (ANX), Mem. Supp. TRO at 7 (C.D. Cal filed Jul. 13, 2009).

[70] *See, e.g., FTC* v. *First Universal Lending, LLC,* No. 09–CV–82322, Mem. Supp. TRO at 4–5 (S.D. Fla. filed Nov. 24, 2009); *FTC* v. *1st Guar. Mortgage Corp.*, No. 09–DV–61846 (S.D. Fla. filed Nov. 17, 2009); *FTC* v. *Freedom Foreclosure Prevention*

with lenders and servicers;[71] and (4) is closely affiliated with the government,[72] nonprofit programs,[73] or the consumer's lender or servicer.[74] Providers also commonly represent that there is a high likelihood, and in some instances a "guarantee," of success.[75] Many MARS providers do not disclose to consumers in their promotions the cost of their services.[76] In some cases, MARS providers entice consumers to make substantial up-front payments with false claims that they will be able to obtain a refund if consumers do not receive an acceptable result.[77]

Based on the FTC's law enforcement experience, the public comments, and consumer complaints, it appears that the vast majority of consumers do not receive the results MARS providers promise.[78] After collecting their up-front 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.[79] In many cases, MARS providers fail to perform even the most basic promised services or achieve any beneficial results.

In some cases, providers also cause harm to consumers by instructing them to stop communicating with their lenders and servicers.[80] Consumers who

Specialists, LLC, No. 2:09–cv–01167–FJM (D. Ariz. filed June 1, 2009); *FTC* v. *Fed. Loan Modification Law Ctr.,* LLP, No. SACV09–401 CJC (MLGx) (C.D. Cal. filed Apr. 3, 2009).

[71] *See, e.g., FTC* v. *Debt Advocacy Ctr., LLC,* No. 1:09CV2712 (N.D. Ohio filed Nov. 19, 2009); *FTC* v. *1st Guar. Mortgage Corp.,* No. 09–DV–61846 (S.D. Fla filed Nov. 17, 2009); *FTC* v. *LucasLawCenter* "*Inc.*," No. SACV–09–770 DOC (ANX) (C.D. Cal. filed July 7, 2009); *FTC* v. *US Foreclosure Relief Corp.,* No. SACVF09–768 JVS (MGX) (C.D. Cal. filed July 7, 2009).

[72] *See, e.g., FTC* v. *Dominant Leads, LLC,* No. 1:10–cv–00997 (D.D.C. filed June 16, 2010) (alleging that defendants' Web sites featured official government seals and logos, and deceptively appeared to be affiliated with the government); *FTC* v. *Washington Data Res., Inc.,* No. 8:08–cv–02309–SDM–TBM (M.D. Fla. filed Nov. 12, 2009) (alleging that defendants falsely represented that they were affiliated with the United States government); *FTC* v. *Fed. Housing Modification Dep't,* No. 09–CV–01753 (D.D.C. filed Sept. 15, 2009); *FTC* v. *Sean Cantkier,* No. 1:09–cv–00894 (D.D.C. filed July 10, 2009) (alleging defendants placed advertisements on Internet search engines that refer consumers to Web sites that deceptively appear to be affiliated with government loan modification programs); *FTC* v. *Thomas Ryan,* No. 1:09–00535 (HHK) (D.D.C. filed Mar. 25, 2009); *FTC* v. *Fed. Loan Modification Law Ctr.,* LLP, No. SACV09–401 CJC (MLGx) (C.D. Cal. filed Apr. 3, 2009) (charging defendant with misrepresenting that it is part of or affiliated with the federal government); *see also* LOLLAF at 2 ("Other clients have been deceived into believing the MARS provider will assist them because it claimed to be a 'non-profit,' used a government symbol or claimed to be affiliated with the HOPE hotline."); OH AG (ANPR) at 4 ("Our office has seen many companies that have names or advertisements that make it sound like they are government sponsored."); NCLC (ANPR) at 3 ("One website, USHUD.com, even claims to be 'America's Only Free Foreclosure Resource' even though HUD-certified agencies also offer free assistance regardless of income.").

[73] *See FTC* v. *New Hope Prop. LLC,* No. 1:90–cv–01203–JBS–JS (D.N.J. filed Mar. 17, 2009); FTC v. New Hope Modifications, LLC, No.1:09–cv–01204–JBS–JS (D.N.J. filed Mar. 17, 2009).

[74] *See, e.g., FTC* v. *Kirkland Young, LLC,* No. 09–23507 (S.D. Fla. filed Nov. 18, 2009) (alleging that defendants falsely represented an affiliation with borrowers' lenders); *FTC* v. *Loss Mitigation Servs., Inc.,* No. SACV–09–800 DOC (ANX) (C.D. Cal. filed July 13, 2009) (alleging that defendants deceptively claimed affiliation with consumers' lenders); *see* also Am. Bankers Ass'n (ANPR) at 7 ("They often misuse the intellectual property of lenders and servicers by claiming in mailings, on Web sites, and in other communications that they either are affiliated with the lenders and servicers or have special relationships with them that do not exist. They use the names, trademarks and logos of these lenders and servicers in their advertising to deceive consumers into believing they can obtain modification relief for them that these consumers could not otherwise obtain for themselves at no cost."); Chase (ANPR) at 3 ("These MARS entities also may lead the borrower to believe that they are associated with the servicer or that they have special agreements with the servicer for processing loan modifications, when, in fact, they do not.").

[75] *See, e.g., FTC* v. *Truman Foreclosure Assistance, LLC,* No. 09–23543 (S.D. Fla. filed Nov. 23, 2009) (alleging defendants falsely claimed success rate of 97 to 100%); *FTC* v. *Debt Advocacy Ctr., LLC,* No. 1:09CV2712 (N.D. Ohio filed Nov. 19, 2009) (alleging defendants falsely claimed a 90% success rate); *FTC* v. *Loss Mitigation Servs., Inc.,* No. SACV09–800 DOC (ANX) (C.D. Cal. filed July 13, 2009) (alleging "[d]efendants have told homeowners that their success rate is above ninety percent"); *FTC* v. *LucasLawCenter* "*Inc.*," No. SACV–09–770 DOC (ANX) (C.D. Cal. filed July 7, 2009) (alleging "[d]efendants' representatives tell consumers that Defendants have a success rate in the ninetieth percentile with their lender"); *FTC* v. *Freedom Foreclosure Prevention Specialists, LLC,* No. 2:09–cv–01167–FJM (D. Ariz. filed June 1, 2009) (alleging defendants claimed to have 97% success rate); *FTC* v. *Data Med. Capital Inc.,* No. SA–CV–99–1266 AHS (Eex), Mem. Supp. App. Contempt at 8 (C.D. Cal. filed May 27, 2009) (alleging defendants represented 100% success rate to consumers).

The Loan Modification Scam Prevention Network (LMSPN)—a coalition of Federal and state organizations led by the Lawyers' Committee for Civil Rights—has created a nationwide complaint reporting system for loan modification fraud. The Network, formed in February 2010, has received complaints through a variety of channels, including a form posted on its Web site, the Homeowners' Hope Hotline, and referrals from non-profit housing counselors. As of August 25, 2010, the LMSPN database contained a total of 6,473 complaints of loan modification fraud, dating as far back as April 8, 2008. FTC staff reviewed a random sample of 100 of these complaints and found that 63 reported that MARS providers had guaranteed consumers loan modifications. In projecting this finding to the entire LMSPN database, the FTC estimates that between 52% and 72% of the complaints report the same information.

[76] In a recent report summarizing the results of undercover calls made to MARS providers, the National Community Reinvestment Coalition (NCRC) found that in 54% of the calls the providers did not inform consumers about their fees. *See* NCRC, *Foreclosure Rescue Scams: A Nightmare Complicating the American Dream,* at 21 (Mar. 2010) ("NCRC Report"), *available at http://www.ncrc.org/images/stories/pdf/research/foreclosure%20rescue%20scams%20-%20%20nightmare%20complicating%20the%20american%20dream.pdf.*

[77] *See, e.g., FTC* v. *Truman Foreclosure Assistance, LLC,* No. 09–23543 (S.D. Fla. filed Nov. 23, 2009) (alleging that defendant falsely claimed to provide "100% money back guarantee"); *Debt Advocacy Ctr., LLC,* No. 1:09CV2712 (N.D. Ohio filed Nov. 19, 2009) (alleging that defendants falsely represented they will refund borrower fee if unsuccessful); *FTC* v. *Infinity Group Servs.,* No. SACV09–00977 DOC (MLGx) (C.D. Cal. filed Aug. 26, 2009); *FTC* v. *Loan Modification Shop, Inc.,* No. 3:09–cv–00798 (JAP), Mem. Supp. TRO at 1 (D.N.J. amended complaint filed Aug. 4, 2009) (alleging defendants represented that advance fees were fully refundable); *FTC* v. *Freedom Foreclosure Prevention Specialists,* LLC, No. 2:09–cv–01167–FJM (D. Ariz. June 1, 2009) (alleging defendants promised "100% money-back guarantee" but then failed to provide refunds); *see also* NAAG at 2 ("[MARS providers] 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."); *see also, e.g., FTC* v. *Home Assure, LLC,* No. 8:09–CV–00547–T–23T–Sm, Mot. S.J., App.1 at 6 (M.D. Fla. filed Jan. 25, 2010) (Expert Report of Dr. Kivetz survey reporting that 56% of consumers requested that defendant provide a refund; 65% of those who requested a refund did so because defendant failed to perform its services; but only 12% of consumers who requested refunds received them).

[78] *See, e.g., infra* Section III.E.2.a.; LOLLAF at 1 ("We have worked with many homeowners who have paid money to a Mortgage Assistant Relief Services (MARS) provider, only to discover that they received absolutely no service in exchange for the fee."); CMC (ANPR) at 1 ("CMC members and other mortgage servicers found that MARS providers consistently misrepresent their ability to obtain concessions from servicers * * *."); Chase (ANPR) at 3 ("They collect their fees up-front and promise the borrower they can get a loan modification or other foreclosure relief, when, in fact, this is only a determination that the servicer can make after reviewing the borrower's financial information and investor agreements.").

[79] *See, e.g., FTC* v. *Truman Foreclosure Assistance, LLC,* No. 09–23543 (S.D. Fla. filed Nov. 23, 2009) (alleging that defendant often failed to return borrowers' phone calls and failed to contact and negotiate with lenders); *FTC* v. *Apply2Save, Inc.,* No. 2:09–cv–00345–EJL–CWD (D. Idaho filed July 14, 2009) (complaint alleging that "[m]any consumers learned from their lenders that Defendants had not even contacted the lender or that Defendants had only minimal, non-substantive contact with the lender"); *FTC* v. *Loss Mitigation Servs., Inc.,* No. SACV09–800 DOC (ANX) (C.D. Cal. filed July 13, 2009) (alleging that "[d]efendants have misrepresented that negotiations were underway, although Defendants had not yet contacted the lender"); *FTC* v. *LucasLawCenter* "*Inc.*", No. SACV–09–770 DOC (ANX), Mem. Supp. TRO at 19 (C.D. Cal. filed July 7, 2009) (alleging that consumers who contact their lenders "learn that [Defendant] never even contacted the lender, or merely verified the consumer's loan information"); *FTC* v. *Freedom Foreclosure Prevention Specialists, LLC,* No. 2:09–cv–01167–FJM (D. Ariz. June 1, 2009) (alleging that defendants failed to act on homeowners' cases for more than four to six weeks without completing—or in some cases, even starting—negotiations and "failed to return consumers' repeated telephone calls, even when homeowners were on the brink of foreclosure").

[80] *See, e.g., FTC* v. *Truman Foreclosure Assistance, LLC,* No. 09–23543 (S.D. Fla. filed Nov.

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sever contact with lenders and servicers unwittingly diminish their ability to learn that their MARS provider is doing little or nothing on their behalf. These consumers may never learn of concessions their lenders or servicers would be willing to make—or, worst of all, may never discover that foreclosure is imminent.[81] In some cases, MARS providers also advise consumers to discontinue making their mortgage payments even though doing so could result in the loss of their homes and damage to their credit ratings.[82]

The Commission's law enforcement experience,[83] state law enforcement,[84] the comments received,[85] and state bar actions[86] indicate that a growing number of attorneys themselves market and sell MARS. Many of them engage in unfair and deceptive acts and practices, such as making the specific claim that they offer legal services,[87] when in fact, no attorneys are employed by the company, or if they are, they do little or no legal work for customers.[88]

C. Continued Law Enforcement and Other Responses

The Commission has taken aggressive action to protect consumers from deceptive MARS providers. As noted above, the FTC has filed 32 lawsuits[89] in the last three years against MARS providers for engaging in deceptive practices in violation of the FTC Act and, in several instances, the Telemarketing Sales Rule (TSR).[90] In addition, the FTC has coordinated its efforts with state law enforcement and other federal agencies, including the Department of Justice (DOJ), the Department of Housing and Urban Development (HUD), the Treasury Department, and the Office of the Special Inspector General for the Troubled Asset Relief Program (SIG–TARP).[91] The Commission also is a member of the Financial Fraud

23, 2009); *FTC* v. *Kirkland Young,* LLC, No. 09–23507 (S.D. Fla filed Nov. 18, 2009); *FTC* v. *Washington Data Res., Inc.,* No. 8:09–cv–02309–SDM–TBM (M.D. Fla. filed Nov. 12, 2009); *FTC* v. *Loss Mitigation Servs., Inc.,* No. SACV09–800 DOC (ANX) (C.D. Cal. filed July 13, 2009); *FTC* v. *US Foreclosure Relief Corp.,* No. SACV09–768 JVS (MGX) (C.D. Cal. filed July 7, 2009); *see also* NCRC Report, *supra note* 76, at 4 (noting that, on 25% of its undercover calls, MARS providers instructed the caller to cease communicating with his or her lender).

[81] *See, e.g., FTC* v. *Truman Foreclosure Assistance, LLC,* No. 09–23543 (S.D. Fla. filed Nov. 23, 2009) (alleging that "[w]hen consumers speak with their lenders directly, they often discover that Defendants had not yet contacted the lender or only had left messages or had non-substantive contacts with the lender"); *FTC* v. *Loss Mitigation Servs., Inc.,* No. SACV09–800 DOC (ANX), Mem. Supp. TRO at 18–19 (C.D. Cal. filed July 13, 2009) (detailing "devastating effects" of consumers learning too late of lack of effort by loan modification company); CRC (ANPR) at 7 ("People who do have a chance of keeping the home are being steered away from legitimate, free homeowner counseling services or are failing to take any action before it is too late because they have been assured everything is being taken care of for them already.").

[82] *See* NAAG at 4 ("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."); CUNA at 2 (consumers "are often instructed to stop making mortgage payments"); NCLC at 7 (family told "to stop paying their mortgage payments and promised a loan modification with lower payments."); Rodriguez at 1 ("I have had clients face foreclosure because of these companies telling them to stop paying their mortgage and pay them!"); *FTC* v. *Fed. Loan Modification Law Ctr.,* LLP, No. SACV09–401 CJC (MLGx) (C.D. Cal., Am. Compl. filed June 24, 2009) ("In numerous instances, Defendants have [allegedly] encouraged consumers to stop paying their mortgages, telling consumers that delinquency will demonstrate the consumer's hardship to the lender and make it easier to obtain a loan modification."); *FTC* v. *LucasLawCenter* "*Inc.*", No. SACV–09–770 DOC (ANX) (C.D. Cal. filed July 9, 2009) (alleging that "[i]n numerous instances, Defendants' representative encourages consumers to stop paying their mortgages, telling consumers that delinquency will demonstrate the consumers' hardship to the lender and make it easier to obtain a loan modification."); *FTC* v. *Foreclosure Solutions, LLC,* No. 1:08–cv–01075 (N.D. Ohio filed Apr. 28, 2008) ("Defendants [allegedly] instruct the consumer to open a savings account and deposit, every month until further notice from Defendants, the consumer's monthly mortgage payment plus an additional [25%]. Defendants claim this money will be used to negotiate with the lender to reinstate the loan."); *see also FTC* v. *First Universal Lending, LLC,* No. 09–CV–82322 (S.D. Fla. filed Nov. 24, 2009); *FTC* v. *Fed. Housing Modification Dep't,* No. 09–CV–01753 (D.D.C. filed Sept. 15, 2009); *FTC* v. *Loss Mitigation Servs., Inc.,* No. SACV09–800 DOC(ANx) (C.D. Cal. filed July 13, 2009); *FTC* v. *US Foreclosure Relief Corp.,* No. SACV09–768 JVS (MLGx) (C.D. Cal., Amd. Compl. filed Mar. 8, 2009); FTC v. *New Hope Property LLC,* No. 1:09–cv–01203–JBS–JS (D.N.J. filed Mar. 17, 2009); NCRC Report, *supra* note 76, at 24 ("[I]n over 50% of the tests service providers advised testers that they should not pay their mortgage."); NAAG (ANPR) at 10 ("In some cases, the mortgage consultants will actually counsel the consumer not to make a mortgage payment, which of course frees up funds for the consultants' fee.").

[83] *See infra* notes 89–90.

[84] *See, e.g., Florida* v. *Kirkland Young,* No. 09–90945 (Fla. Cir. Ct. Miami-Dade Cty., filed Dec. 17, 2009), *available at http://myfloridalegal.com/webfiles.nsf/WF/MRAY-7YXQF7/$file/Complaint.121709.pdf.* Press Release, N.C. Dep't of Justice, *AG Cooper Targets California Schemes that Prey on NC Homeowners* (July 15, 2009), *available at http://www.ncdoj.com/News-and-Alerts/News-Releases-and-Advisories/Press-Releases/AG-Cooper-targets-California-schemes-that-prey-on-.aspx;* Press Release, Colo. Att'y Gen. Office, *Attorney General Announces Actions Against Seven Loan-Modification Companies As Part of Multistate Sweep* (July 15, 2009), *available at http://www.coloradoattorneygeneral.gov/press/news/2009/07/15/attorney_general_announces_actions_against_seven_loan_modification_companies_p;* Press Release, Ill. Att'y Gen., *Illinois Attorney General Sues 14th Company for Mortgage Rescue Fraud* (Aug. 28, 2009), *available at http://www.illinoisattorneygeneral.gov/pressroom/2008_08/20080828.html.*

[85] *See, e.g.,* Deal at 5–6 ("Some non-attorney modification companies claimed to have attorneys on staff or available to review the work or to negotiate with lenders. A few lawyers 'rented' their names to non-attorney MARS providers while providing little service."); IL AG (ANPR) at 1 (noting that "33 percent of the [MARS] companies we have dealt with are owned by attorneys, while 38 percent have some link to the legal profession"); CRC (ANPR) at 2 ("An increasing number of attorneys are involving themselves in these unethical practices without providing any legal (or other) services. . . ."); MN AG (ANPR) at 5 ("This Office is aware of several loan modification and foreclosure rescue companies that have affiliated with licensed attorneys in other states in an effort to circumvent state law."); NAAG (ANPR) at 4 ("Attorneys * * * have an increasing presence in this industry and have been found working in conjunction with or serving as referral sources for mortgage consultants.").

[86] *See, e.g., Legislative Solutions for Preventing Loan Modification and Foreclosure Rescue Fraud: Hearing Before the Subcomm. on Hous. & Cmty. Opportunity of the H. Comm. on Fin. Servs.,* 111th Cong. 58 (2009) (statement of Scott J. Drexel, Chief Trial Counsel, State Bar of California), *available at http://financialservices.house.gov/media/file/hearings/111/111-28.pdf* at 2, 4 (Drexel Testimony) (noting that attorney misconduct in connection with MARS "is a problem of extremely significant—if not crisis—proportions in California," and that the state bar has initiated over 175 associated investigations of attorneys); Polyana Da Costa, *Record Number of Complaints Target Florida Loan Modification Lawyers,* Law.com (Oct. 1, 2009) ("The [Florida] state attorney general has received a record 756 complaints through August of this year about loan modifications involving attorneys."), available at *http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=1202434223147.*

[87] *See, e.g., FTC* v. *Fed. Housing Modification Dep't,* No. 09–CV–01753 (D.D.C. filed Sept. 16, 2009) (alleging that defendants falsely claim to have attorneys or forensic accountants on staff); *FTC* v. *Loan Modification Shop, Inc.*, No. 3:09–cv–00798 (JAP), Mem. Supp. TRO at 14 (D.N.J. filed Aug. 4, 2009) (alleging that defendants misrepresent "that it is an attorney-based company"); *see also FTC* v. *LucasLawCenter* "*Inc.*", No. SACV–09–770 DOC (ANX), Mem. Supp. TRO at 19 (C.D. Cal. filed July 7, 2009) (alleging that "[d]espite promises to the contrary, consumers have no contact with the purported attorneys who are supposed to be negotiating with their lenders").

[88] *See, e.g., FTC* v. *Truman Foreclosure Assistance, LLC,* No. 09–23543 (S.D. Fla. filed Nov. 23, 2009); *FTC* v. *Washington Data Res., Inc.,* No. 8:09–cv–02309–SDM–TBM (M.D. Fla. filed Nov. 12, 2009); *see also FTC* v. *US Foreclosure Relief Corp.,* No. SACV09–768 JVS (MGX), Prelim. Rep. Temp. Receiver at 2–3 (C.D. Cal. filed July 7, 2009) (stating that defendants' "relationship with two different lawyers was nominal at best and served primarily as a cover to dignify the business and invoke the attorney exception to advance fee prohibitions").

[89] *See* FTC Case List, *supra* note 28.

[90] 16 CFR 310.1, *et seq.* (2003); *see, e.g., FTC* v. *Kirkland Young, LLC,* No. 09–23507 (S.D. Fla. filed Nov. 18, 2009); *FTC* v. *Washington Data Res., Inc.*, No. 8:09–cv–02309–SDM–TBM (M.D. Fla. filed Nov. 12, 2009); *FTC* v. *First Universal Lending, LLC,* No. 09–CV–82322 (S.D. Fla. filed Nov. 24, 2009); *FTC* v. *Fed. Housing Modification Dep't,* No. 09–CV–01753 (D.D.C. filed Sept. 15, 2009); *FTC* v. *Hope Now Modifications, LLC,* No. 1:09–cv–01204–JBX–JS (D.N.J. filed Sept. 14, 2009); *FTC* v. *US Foreclosure Relief Corp.,* No. SACV09–768 JVS (MGX) (C.D. Cal. filed July 7, 2009).

[91] See Press Release, FTC, *Federal and State Agencies Target Mortgage Foreclosure Rescue and Loan Modification Scams* (July 15, 2009), *available at http://www.ftc.gov/opa/2009/07/loanlies.shtm;* Press Release, FTC, *Federal and State Agencies Crack Down on Mortgage Modification and Foreclosure Rescue Scams* (Apr. 6, 2009), *available at http://www.ftc.gov/opa/2009/04/hud.shtm.*

Enforcement Task Force (FFETF), a coalition of federal and state law enforcement agencies that has worked to combat illegal activity by MARS providers.[92] In the past 15 months, the FTC has participated in three interagency nationwide sweeps: "Operation Stolen Dreams" (June 17, 2010), in which the Commission secured consent orders against 16 marketers of MARS;[93] "Operation Stolen Hope" (November 24, 2009), in which the Commission joined with 20 states collectively to file over one hundred lawsuits against MARS providers;[94] and "Operation Loan Lies" (July 15, 2009), in which the FTC coordinated with 25 federal and state agencies to bring 189 actions against MARS defendants.[95] Prior to these nationwide sweeps, the Commission, jointly with the DOJ, the Treasury Department, HUD, and the Illinois Attorney General, had announced several law enforcement actions targeting MARS.[96]

In addition to their coordination with the Commission, the states have continued to engage in their own aggressive law enforcement. Collectively, the states have investigated at least 450 MARS providers and sued hundreds of them for alleged state law violations.[97] Individual states also have continued to enact statutes and regulations to address practices related to MARS.[98]

In addition to federal and state law enforcement, on December 15, 2009, HUD published a proposed rule in the **Federal Register** that would require states to adopt uniform licensing requirements for MARS providers.[99] The proposed HUD Rule targets the practices of "loan originators," a term that encompasses third-party loan modification services.[100] Under the proposed HUD Rule, loan originators must undergo a background check, complete 20 hours of pre-licensing education, and pass a written test to obtain a license.[101] The proposed HUD Rule also requires the creation of a centralized database of loan originators licensed in each state, containing such information as their employment history, consumer complaints, and any enforcement and disciplinary actions brought against them. State regulators and the public will be able to access this database, thus allowing them to find and track mortgage loan originators throughout the country.[102] The goal of the proposed HUD Rule is to reduce the incidence of fraud by encouraging states to establish minimum licensing and registration standards, thereby making originators, including MARS providers, more accountable.[103]

III. Discussion of the Rule

As detailed in this SBP, the Final Rule prohibits and seeks to prevent unfair and deceptive acts and practices in connection with mortgage assistance relief services. It includes provisions that:

1. Define several key terms, including "mortgage assistance relief service" and "mortgage assistance relief service provider";

2. Prohibit providers from instructing consumers to cease communication with their lenders or servicers;

3. Bar providers from misrepresenting any material aspect of their services, including but not limited to several specific misrepresentations;

4. Mandate that providers disclose: (a) That they are for-profit businesses not affiliated with the consumers' lenders or the government, (b) that consumers' lenders or servicers may not agree to change their loans, (c) that consumers could lose their homes and damage their credit ratings if they stop making their mortgage payments (a disclosure triggered if providers instruct consumers to stop making payments), and (d) that consumers are not required to stay in the service or accept the results delivered, and the total cost of the service if they do accept the results.

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[92] *See* Press Release, Financial Fraud Enforcement Task Force (FFETF), *President Obama Establishes Interagency Financial Fraud Enforcement Task Force* (Nov. 17, 2009), *available at http://www.stopfraud.gov/news/news-11172009-01.html.* The FFETF was established by President Obama in late 2009 and is chaired by the Attorney General. The Commission has played an active role on the Task Force through, among other things, its membership on the Task Force's Mortgage Fraud Working Group.

[93] *See* Press Release, FTC, *FTC Settlement Orders Ban More Than A Dozen Marketers from Selling Mortgage Relief Services; Repeat Offender Ordered to Pay $11.4 Million for Contempt* (June 17, 2010), *available at http://www.ftc.gov/opa/2010/06/loanmods.shtm.* This sweep was organized by the FFETF, and member agencies filed hundreds of civil and criminal mortgage fraud cases, including numerous cases against MARS providers.

[94] Press Release, FTC, *Federal and State Agencies Target Mortgage Relief Scams* (Nov. 24, 2009), *available at http://www.ftc.gov/opa/2009/11/stolenhope.shtm.*

[95] Press Release, FTC, *Federal and State Agencies Target Mortgage Foreclosure Rescue and Loan Modification Scams* (July 15, 2009), *available at http://www.ftc.gov/opa/2009/07/loanlies.shtm.*

[96] Press Release, FTC, *Federal and State Agencies Crack Down on Mortgage Modification and Foreclosure Rescue Scams* (Apr. 6, 2009), *available at http://www.ftc.gov/opa/2009/04/hud.shtm.* In connection with these joint efforts, the Commission also sent warning letters to 71 companies marketing potentially deceptive mortgage loan modification and foreclosure assistance programs on the Internet. *Id.*

Moreover, the Justice Department and other members of the FFETF have pursued many MARS providers for illegal conduct, including criminal activity. *See* Press Release, FFETF, *Financial Fraud Enforcement Task Force Announces Results of Broadest Mortgage Fraud Sweep in History* (June 17, 2010), *available at http://www.stopfraud.gov/news/news-06172010-02.html.*

[97] *See supra* note 62.

[98] At least 30 states and the District of Columbia have enacted such statutes or regulations. *See, e.g.,* Ariz. Rev. Stat. § 44–1378 (2010 Ariz. ALS 143); Cal. Civ. Code § 2944.7; *id.* § 2945, *et seq.;* Colo. Rev. Stat. § 6–1–1101, *et seq.;* 2009 Conn. Gen. Stat. § 36a–489; 6 Del. Code Ann. § 2400B, *et seq.;* D.C. Code § 42–2431, *et seq.;* Fla. Stat. § 501.1377; Haw. Rev. Stat. § 480E–1, *et seq.;* Idaho Code Ann. § 45–1601, *et seq.;* 765 Ill. Comp. Stat. Ann. 940/1, *et seq.;* 24 Ind. Admin. Code § 5.5–1–1, *et seq.;* Iowa Code § 741E.1, *et seq.;* Me. Rev. Stat. Ann. tit. 32, § 6171, *et seq.* & 6191, *et seq.;* Md. Code Ann., Real Property § 7–301, *et seq.;* 940 Mass. Code Regs. § 25.01, *et seq.;* Mich. Comp. Law § 445.1822, *et seq.;* Minn. Stat. § 325N.01, *et seq.;* Mo. Rev. Stat. § 407.935, *et seq.;* Neb. Rev. Stat. § 76–2701, *et seq.;* Nev. Rev. Stat. § 645F.300, *et seq.;* N.H. Rev. Stat. Ann. § 479–B:1, *et seq.;* 2010 N.M. ALS 58; N.Y. Real Prop. Law § 265–B; N.C. Gen. Stat. § 14–423, *et seq.;* 2008 Or. Laws Ch. 19; R.I. Gen. Laws § 5–79–1, *et seq.;* Tenn. Code Ann. § 47–18–5501, *et seq.;* Utah Admin. Code § 61.2; Va. Code Ann. § 59.1–200.1; Wash. Rev. Code § 19.134.010, *et seq.;* Wis. Stat. § 846.45.

These laws generally include a number of requirements and restrictions, including: (1) Banning covered entities from requiring or collecting advance fees before fully performing contracted or promised services to the consumer; (2) requiring written contracts containing certain provisions and disclosures; and (3) providing consumers with the right to cancel the contract in certain circumstances.

Where, as here, Congress has not foreclosed state regulation, a state statute is preempted only if it conflicts with a federal statute. *Ray* v. *Atl. Richfield Co.,* 435 U.S. 151, 158 (1978). State laws are preempted only to the extent there is a conflict—compliance with both federal and state regulations is impossible or the state law is an obstacle to effectuating the purposes and objectives of Congress. *Id.* Thus, state laws can impose additional requirements as long as they do not directly conflict with the Final Rule. *See, e.g., TSR Final Rule,* 75 FR at 48481.

[99] *See Safe Mortgage Licensing Act: HUD Responsibilities under the Safe Act; Proposed rule,* 74 FR 66548 (Dec. 15, 2009) (proposed HUD Rule). Pursuant to the Dodd-Frank Act, responsibility for HUD's proposed rule will transfer to the BCFP as of the transfer date selected by the Treasury Department. Dodd-Frank Act § 1061; which has been designated as July 21, 2011. *BCFP; Designated Transfer Date,* 75 FR 57252.

[100] 74 FR at 66554.

[101] 74 FR at 66552.

[102] 74 FR at 66548–49.

[103] 74 FR at 66548. The proposed rule also would authorize HUD to examine loan originators' records, conduct enforcement proceedings, and collect civil penalties for violations of HUD and state licensing requirements. *See* 74 FR at 66550, 66555.

A coalition of state bank regulators argued in its comment that the FTC's proposed rule would provide important additional protections not included in the HUD proposal. *See* CSBS at 1 ("SAFE Act-compliant state licensing laws are primarily focused toward the origination of new mortgage loans and may not directly address the particular dangers associated with mortgage assistance relief services. The proposed FTC rule will establish a floor to protect consumers from abusive MARS practices nationwide. By banning up-front fees, implementing disclosure requirements, prohibiting certain misrepresentations, and instituting various record-keeping requirements for MARS providers, the FTC's proposal, if adopted, will go a long way in rooting out fraudulent practices among these individuals wherever they operate.").

5. Prohibit the collection of fees until providers have: (a) Secured a written and executed agreement between the consumer and the lender or servicer and, (b) before that agreement has been executed, (i) disclosed that the consumer can accept or reject the lender's or servicer's offer for mortgage relief and (ii) provided a separate written notice from the consumer's lender or servicer summarizing the material differences between the consumer's current mortgage loan and the relief offered;

6. Enjoin persons from providing substantial assistance or support to another whom they know or consciously avoid knowing is engaged in a violation of the Rule;

7. Require that providers maintain records and monitor Rule compliance; and

8. Exempt attorneys providing MARS as part of the practice of law from most provisions of the Rule if they: (a) Are licensed in the state where the consumer or the dwelling is located, and (b) comply with relevant state licensing and bar requirements. Such attorneys are exempt from the Rule's advance fee ban if they set aside MARS fees in a client trust account and withdraw funds only as the fees are earned.

A. Section 322.1: Scope

Section 322.1 states that the Final Rule implements the mandate of the Omnibus Appropriations Act, as clarified by the Credit CARD Act. These statutes state that the Commission "shall initiate a rulemaking proceeding," and that "[s]uch rulemaking shall relate to unfair or deceptive acts or practices regarding mortgage loans, which may include unfair or deceptive acts or practices involving loan modification and foreclosure rescue services."[104] As noted earlier, this language authorizes rules that not only prohibit or restrict practices that are themselves unfair or deceptive, but also rules that prohibit or restrict other practices if such rules are reasonably related to the goal of preventing unfairness or deception.[105] As discussed above, the Commission's rulemaking authority is limited by the Credit CARD Act to persons over whom the FTC has jurisdiction under the FTC Act.

B. Section 322.2: Definitions

1. Section 322.2(i): Mortgage Assistance Relief Service

As discussed above, the Rule is intended to regulate for-profit providers of mortgage assistance relief services. Section 322.2(i) of the Rule adopts, without substantive modification, the proposed rule's definition of "mortgage assistance relief service" (MARS) as including "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 negotiating a modification of a dwelling loan that reduces the amount of interest, principal balance, monthly payments, or fees; stopping, preventing, or postponing a foreclosure or repossession; or obtaining one of several other types of relief to avoid delinquency or foreclosure. Sections 322.2(i)(3)–(6) define these additional types of relief to include obtaining: (1) A forbearance or repayment plan; (2) an extension of time to cure default, reinstate a loan, or redeem a property;[106] (3) a waiver of an acceleration clause or balloon payment; and (4) a short sale, deed-in-lieu of foreclosure, or any other disposition of the property except a sale to a third-party that is not the loan holder.[107] The Rule covers instances in which a third party itself works with lenders or servicers to obtain mortgage relief as well as instances in which a third party markets services to aid consumers who themselves work with lenders or servicers to obtain relief.[108] Accordingly, § 322.2(i) is intended to apply to every service MARS providers offer,[109] expressly or by implication, for the purpose of obtaining loan concessions, avoiding foreclosure, or saving their homes.[110]

Mortgage assistance relief services under the Rule are limited to services

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[104] *See* Omnibus Appropriations Act § 626(a); Credit CARD Act § 511.

[105] In articulating the scope of its rulemaking authority to remedy unfair and deceptive acts and practices under the FTC Act, the Commission has explained:

> In exercising this remedial authority, the Commission has not been limited to proscribing only the precise practices found to exist, but rather has been free to close all roads to the prohibited goal. * * * The Commission's discretion to formulate an appropriate means of preventing the unfair or deceptive acts or practices found to exist also takes into account the nature of rulemaking, which involves predictions based upon pure legislative judgment and judgmental or predictive determinations such as those involved in fashioning remedies. In making such determinations, the Commission is entitled to rely on its judgment, based on experience as to the appropriate remedy to impose in the rule.

FTC, *Funeral Industry Practices; Final Trade Regulation Rule,* 47 FR 42269, 42272 (Sept. 24, 1982) (citing, *inter alia, FTC* v. *Ruberoid,* 343 U.S. 470, 473 (1952)) (internal citations and quotations omitted); *see also Am. Fin. Servs Ass'n* v. *FTC.,* 767 F.2d 957, 988 (DC Cir. 1985) (noting that the Commission "has wide latitude for judgment" in crafting rules to curb unfair or deceptive practices).

The Commission exercises similar discretion in crafting orders to resolve law violations. *See FTC* v. *Nat'l Lead Co.,* 352 U.S. 419, 428 (1957) ("[T]he Commission is clothed with wide discretion in determining the type of order that is necessary to bring an end to the unfair practices found to exist."); *Ruberoid,* 343 U.S. at 473 ("If the Commission is to attain the objectives Congress envisioned, it cannot be required to confine its road block to the narrow lane the transgressor has traveled; it must be allowed effectively to close all roads to the prohibited goal, so that its order may not be by-passed with impunity."); *Jacob Seigel Co.* v. *FTC,* 327 U.S. 608, 611–12 (1946) ("The Commission has wide discretion in its choice of a remedy deemed adequate to cope with the unlawful practices in this area of trade and commerce.").

[106] In many states, mortgagors have the right to "redeem," *i.e.,* regain possession of, a property for a period of time following foreclosure. *See, e.g.,* RealtyTrac, *Foreclosure Laws and Procedures By State* (chart showing that, depending on the state and the borrower's circumstances, redemption periods can last anywhere from 10 days to over one year), *available at http://www.realtytrac.com/foreclosure-laws/foreclosure-laws-comparison.asp*.

[107] Several commenters supported the adoption of this definition. *See, e.g.,* NCLC at 3 ("[T]he broad definition of MARS and MARS provider are also important aspects of the rule that will help ensure its effectiveness. By including all possible forms of mortgage relief assistance, including those represented by implication to assist or attempt to assist consumers, the FTC has reduced the possibility of scammers evading the rule with tricks or loopholes."); CUUS at 2 ("[T]he definition of 'mortgage assistance relief services' in [the proposed rule] is sufficiently broad to include the types of companies offering the services which are the subject of abuses."); CSBS at 2 ("The state regulators believe that the proposed definition of 'mortgage assistance relief service' is generally adequate in covering the scope of the NPR[M].").

[108] The Rule, however, is not intended to cover those who provide general financial advice to consumers—such as accountants or financial planners—that consumers could potentially use to avoid foreclosure or obtain loan modifications from their lenders or servicers. Nevertheless, if an entity that provides financial advice or that reviews consumers' mortgage loan paperwork (*e.g.,* performs a "forensic audit"), *see infra* note 110, promotes its services in such a manner that consumers take away the express or implied claim that the entity's service will result in a loan modification or other mortgage relief, the entity is a "mortgage assistance relief service provider" under the Final Rule. In that instance, if consumers do not obtain the represented result, the entity will have made a misrepresentation in violation of Section 322.3(b) of the Final Rule. *See infra* § III.3.a. The Commission emphasizes that fine-print or pro forma disclaimers generally are not sufficient to qualify performance or success claims. *See, e.g.,* Deception Policy Statement, *infra* note 200, at 180; *infra* note 220.

[109] *See, e.g.,* MN AG at 2 ("Any rule adopted by the Commission should clearly regulate all forms of mortgage assistance relief servicers.").

[110] This provision encompasses "forensic audits" and other services in which the provider purports to review, and identify potential errors in, loan documents or documents sent by a consumer's lender or servicer in order to avert foreclosure or obtain concessions from the lender or servicer. *See supra* note 56; *MARS NPRM,* 75 FR at 10720 n.160. For example, if, for these purposes, a provider offers to examine and find mistakes in foreclosure documents which the lender or servicer signed by automatic means (sometimes referred to as "robo-signing") without checking them for accuracy, this service would fall within § 322.2(i) of the Final Rule.

that are offered to consumers [111] who are obligated under loans secured by a "dwelling" or residence. A "dwelling" is defined in Section 322.2(e) of the Rule to be a residential structure containing four or fewer units, regardless of whether it is attached to real property. The term dwelling includes "an individual condominium unit, cooperative unit, mobile home, manufactured home, or trailer." [112] In response to comments on the NPRM, the Rule adds the term "manufactured home" to the definition of "dwelling" to ensure that the Rule's protections extend to consumers whose homes are constructed at a site (*e.g.,* factory floor) other than the final location of the structure.[113] Finally, the definition of "dwelling" applies only to residences that are "primarily for personal, family, or household purposes." [114] The definition of "dwelling" includes second homes and rental properties of consumers, because the Commission's law enforcement experience indicates that consumers who own such properties may seek help to avoid foreclosure on these properties.[115] However, "dwelling" does not cover MARS offered in connection with commercial properties.[116]

a. Sale-Leaseback and Title Reconveyance Transactions

In the NPRM, the Commission advised that the proposed definition of MARS would cover offers of sale-leaseback and title reconveyance transactions,[117] but only if they were marketed "to save the consumer's home from foreclosure or repossession." [118] The Commission specifically solicited comment on this aspect of the proposed rule, including whether and how a final rule should address these transactions.[119]

In response to the FTC's request for comments, state law enforcers and consumer groups endorsed the proposed rule's coverage of sale-leaseback or title reconveyance transactions when they are marketed as ways to avoid foreclosure.[120] These organizations asserted that this limited coverage is sufficient in light of existing state laws governing how such sales must be structured.[121] One group of state regulators, however, advocated that the Commission address the underlying sale-leaseback transaction in a subsequent rulemaking if addressing it now would delay the issuance of the Final Rule.[122]

Many states have enacted laws that comprehensively regulate sale-leaseback and title reconveyance transactions, imposing, for example, specific valuation requirements on the property transfers and obligations to determine that the consumer can reasonably afford to repurchase the property.[123] On the other hand, the record shows that sale-leaseback and title reconveyance transactions have been commonly touted as a means to avert foreclosure and its consequences.[124] Although the Final Rule does not regulate the terms of sale-leaseback and title reconveyance transactions, if such transactions are represented, expressly or impliedly, as a way for a consumer to avoid foreclosure, they present the same risks to consumers as other forms of MARS.[125] The FTC thus has determined that the Final Rule will cover offers of sale-

[111] "Consumer" is broadly defined to include "any natural person who is obligated under any loan secured by a dwelling." Section 322.2(d). For the purposes of clarity, the Final Rule's definition of "consumer" replaces "owes on" in the proposed definition with "is obligated under." The Commission intends to cover consumers at every stage of the process and does not limit the Rule's protections to those who are in default or foreclosure. *See* NAAG at 3 ("We support broad application of the rule to cover all homeowners, regardless of whether they are in foreclosure or have defaulted on their loans."). Covering consumers who are not in default or foreclosure is necessary because many of them seek assistance from MARS providers before they are actually delinquent on their loans. *See* CMC (ANPR) at 8 ("Many of the abuses that servicers have encountered have occurred before the consumer has received a notice of default. MARS providers sometimes solicit customers who are not in default but who live in areas with high numbers of distressed borrowers. Any rule should apply to MARS providers at any stage of the process."); NCLC (ANPR) at 4 ("Many homeowners have sought help from MARS [providers] before entering default, though sometimes the MARS then encourages a default. * * * The mortgage servicing industry and others have urged homeowners to seek help before they go into default."); NCRC (ANPR) at 2 (noting that there are "[c]ompanies claiming to offer assistance with loan modifications, to consumers who may or may not be in default"); NAAG (ANPR) at 11 ("The [state] requirement that consumers be in default before statutory protections begin made sense when mortgage consultants solicited business based on foreclosure filings, as those consumers would necessarily be in default. Mortgage consultants are now able to mine public information to target consumers who are not yet in default. Consultants may rely on an Internet presence to draw in consumers who may also not be in default. As consumers have grown more concerned about the state of the economy, these solicitations are proving increasingly attractive. Based on these reasons, a rule should provide as much coverage for consumers as possible.").

[112] Section 322.2(e). The definition for "dwelling" is similar to the definition of that term in Regulation Z, 12 CFR. 226, which implements the Truth in Lending Act, 15 U.S.C. 1601 *et seq.;* 12 CFR 226.2(a)(19).

[113] Some commenters recommended including manufactured homes, a term defined by the National Manufactured Housing Construction and Safety Standards Act, 42 U.S.C. 5402(6), to refer to non-site built homes. *See, e.g.,* NCLC at 3 (the term "mobile home" often refers to a home built prior to 1974, while the term "manufactured home" means a post-1974 home that complies with HUD standards); *see also* OPLC at 2; NCLC at 4.

[114] This language is derived from Regulation Z. *See* 12 CFR 226.2(a)(12) (definition of "consumer credit").

[115] There have been cases in which consumers were at risk of foreclosure on non-primary residences. One comment observed that those at risk of losing a property to foreclosure include senior citizens who live in nursing homes or assisted living facilities and military service members who rent their homes while deployed. NCLC at 4 (supporting covering services purported to assist consumers save second homes or rental properties from foreclosure).

[116] The Final Rule also contains a definition of "dwelling loan," unmodified from the proposal, as "any loan secured by a dwelling, and any associated deed of trust or mortgage." Section 322.2(f).

[117] As noted in § II, in a sale-leaseback or title reconveyance transaction, the MARS provider typically instructs the consumer to transfer title to his or her home to the provider and then to rent the home from the provider. The provider then promises to reconvey title to the home at some later date. In some cases, the provider also may charge upfront fees in connection with the transaction. *See supra* note 43.

[118] *MARS NPRM,* 75 FR at 10728.

[119] *Id.*

[120] See NAAG at 5 ("We believe that the proposed rule will not interfere with state laws, but instead will complement existing state laws that address sale-leaseback transactions"); CSBS at 2 ("[S]tate regulators believe that it is important for the FTC to address abuses with respect to sale-leaseback transactions."); NCLC at 16 ("We support the FTC's plan to regulate only the marketing of these scams while leaving further regulation to the states.").

[121] *Supra* note 120.

[122] CSBS at 2 ("The state regulators believe that it is important for the FTC to address abuses with respect to sale-leaseback transactions. However, given the current prevalence of loan modification scams, regulations addressing those practices must receive priority. If the development of sale-leaseback regulations will delay the promulgation of final regulations to address loan modification scams, we believe that the sale-lease back regulations should be addressed in a separate effort.").

[123] *See supra* note 98. For example, some laws mandate that before executing a title transfer, the foreclosure rescue operator must verify that the consumer can reasonably afford to repurchase the home. *See, e.g.,* Minn. Stat. § 325N.17(a)(1). In addition, the foreclosure rescue operator may be required to obtain written consent from the homeowner, conduct a face-to-face closing, abide by federal and state laws governing sales of residential properties, allow consumers a period of time to cancel the transaction before title conveyance can be recorded, and either return title to the consumer or provide compensation that represents the property's fair market value. *See, e.g., id.* § 325N.17(a)(2)–(4), (b).

[124] *See supra* note 43; *see also, e.g.,* CJI, Att. 1, 2 (private plaintiffs in Maryland challenging foreclosure rescue and equity stripping scam); NAAG (ANPR) at 5–6; CJI, Att. 1 at 2; NCLC at 16 ("Sale-leaseback and other title-transfer transactions can be the most harmful of foreclosure rescue scams because they not only deprive a homeowner of scarce money but outright steal the homeowner's deed.").

[125] Other transactions proposed to consumers similarly would be covered by the Rule if marketed as a means to stop or avoid foreclosure. *See, e.g.,.* NV DML at 2–3 (describing two transactions being marketed to some consumers as a means to secure concessions on their mortgage loans). The definition of MARS encompasses any service that purports to help consumers stop, prevent, or postpone any foreclosure sale, or otherwise save the property, regardless of the form that relief may take. Section 322(i)(2).

leaseback and title reconveyance transactions marketed as a way to save a consumer's home from foreclosure or repossession.[126]

b. Mortgage Refinancing Services

The proposed rule covered mortgage brokers who offer loan origination or refinancing services, but only if those services are represented, expressly or impliedly, to help consumers avoid delinquency or foreclosure. The Final Rule is unchanged on this point. Thus, the Final Rule does not cover mortgage brokers who offer services that are advertised or marketed for other purposes. To obtain a new loan or refinance an existing loan, consumers can work either with the lender directly or with a mortgage broker. [127]

As discussed in the NPRM, in some cases consumers at risk of foreclosure could benefit from assistance in refinancing; thus, the Commission does not wish the Rule to reduce the availability of legitimate services of this kind.[128] At the same time, the Commission is concerned that services purported to help consumers avoid foreclosure through refinancing could be marketed unfairly or deceptively. Indeed, with the deterioration of the housing market, many mortgage brokers have focused on marketing and providing MARS to consumers,[129] and the record shows that some former brokers who now provide MARS have engaged in the same types of unfair and deceptive practices as other MARS providers.[130]

In the NPRM, the Commission specifically requested comment on how the Rule should treat mortgage brokers who offer refinancing services. A number of commenters, noting the incidence of unfair and deceptive practices by mortgage brokers selling MARS,[131] recommended that the Final Rule cover mortgage brokers.[132] In addition, one comment from a consumer group argued that the Rule should expressly cover refinancing as a form of MARS.[133] A consortium of state bank regulating agencies, on the other hand, recommended that the Rule exclude mortgage brokers entirely or, at a minimum, exclude their loan origination activities.[134]

The Commission concludes that mortgage brokers generally are not covered by the Rule. However, if a mortgage broker offers loan refinancing or originations as a means for consumers to save their homes from foreclosure—that is, the broker is providing MARS—then the Rule covers this conduct. Thus, the Final Rule protects consumers from unfair and deceptive practices by mortgage brokers operating as MARS providers without unduly restricting legitimate mortgage brokerage activities.

c. Mortgage Assistance Relief "Product"

One commenter recommended that the Commission add the word "product" to the proposed definition "mortgage assistance relief service." The commenter recommended this addition to ensure that providers cannot evade the Rule by claiming to sell a product (*e.g.,* software, books, CDs, or other tangible materials to help consumers avoid foreclosure) rather than a service.[135] Another comment from a group of state bank regulators disagreed, stating, without elaboration, that the regulators saw no reason to include the word "product" in the definition of MARS.[136]

The Commission declines to include products in the definition of MARS in the Final Rule. The record demonstrates that providers of services to help consumers modify their mortgages and avoid foreclosure often engage in unfair and deceptive practices; in contrast, neither the Commission's law enforcement experience nor the rulemaking record show that those who sell products for mortgage assistance relief are engaged in the same types of conduct. The Commission will continue to monitor to ensure that MARS providers do not gravitate to the sale of products to evade the Rule.[137] Should MARS providers selling products engage in unfair or deceptive practices, the Commission has the authority to take law enforcement action under Section 5 of the FTC Act. Moreover, should unfair or deceptive practices in the sale of mortgage assistance relief products become widespread, the Commission may consider amending the Rule to include such practices.[138]

2. Section 322.2(a): "Clear and Prominent"

The proposed rule required that mandated disclosures be made "clearly and prominently," specifying how this requirement applied in different mediums. The two commenters that addressed how disclosures must be made supported the proposed criteria for making clear and prominent

[126] As a general matter, the Final Rule is not intended to apply to the marketing of services to assist consumers in selling their properties to third parties. The Final Rule, however, does specifically cover the marketing of services involving the sale of properties to third parties if those services are designed or intended to assist consumers in averting foreclosure, *e.g.,* through a short sale or deed-in-lieu of foreclosure. One commenter urged the Commission to exempt licensed real estate professionals from the Final Rule. NAR at 1–2. The commenter argued the Rule would restrict real estate agents in helping consumers with the process of selling their homes through short sales. *Id.* The Commission concludes that an exemption for real estate agents is not necessary. Real estate agents customarily assist consumers in selling or buying homes and perform functions such as listing homes for sale, showing homes, and finding desirable homes for consumers. The Commission is aware that real estate agents may perform these functions when properties are bought or sold through a short sale transaction, but does not consider these services to be MARS.

[127] Mortgage brokers can offer a wide choice of loan products from different lenders, without consumers having to deal with each lender separately. Thus, mortgage brokers commonly act as intermediaries between consumers and lenders in bona fide loan origination or refinancing transactions. Mortgage brokers typically are paid by the lender, or in some cases by the borrower, from the closing costs of the loan transaction. *See, e.g.,* Nat'l Ass'n of Mortg. Brokers FAQs, *available at http://www.namb.org/namb/FAQs1.asp?SnID=498395277; see also* NAAG at 12 (noting that brokers "are traditionally paid * * * at the closing of a consumer's loan, after all services have been provided"); NCLC (ANPR) at 29 ("[B]rokers * * * are normally paid only when a sale or mortgage transaction is completed.").

[128] *MARS NPRM,* 75 FR at 10713.

[129] One commenter provided examples of advertisements showing MARS providers aggressively recruiting mortgage brokers to sell MARS. *See* NCLC (ANPR) at 10.

[130] *See, e.g. supra* note 52; Peter S. Goodman, *Subprime Brokers Back as Dubious Loan Fixers,* N.Y. Times, July 19, 2009, at A1 (accounting of how many mortgage brokers in southern California began selling MARS when loan origination work evaporated).

[131] *See* NYC DCA at 8; NAAG (ANPR) at 11–12.

[132] CSBS at 2 ("The proposed FTC rules should apply to mortgage brokers to the extent that mortgage brokers engage in non-loan origination MARS activities, *e.g.* negotiating loan modifications, short sales, etc."); NYC DCA at 8 ("Mortgage brokers offering for-profit mortgage assistance services are likely to be engaged in the same problematic practices as other MARS providers and must be subject to the rule."); LLAF at 2. Comments to the ANPR made similar arguments. *See, e.g.,* NAAG (ANPR) at 11–12 ("We have already seen complaints in which mortgage brokers charge consumers for mortgage consulting services and then failed to provide services or provided fewer services than originally promised. The trend of mortgage brokers providing services is likely to continue, especially if the market for mortgage loan origination remains soft."); NCLC (ANPR) at 13–14.

[133] *See* CUUS at 2–3 (recommending that Rule specify that "a refinance of the existing mortgage" is an example of an included service).

[134] *See* CSBS at 2 ("The proposed FTC rules do not need to address loan origination activities, even if the loan is being originated to avoid foreclosure.").

[135] *See* CUUS at 2 (adding the word "product" to the definition of MARS "would prevent MARS providers from claiming they are not covered by the rule because they offer a product, not a service.").

[136] *See* CSBS at 2 ("The state regulators do not believe that there is any reason to broaden the definition of MARS to include the word 'product' as inquired by the Commission.").

[137] Providers should be aware that merely including a product, such as a book, in conjunction with the sale of services will not remove the transaction from coverage by the Rule.

[138] As discussed above, *see supra* note 15, the Commission's authority to amend the MARS Rule will transfer to the BCFP on July 21, 2011.

disclosures.[139] No commenters opposed these requirements. The Final Rule substantially adopts the proposed rule's definition of "clear and prominent" with only the few changes discussed below. The Rule sets forth general requirements to ensure that required disclosures in commercial communications [140] are sufficiently clear and prominent for consumers to notice and comprehend them.[141] In all cases, the syntax and wording of disclosures must be easy for consumers to understand and must not be accompanied by statements that contradict or obscure their meaning.[142] The disclosures must be made in each language that is "substantially used" in the advertising.[143] In addition, as described below, the Rule includes clarity and prominence requirements specific to the particular media in which disclosures appear. The extensive record of unfairness and deception in the MARS industry makes it appropriate for the Commission to articulate with specificity how MARS providers must make required disclosures to prevent consumer harm.

a. Written Disclosures

The proposed rule set forth various requirements for disclosures that must appear in consumer communications disseminated in print or written form, including on a computer screen. The proposed rule provided that such disclosures:

shall be in a font easily read by a reasonable consumer, of a color or shade that readily contrasts with the background of the commercial communication, in the same language as each that is substantially used in the commercial communication, 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.

Section 322.2(a)(1) of the Final Rule largely retains these requirements but modifies them slightly to improve the clarity and effectiveness of the disclosures and to conform the relevant provisions of the Final Rule to the Free Credit Report Rule the Commission recently issued.[144] The Final Rule therefore now specifies that a written disclosure must be easily readable; in a high degree of contrast from the immediate background on which it appears;[145] distinct from other text, such as inside a border; and in a distinct type style, such as bold.[146] Unchanged, however, are the requirements that the disclosure must be communicated in the same languages that are substantially used in the commercial communication;[147] and appear parallel to the base of the communication[148] and that, unless otherwise specified, each letter of the disclosure text shall be, at a minimum, the larger of 12-point type or one-half the size of the largest character used in the name of the advertised website or telephone number to which consumers are referred for information on any MARS.[149]

b. Audio Disclosures

Section 322.2(a)(2) addresses the use of disclosures in audio communications such as broadcast radio or streaming radio. The proposed rule required these disclosures to be "delivered in a slow and deliberate manner and in a volume and cadence sufficient for an ordinary consumer to hear and comprehend them." As with the requirements for written disclosures, the Commission has decided to modify these requirements slightly to improve the clarity of the

[139] *See* CSBS at 2 (endorsing requirements as "generally well-rounded and adequate"); NCLC at 16 ("The Commission has done an admirable job writing disclosure rules that will reduce the ability of MARS providers to obscure or overshadow mandatory disclosure statements.").

[140] As defined in the Final Rule, "commercial communication" is intended to include any written or oral statement, illustration, or other depiction used to induce the purchase of a service, plan, or program. *See* § 322.2(c) (adopting the proposed definition without substantive modification). As detailed in Section III.D. of this SBP, the Final Rule also adds to the proposed provision two subprovisions defining "general commercial communication" and "consumer-specific commercial communication." *See* §§ 322.2(c)(1) & 322.2(c)(2). Section 322.2(c)(1) defines a "general commercial communication" to be "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." Section 322.2(c)(2) defines a "consumer-specific commercial communication" as "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." These definitions were added to clarify the disclosure requirements in § 322.4 of the Final Rule.

[141] Where possible, in formulating the requirements of the Rule, the Commission has drawn from comparable FTC rules requiring clear and prominent disclosures. *See* Free Annual File Disclosures, 16 CFR 610.4 (2010) (*Free Credit Report Rule*); Disclosure Requirements and Prohibitions Concerning Franchising, 16 CFR 436.6 (2007) (*Franchise Rule*); Disclosure Requirements and Prohibitions Concerning Business Opportunities, 16 CFR 437.1 (*Business Opportunity Rule*); Regulations Under Section 4 of the Fair Packaging and Labeling Act, 16 CFR 500.4 (*Fair Packaging and Labeling Act Regulations*); Trade Regulation Pursuant to the Telephone Disclosure and Dispute Resolution Act of 1992, 16 CFR 308.2 (*900 Number Rule*); Rule Concerning Cooling-Off Period for Sales Made at Home or at Certain Other Locations, 16 CFR 429.1 (*Door-to-Door Sales Rule*). The disclosure requirements also are consistent with those in many FTC orders. *See, e.g.,* Sears Holding Mgmt. Co., Docket No. C–4264, File No. 082–3099 (FTC Sept. 9, 2009), *available at http://www.ftc.gov/os/caselist/0823099/090604searsdo.pdf.*

[142] *See Free Credit Report Rule,* 16 CFR 610.4(3)(vi) (prohibiting any representation that contradicts, is inconsistent with, or undermines the required disclosures, and any techniques that significantly detract from the message communicated by the disclosures); *900 Number Rule,* 16 CFR 308.3(a)(5); *Franchise Rule,* 16 CFR 436.9(a); *Business Opportunity Rule,* 16 CFR 437.1(a)(21).

[143] *See Free Credit Report Rule,* 16 CFR 610.4(3)(ii) (same language as that principally used in the advertisement); *see also* NYC DCA at 7–8 ("The FTC should require MARS providers to offer all mandated disclosures * * * in the languages used in their advertising."); LFSV at 2 ("The FTC should require that companies that negotiate a contract primarily in a language other than English provide a contract in the language in which the contract was primarily negotiated.").

[144] *See Free Credit Report Rule,* 16 CFR 610.4 (2010). The Commission did not promulgate the Free Credit Report Rule until after it issued the *MARS NPRM.* In that proceeding, unlike this one, the Commission received numerous comments on how the rule should address the prominence of the required disclosures, including formatting and placement. *Free Annual File Disclosures; Final Rule* 75 FR 9733 (2010). Several commenters, for example, offered suggestions on how to make visual disclosures prominent, including placing them within a border in a box, and in a contrasting color. *Id.* at 9734.

[145] *Free Credit Report Rule,*16 CFR 610.4(a)(3)(iii); *see also, In re Tender Corp.,* Docket No. C–4261 (FTC July 17, 2009), *available at http://www.ftc.gov/os/caselist/0823188/090717tenderdo.pdf* (stating that disclosures must appear "in print that contrasts with the background against which it appears"); *In re Budget Rent-A-Car-System, Inc.,* Docket No. C–4212 (FTC Jan. 4, 2008), available at *http://www.ftc.gov/os/caselist/0623042/080104do.pdf* (same); *see also* FTC, *Dot Com Disclosures: Information about Online Advertising* 12 (2000), *available at http://www.ftc.gov/bcp/edu/pubs/business/ecommerce/bus41.pdf (Dot Com Disclosures)* ("A disclosure in a color that contrasts with the background emphasizes the text of the disclosure and makes it more noticeable. Information in a color that blends in with the background of the advertisement is likely to be missed.").

[146] Sections 322.4(a) and (b) of the Rule set forth additional requirements for the heading that must precede written disclosures. This heading must be in bold face font that is at least two-point type larger than the font size of the text of the required disclosures.

[147] *See also, e.g., Free Credit Report Rule,* 16 CFR 610.4(a)(3)(ii); *900 Number Rule,* 16 CFR 308.3(a)(1). If the advertisement has substantial material in more than one language, the MARS Rule requires that the disclosure be delivered in each such language. Section 322.2(a)(1).

[148] *See, e.g., Swisher Int'l, Inc.,* Docket No. C–3964 (FTC Aug. 25, 2000), *available at http://www.ftc.gov/os/2000/08/swisherdo.htm* (requiring warnings for cigars to appear "parallel * * * to the base of the * * * advertisement"); Fair Packaging and Labeling Act Regulations, 16 CFR 500.4(b) (requiring that identification for packaged goods appear "in lines generally parallel to the base on which the packaging or commodity rests as it is designed to be displayed").

[149] *See Free Credit Report Rule,* 16 CFR 610.4(b)(3); *see also 900 Number Rule,* 16 CFR 308.

requirements for audio disclosures and to be consistent with the Free Credit Report Rule.[150] Thus, the Final Rule requires MARS providers to deliver the required disclosures "in a slow and deliberate manner and in a reasonably understandable volume and pitch."[151]

c. Video Disclosures

Section 322.2(a)(3) of the Final Rule adopts the proposed rule's video disclosure requirements without modification. Video communications include those that appear on television or are streamed over the Internet. As a threshold matter, these disclosures must be delivered in accordance with the requirements for written and audio disclosures in §§ 322.2(a)(1) and (2). In addition, the disclosures must be made simultaneously in both audio and video,[152] the latter of which must be displayed for at least the duration of the audio disclosure and comprise at least four percent of the vertical picture height of the screen.[153]

d. Interactive Media

Section 322.2(a)(4) of the Final Rule addresses how disclosures must be made in interactive media formats, such as software, the Internet, or mobile media. As in proposed § 322.2(a)(4), the disclosures must conform with the requirements for written, audio, and video disclosures set forth in other parts of the "clear and prominent" definition. In addition, the disclosures must be provided in a way that the consumer cannot avoid the information, *i.e.*, it must be visible without the need to scroll down a Web page. The Final Rule makes two minor modifications to the proposed rule. First, it modifies the requirement that the disclosure be made on a separate landing page from the page on which the consumer takes any action to incur a financial obligation. The disclosure instead must be made on or immediately prior to the page on which the consumer takes any action to incur a financial obligation.[154] Second, the Final Rule mandates that the disclosure appear in text at least the same size as the largest character of the advertisement, replacing the proposed rule's requirement that it be twice the size of any hyperlink to the company's website or display of the URL. Both of these modifications are intended to ensure that consumers see mandated disclosures before they decide whether to purchase a mortgage assistance relief service.[155]

e. Program-Length Media

Section 322.2(a)(6) of the Final Rule, which adopts the proposed rule without modification, requires that disclosures in program-length television, radio, and Internet-based advertisements for MARS be presented at the beginning, near the middle, and at the end of the advertisement.[156] Requiring that disclosures be delivered at different stages of the broadcast makes it more likely that consumers who join the broadcast in progress will receive them.

3. Section 322.2(j): "Mortgage Assistance Relief Service Provider"

a. Exemption for Loan Holders and Servicers

Under § 322.2(j) of the Final Rule, "any person that provides, offers to provide, or arranges for others to provide, any mortgage assistance relief service" is a "mortgage assistance relief service provider,"[157] and thus subject to the Rule. The proposed rule generally exempted from its provisions loan holders and servicers, and agents of such entities unless the agents "claim, demand, charge, collect, or receive any money or other valuable consideration from the consumer for the agent's benefit."[158]

In the NPRM, the Commission specifically sought comment on the proposed exemption for loan holders and servicers.[159] Lenders and servicers (who actually have the authority to change loan terms) may offer MARS that the Rule would cover in the absence of an exemption.[160] For example, a lender or servicer may notify a consumer of her eligibility for a loan modification under the MHA program and assist her in submitting the necessary paperwork.[161] In addition, lenders and servicers may outsource these functions to other parties who operate on their behalf. Such outsourcing is a common method of providing these services given the large number of consumers currently requesting assistance.[162]

Several comments from the financial services industry and consumer groups expressly supported the proposed exemption for lenders and servicers,[163]

[150] *See supra* notes 141–49.

[151] *See Free Credit Report Rule,* 16 CFR 610.4(a)(1)(3)(iv); *see also In re Sears Holding,* Docket No. C–4264 (stating that audio disclosures must be made "in a volume and cadence sufficient for an ordinary consumer to hear and comprehend them"); *In re Darden Rests., Inc.,* Docket No. C–4189 (FTC May 11, 2009), *available at http://www.ftc.gov/os/caselist/0623112/070510do0623112c4189.pdf* (same); *In re Kmart Corp.,* Docket No. C–4197 (FTC Aug. 15, 2007), *available at http://www.ftc.gov/os/caselist/0623088/0623088do.pdf* (same); *In re Palm, Inc.,* Docket No. C–4044 (FTC Apr. 19, 2002), *available at http://www.ftc.gov/os/caselist/0023332/index.shtm* (same); *Dot Com Disclosures, supra* note 145, at 14 (same).

[152] Disclosures generally are more effective if they are made in both the visual and audio part of a consumer communication. *See generally* Maria Grubbs Hoy & J. Craig Andrews, *Adherence of Prime-Time Televised Advertising Disclosures to the* "*Clear and Conspicuous*" *Standard: 1990 Versus 2002,* 23 J. Mktg. Pub. Pol. 170 (2004) (stating that "dual modality" disclosures—oral and visual together—are more effective at communicating information to consumers); *see also In re Kraft, Inc.,* 114 F.T.C. 40 (1991) (finding that a visual disclosure alone was unlikely to be effective as a corrective measure in light of "the distracting visual and audio elements and the brief appearance of a complex superscript in the middle of the commercial"), *aff'd,* 970 F.2d 311 (7th Cir. 1992).

[153] *See Federal Election Commission Rules: Contributions and Expenditure Limitations and Prohibitions,* 11 CFR 110.11(c)(3)(iii)(B)–(C) (statement concerning funding source for political ads "must appear in letters equal to or greater than four (4) percent of the vertical picture height" and "be visible for a period of at least (4) four seconds").

[154] The Commission declines to require in the Final Rule that information be disclosed on a separate landing page, because this requirement may not be feasible or effective in some contexts, *cf. Free Credit Report Rule; Final Rule,* 75 FR 9726, 9737 (Mar. 6, 2010), and there is no evidence in the record addressing its effectiveness in this context.

[155] *See Dot Com Disclosures, supra* note 145, at 11 (explaining that disclosures are more likely to be effective if they are provided when the consumer is considering the purchase).

[156] *See Free Credit Report Rule,* 16 CFR 610.4(a)(3)(v). Section 308.3(a)(6) of the 900 Rule also imposes a nearly-identical requirement. 16 CFR 308.3(a)(6).

[157] Section 322.2(j).

[158] *See* § 322.2(i) (proposed rule). This limiting language was intended to ensure that MARS providers could not evade the Rule by styling themselves as "agents" of the lender or servicer.

[159] *See MARS NPRM,* 75 FR at 10728.

[160] *See, e.g.,* CMC (ANPR) at 5 ("Servicers are increasingly turning to third-party service-providers to assist them in processing loan modifications and in other loss-mitigation activities."); Am. Bankers Ass'n (ANPR) at 4–6; AFSA (ANPR) at 3, 5; MBA (ANPR) at 4.

[161] *See, e.g.,* AFSA at 3 (stating that mortgage servicers engage in the same forms of communication that would be covered under the Rule "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"); MBA (ANPR) at 4 (stating that mortgage servicers collect payments, conduct borrower contact and outreach, and execute loan modification or other loss mitigation agreements).

[162] *See, e.g.,* David Lawder, *Few US Mortgage Modifications Made Permanent,* Reuters Dec. 10, 2009, *available at http://www.reuters.com/article/idUSN1021463420091210* (referring to a company that "has been hired by some of the largest U.S. banks to assist in modification efforts").

[163] *See* AFSA at 2–3 (The 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, rather than this MARS rule, is the appropriate place to consider additional regulations for mortgage holders and servicers."); CUUS at 3 ("Consumers Union agrees that lenders and servicers should be exempted from the definition of 'mortgage assistance relief services.'" Consumers Union is not aware of any lenders or servicers actively marketing MARS services for a fee to their customers."); CUNA at 2 ("We strongly urge the FTC to retain this exemption in the Final Rule. Credit unions have not been the source of any problems for home loan

but some recommended modifications to its scope.[164] Three commenters said that the Rule should cover lenders and servicers.[165]

The Commission has determined that the record supports an exemption for lenders and servicers. These lenders and servicers might provide useful MARS to consumers, and nothing in the record shows that such entities have engaged in the core conduct addressed by the Final Rule, i.e., deceiving consumers into paying large advance fees for services and not delivering promised results.[166]

Thus, the Commission adopts the exemption in the proposed rule for lenders and servicers, but with three modifications.[167] First, the Commission has modified the definitions of "servicer" and "dwelling loan holder" in §§ 322.2(l) and 322.2(g), respectively, to limit the exemption to loan holders and servicers of loans "that [are] the subject of the offer to provide mortgage assistance relief services."[168] This modification clarifies that there is no blanket exemption for lenders and servicers based solely on their status,[169] but rather that the Final Rule exempts such entities only if they offer MARS in connection with loans they actually hold or service.

The second change to the exemption clarifies that it encompasses both agents and contractors of lenders and servicers. Specifically, §§ 322.2(j)(1) and (2) have been changed to include not only loan holders and servicers as well as their agents, but also "contractor[s] of such individual[s] or entit[ies]."[170] Adding the term "contractor" makes clear that the exemption would apply to third parties with whom lenders and servicers technically do not have an agency relationship as a matter of law, but who nevertheless perform MARS on their behalf.[171]

Third, the Commission has determined to remove the language in the proposed rule that would exclude from the exemption third parties who "claim, demand, charge, collect, or receive any money or other valuable consideration from the consumer for the agent's benefit." Such language would have resulted in the Rule covering agents and contractors that lenders and servicers may pay on a contingency or commission basis.[172] The Rule is not intended to restrict how lenders and servicers choose to compensate third parties that perform MARS functions on their behalf. Further, the Commission concludes that such a restriction on the exemption is not necessary to prevent third parties from improperly claiming an exemption in order to collect advance fees for MARS from consumers. The exemption applies only to those activities conducted within the scope of their agency or contractor relationship with exempted lenders and servicers. Thus, if they collect fees for MARS not performed on behalf of the lender or servicer, they would be subject to the Rule's requirements.

b. Treatment of Nonprofit Providers of Mortgage Relief Services

Section 322.2(k) of the Final Rule retains without substantive modification the exemption for nonprofit entities that was included in the proposed rule.[173] Nonprofits are excluded from the FTC's jurisdiction under the FTC Act and, therefore, they are exempt from rules issued pursuant to the Omnibus Appropriations Act.[174] This exemption includes bona fide nonprofit organizations with housing counselors offering MARS and nonprofit legal organizations representing financially stressed consumers.[175] The FTC, however, does have jurisdiction over purported nonprofits that in fact operate for the profit of their members,[176] and § 322.2(k) does not exempt these entities.[177]

borrowers and do not need additional rules to ensure they act in their members' best interests."); CSBS at 2–3 ("We support the Commission's inclination to generally exempt loan holders and servicers, as well as their agents, and nonprofit entities excluded from the FTC's jurisdiction from the definition of mortgage assistance relief service provider."); MBA at 3–4 ("We are pleased that the proposed rule specifically excludes mortgage servicers.").

[164] CUUS at 3 ("The Rule should specify that the only lender or servicer qualifying for this exemption is the one currently holding the mortgage loan of the homeowner retaining the services of a MARS entity."). *But see* MBA at 4 (the rule should exempt contractors of lenders and servicers); AFSA at 3–4 (servicers' agents and contractors that request or collect fees for their own benefit should not be excluded from the exemption). One commenter also requested that the Rule specify that "certain up-front fees are permissible by a licensed mortgage company, servicer or depository institution when necessary to execute a refinance, modification, or other loss mitigation agreement." MBA at 4. As discussed, the rule does not apply to loan holders or servicers, and thus does not govern these activities.

[165] One of the three commenters argued that lenders and servicers do not properly inform consumers of their foreclosure risks, lose paperwork associated with loan modification requests, fail to process these requests correctly, and mislead consumers about their eligibility for permanent loan modifications. *See* OPLC at 2. Another said it was aware of servicers who instructed homeowners to stop making payments and, in some cases, required homeowners to pay a fee to be considered for a loan modification. LOLLAF at 2–3. In opposing the exemption, a third commenter, a MARS provider, claimed that some lenders are "staffing up to create their own MARS entities" but did not elaborate further. *See* 1st ALC, Att. at 7. However, these practices fall outside of the scope of this rulemaking, which is focused on the conduct of intermediaries who consumers retain to work with their lenders.

[166] CUUS at 3 ("Consumers Union is not aware of any lenders or servicers actively marketing MARS services for a fee to their customers."); NAAG (ANPR) at 13 ("We are unaware of any banks, thrifts or federal credit unions engaged in for-profit loan modification or foreclosure rescue services, aside from negotiating loan modifications for consumers whose loans they are servicing."); Am. Bankers Ass'n (ABA) (ANPR) at 6; AFSA (ANPR) at 3; HPC (ANPR) at 2; OH AG (ANPR) at 5.

[167] Section 322.2(j)(1)–(2).

[168] "Dwelling loan holder" is defined in § 322.2(g) as "any individual or entity who holds the dwelling loan that is the subject of the offer to provide mortgage assistance relief services." Section 322.2(l) defines "servicer" as "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." This definition draws upon the definition of servicer in the Real Estate Settlement Procedures Act. *See* 12 U.S.C. 2605(i). As noted above, the Final Rule adds the phrase "that is the subject of an offer to provide mortgage assistance relief services" to the proposed definitions of "dwelling loan holder" and "servicer."

[169] *See* CUUS at 3 ("[C]onsumers Union is concerned that the lender or servicer exemptions may be used by MARS entities who otherwise provide or service loans and are technically lenders or servicers, but are not the lenders or servicers for the mortgage loan that is the subject of MARS services.")

[170] Section 322.2(j).

[171] *See* MBA at 4 (contractors under the supervision and control of the servicer do not "pose the risk of a foreclosure scam or phantom help").

[172] *See* AFSA at 3–4 (describing use of employee incentive programs and attorneys who work on a contingency).

[173] To improve the organization and clarity of the Rule text, however, the Commission has deleted proposed § 322.2(j)(3), and altered the definition of "person" in § 322.2(k) of the Final Rule—the foundational term of "mortgage assistance relief service provider"— to exclude "any person [that] is specifically excluded from the Federal Trade Commission's jurisdiction pursuant to 15 U.S.C. 44 and 45(a)(2)."

[174] Section 5(a)(2) of the FTC Act states: "The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations * * * from using unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. 45(a)(2). Section 4 of the Act defines "corporation" to include: "any company, trust, so-called Massachusetts trust, or association, incorporated or unincorporated, *which is organized to carry on business for its own profit or that of its members*." 15 U.S.C. 44 (emphasis added).

[175] These nonprofit services are described in more detail in Section II.C. of the ANPR. MARS ANPR, 74 FR at 26135.

[176] *See, e.g., AMA* v. *FTC,* 638 F.2d 443 (2d Cir. 1980); *FTC* v. *Ameridebt, Inc.,* 343 F. Supp. 2d 451 (D. Md. 2004).

[177] An entity that is registered as a tax exempt nonprofit under the Internal Revenue Code is not necessarily considered a nonprofit for the purposes of the exemption in the FTC Act. *See, e.g., FTC* v.

Continued

C. Section 322.3: Prohibited Representations

Section 322.3 of the Final Rule prohibits MARS providers from making certain representations or misrepresentations in connection with mortgage assistance relief services.

1. Section 322.3(a): Prohibited Statement

Section 322.3(a) of the Final Rule bans MARS providers from instructing consumers not to communicate with their lender or servicer. The Commission has concluded that giving such instruction is an unfair practice. In addition, the Commission has concluded that barring such instruction is reasonably related to the prevention of deception. The provision in the Final Rule is slightly modified from the proposed rule, as detailed below.

a. Public Comments on the Proposed Provision

Several commenters supported the ban on instructing consumers not to speak with their lender or servicer, including two consumer groups, a consortium of state banking regulators, and two trade groups for the financial services industry.[178] The comments generally warned that financially-distressed consumers who receive this advice from purported MARS experts and follow it are prevented from receiving valuable information from their lender or servicer. More specifically, consumers who cease such communications prior to purchasing MARS do not learn about workout or modification offers available from their lender or servicer,[179] as well as other information that may be material in evaluating the veracity of the claims made by the MARS provider about its services.[180] Consumers who stop communicating with their lenders or servicers after purchasing MARS may not learn that the MARS provider is not taking the actions necessary to deliver the results it promised.[181] Finally, in some cases, both before and after purchasing MARS, consumers who do not communicate with their lenders or servicers may not know that foreclosure and loss of their home is imminent.[182]

A few commenters objected to this prohibition as it applied to attorneys, voicing concern that it would prevent attorneys from properly advising their clients as to their mortgages.[183] As described in § III.G. of this SBP, the Final Rule exempts from § 322.3(a) attorneys who provide MARS when they meet certain conditions.

b. Final Section 322.3(a)

Section 322.3(a) of the Final Rule adopts the proposed rule's prohibition on the instruction,[184] with one clarification. The proposed rule prohibited MARS providers from giving consumers such instruction "in connection with the advertising, marketing, promotion, offering for sale, or sale" of mortgage assistance relief services. The Final Rule clarifies that MARS providers also are prohibited from giving consumers such instruction in connection with performing services under their contracts. This change is consistent with the discussion of the scope of the prohibition in the NPRM,[185] and with the comments indicating that consumers who follow this instruction are likely to be harmed even after purchasing MARS.

c. Legal Basis

(1) Unfairness

The Commission concludes that it is an unfair practice for MARS providers to instruct consumers not to communicate with their lenders or servicers, because that instruction:

(1) Causes or is likely to cause substantial injury to consumers,[186] (2) that is not outweighed by countervailing benefits to consumers or competition, and (3) is not reasonably avoidable by consumers.[187]

First, consumers who follow this instruction suffer or are likely to suffer substantial injury. As the commenters noted, consumers who stop communicating with their lender or servicer are deprived of critical information about (1) possible work-out options, (2) the veracity of the provider's claims, (3) whether the provider is actually performing, and (4) in some cases, that foreclosure and the loss of their homes is imminent. Consumers who lack this information may end up paying hundreds or thousands of dollars for MARS services that do not provide the promised relief, and may even lose their homes.[188]

Ameridebt, Inc., 343 F. Supp. 2d 451, 460–61 (D. Md. 2004).

[178] *See, e.g.,* CUUS at 3 ("strongly support[ ] the Rule's prohibition on any representation that would encourage consumers not to speak with their servicer or lender"); LOLLAF at 3 ("endorse[ ] the proposed rule's ban on MARS providers advising consumers not to contact their mortgage lenders and servicers"); CSBS at 3 (supports prohibiting MARS providers from instructing consumers not to contact their lenders or servicers but agrees with limited exemption for attorneys); AFSA at 4 ("strongly support[ ] proposed § 322.3(a). MARS providers should be banned from advising consumers not to contact or communicate with their lenders or servicers * * * [T]elling a borrower not to contact a lender or servicer is the worst advice someone can give a borrower at risk or in default.").

[179] AFSA at 4 ("If lenders and servicers are unable to contact borrowers, they are unable to offer workouts or loan modifications."); LOLLAF at 3 ("[O]ngoing communication with mortgage servicers is key to any homeowner negotiating a workout to save their home from foreclosure.").

[180] CUUS at 3 ("[T]he foreclosure clock continues to run, and rather than seeking help from a legitimate non-profit housing counseling agency, the homeowner is diverted away from legitimate sources of help by the MARS provider's assurances that they will deliver results."); *see also* CRC (ANPR) at 7 ("People who do not have a chance of keeping the home are being steered away from legitimate, free homeowner counseling services or are failing to take any action before it is too late because they have been assured everything is being taken care of for them already. All too often, it is not.").

[181] LOLLAF at 3 ("[C]ommunication with a servicer may allow a homeowner to determine whether or not the MARS provider is providing any service on his or her behalf, as that provider promised."); CUUS at 3 ("Consumers report often being instructed by MARS providers to cease all communication with their lenders and/or loan servicers, even though the provider subsequently does nothing of value on the homeowner's behalf.").

[182] AFSA at 4 ("[L]enders and servicers would be unable to warn a borrower of a potential foreclosure."); LOLLAF at 3 ("[U]rging a homeowner not to communicate with his/her servicers only increases the likelihood that a homeowner will end up in foreclosure, as well as burdened with additional late charges and other fees.").

[183] *See, e.g.,* ABA at 5; Bronson at 5.

[184] The Final Rule does not prohibit MARS providers from discussing with consumers the advantages and disadvantages of communicating with their lenders and servicers, so long as providers do not make any deceptive claims in doing so. Rather, the Final Rule bars MARS providers from instructing consumers not to engage in these communications.

[185] *MARS NPRM,* 75 FR at 10715–16.

[186] To establish that an act or practice is unfair, the Commission must demonstrate actual or likely consumer injury. 15 U.S.C. 45(n).

[187] 15 U.S.C. 45(n) (codifying the Commission's unfairness analysis); *see also In re Int'l Harvester Co.,* 104 F.T.C. 949, 1079, 1074 n.3 (1984), *reprinting* Letter from the FTC to Hon. Wendell Ford and Hon. John Danforth, Comm. on Commerce, Sci. and Transp., United States Senate, Commission Statement of Policy on the Scope of Consumer Unfairness Jurisdiction (Dec. 17, 1980) ("Unfairness Policy Statement").

[188] The FTC has observed these losses repeatedly in its law enforcement work. *See, e.g., FTC* v. *Loss Mitigation Servs., Inc.,* No. SACV09–800 DOC (ANX), Mem. Supp. Ex Parte TRO at 18–19 (C.D. Cal. filed July 13, 2009) ("In numerous instances, Defendants have warned consumers that any contact with their lenders will hinder Defendants' modification negotiations, and have threatened to drop consumers and deny them refunds if they independently talk to their lenders. Relying on this advice, many consumers avoid their lenders during critical periods, including after receiving notices of default or foreclosure, or other important communications. * * * At that point the cumulative effects of Defendant's misrepresentations are devastating * * * [including that] many consumers have lost their homes.") (citations omitted); *FTC* v. *Kirkland Young, LLC,* No. 09–23507, Mem. Supp. P.I. at 19 (S.D. Fla. filed Nov. 24, 2009) ("[By] attempting to sever communications between consumers and their lenders, Defendants harm consumers. * * * The cost to consumers is both in time and money, which are obviously important to consumers who are behind on their mortgages and facing the threat of foreclosure on their family's home."); *FTC* v. *US*

Second, the injury is not outweighed by any countervailing benefits to consumers or competition. There is nothing in the record suggesting that there are any circumstances in which a non-attorney MARS provider's instruction not to communicate with a consumer's lender or servicer would benefit the consumer.[189] Similarly, nothing in the record, including the comments of MARS providers, identifies any benefits to competition from such an instruction. A "benefit" this practice might bring is to increase MARS providers' revenues by increasing the number of consumers who decide to contract with them. Such "benefits" are not cognizable in an unfairness analysis.[190] Consequently, the Commission concludes that there are no benefits to consumers or competition from this act or practice, and, even if there were, they clearly are outweighed by the substantial injury to consumers discussed above.

Finally, consumers cannot reasonably avoid the injury this act or practice causes. Many consumers are unaware of the negative consequences of failing to communicate with their lender or servicer. Moreover, the claims many MARS providers make that they have specialized expertise [191] make it less likely that consumers will disregard or discount their advice. As a result, consumers cannot reasonably avoid the harm from such instructions.

The Commission therefore concludes that MARS providers instructing consumers not to communicate with their lenders or servicers is an unfair act or practice. The Final Rule's prohibition on this instruction is intended to preserve and foster consumer access to information from lenders and servicers that may shed light on issues critical to consumers' decision making and their well-being.

(2) Prevention of Deception

The Final Rule's prohibition on instructing consumers not to communicate with their lenders and servicers will remove a barrier to consumers obtaining information that will enable them to evaluate the truth and accuracy of the provider's claims and to gauge the provider's performance against those claims. This provision thus will help consumers avoid being deceived. Accordingly, the Commission has concluded that this prohibition is reasonably related to the goal of preventing deception.[192]

d. Recommendations by Commenters Not Adopted

Several commenters, including a consortium of state attorneys general and a consumer group, recommended that the Commission adopt an additional prohibition, not included in proposed § 322.3(a), that would ban providers from instructing consumers to stop making their mortgage payments.[193] The commenters asserted that MARS providers commonly mislead consumers concerning the consequences of not paying on their mortgages, for example, by telling them that lenders will not work with them unless they stop paying.[194]

The Commission declines to adopt this prohibition. The benefits and costs to consumers of failing to pay their mortgage depend on their individual circumstances. In most instances, it is not in the best interest of a consumer to stop paying,[195] yet there are some, albeit limited, circumstances in which it might be beneficial for some consumers to do so.[196] The Commission declines to

Foreclosure Relief Corp., No. SACV09–768 JVS (MGX), Mem. Supp. TRO at 12 (C.D. Cal. filed July 7, 2009) ("At the company's behest, consumers also stopped answering inquiries from their lenders, and therefore did not realize that their modifications were not in process and that their homes might be at risk. * * * Defendants' inaction caused some lenders to begin foreclosure proceedings against consumers. Other consumers lost their homes."); *FTC* v. *Truman Foreclosure Assistance, LLC,* No. 09–23543, Mem. Supp. P.I. at 20 (S.D. Fla. filed Nov. 23, 2009) ("When consumers speak with their lenders directly, they often discover that Defendants had not yet contacted the lender or only had left messages or had non-substantive contacts with the lender.").

[189] *Cf* Section III.G.3. (discussing the possible benefits to consumers when attorneys who represent them in legal matters give an instruction to stop communicating with adverse parties such as their lenders or servicers).

[190] Increased revenues or profits to a seller engaged in an act or practice are not necessarily a benefit to competition for purposes of unfairness analysis because "[t]he benefit [from the conduct] must be to * * * competition—not simply to the actor." J. Howard Beales, III, *The FTC's Use of Unfairness Authority: Its Rise, Fall, and Resurrection,* 2003 WL 21501809, at *14 n.51 (2003); *see In re Orkin Exterminating Co.,* 108 F.T.C. 263, 364–65 (1986) (discussing benefits to process of competition), aff'd 849 F.2d 1354 (11th Cir. 1988); *FTC* v. *J.K. Publications, Inc.,* 99 F.Supp.2d 1176 (C.D. Cal. 2000); *FTC* v. *Windward Mktg,* No. 1:96–CV–615–FMH, 1997 U.S. Dist. LEXIS 17114, *29–30 (N.D. Ga. Sept. 30, 1997).

[191] *See supra* notes 51–53.

[192] The Commission concludes that prohibiting MARS providers from instructing consumers to stop communicating with their lender or servicer does not violate the First Amendment. The Rule restricts speech that is "commercial" in nature because it arises in the context of a commercial transaction and is "expression related solely to the economic interests of the speaker and its audience." *Cent. Hudson Gas & Elec. Corp.* v. *Pub. Serv. Comm'n,* 447 U.S. 557, 561 (1980). The intermediate scrutiny standard applies to restrictions on nonmisleading commercial speech. *Milavetz, Gallop & Milavetz, P.A.* v. *United States,* 130 S. Ct 1324, 1339 (2010), slip op. at 19; Conn. State Bar Ass'n v. United States, 620 F.3d 81, 95 (2d Cir. 2010).

To pass constitutional muster, commercial speech restrictions subject to intermediate scrutiny must satisfy the test the Court set forth in *Central Hudson. Cent. Hudson Gas & Elec. Corp.,* 447 U.S. at 566. The Final Rule's prohibition on instructing consumers not to communicate with their lenders and servicers satisfies this test. First, the prohibition serves a substantial governmental interest in ensuring that financially distressed consumers who face foreclosure have access to information that may prevent injury and may be critical to their ability to make decisions free of deception and confusion. *See, e.g., Friedman* v. *Rogers,* 440 U.S. 1, 16 (1979) (upholding ban on use of trade names by optometrists because "[r]ather than stifling commercial speech, [the ban] ensures that information regarding optometrical services will be communicated more fully and accurately to consumers"). Second, prohibiting the instruction directly advances this goal by removing impediments to the availability of this information to consumers. Third, there is a reasonable fit between the problem—MARS providers impeding consumers' access to critical information—and the solution, which would remove the impediment. Moreover, alternatives that are less restrictive of speech, such as a disclosure remedy, would not be effective means of achieving the goal. *See, e.g., Pearson* v. *Shalala,* 164 F.3d 650, 659 (DC Cir. 1999) (noting that the banning of a claim may be permissible where a disclosure would not eliminate the harm the claim causes). For example, if MARS providers were permitted to instruct consumers not to communicate with their lender or servicer, but were required to disclose that these entities may have information that would be valuable to consumers, the inconsistent and contradictory nature of these statements would not prevent deception and would, at best, confuse consumers. *See, e.g.,* Deception Policy Statement, *infra* note 200, at 180; *Thompson Med. Co.,* 104 F.T.C. at 842–43; *In re Figgie Int'l, Inc.,* 107 F.T.C. 313, 401 (1986), *aff'd sub nom, Figgie Int'l Inc.* v. *FTC,* 817 F.2d 102 (4th Cir. 1987) (unpublished table decision).

[193] CUUS at 3 ("MARS providers should be prohibited from advising current or prospective clients who are not yet in default to stop making payments on their mortgage loans."); NAAG at 4 ("[W]e would suggest making clear that consultants may not advise consumers not to pay their mortgages.").

[194] *See, e.g.,* NAAG at 4 ("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 also are aware of consultants who advise consumers not to make mortgage payments so that they will be able to afford mortgage loan modification fees."); CUUS at 3 ("Consumers often report being instructed by for-profit MARS entities to stop making mortgage payments in order to qualify for loan modification services or other forms of foreclosure relief.").

[195] CUUS at 3 (Consumers are "often unaware that [following MARS providers' advice to stop paying their mortgage] may ruin their credit scores and lead to fewer options to avoid foreclosure."); CUNA at 2 (following this instruction "only serves to increase the overall mortgage debt in addition to the fees and other penalties that result when payments to the servicer or lender are not made in a timely manner").

[196] For example, the record suggests that some lenders, in the current financial crisis, may be more responsive to borrowers who are delinquent, especially if the borrower would not qualify for a loan modification under various government programs. *See, e.g.,* Suzanne Capner, *Lenders Await Call Back After Mobile Giveaway,* Fin. Times, Jun. 28, 2010 (some lenders are sending mobile phones programmed to call their loss mitigation departments to delinquent borrowers and offering them lower monthly payments when borrowers

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adopt the recommended prohibition because it could prevent MARS providers from disseminating truthful, non-misleading information that could be useful to some consumers.

Nevertheless, the Commission recognizes that most consumers would be harmed if they complied with a MARS provider's instruction to stop paying on their mortgages. Therefore, as discussed more fully in § III.D. of this SBP, the Final Rule requires that if providers instruct consumers not to pay on their mortgages, they must disclose clearly and prominently that not paying may cause consumers to lose their home and damage their credit rating.[197]

2. Section 322.3(b): Prohibited Misrepresentations

a. Proposed Provision

Section 322.3(b) of the proposed rule prohibited express or implied misrepresentations of any material aspect of any mortgage assistance relief service. To provide clarity and guidance to the industry, proposed §§ 322.3(b)(1)–(7) set forth a non-exhaustive list of specific misrepresentations that would violate the Rule, including misrepresentations about the following:

(1) The likelihood of negotiating, obtaining, or arranging a specific form of mortgage relief;

(2) The amount of time needed to obtain the promised mortgage relief;

(3) The affiliation of the provider with the government, public programs, or consumers' lenders or servicers;

(4) Consumers' payment obligations under their mortgage loans;

(5) The terms or conditions of consumers' mortgage loans;

(6) The provider's refund and cancellation policies; and

(7) That the provider has performed the promised services or has the right to demand payment.

The Commission received only a few comments specifically addressing this proposed provision. The comments were generally supportive and did not recommended substantive modification to the proposed exemplar misrepresentations [198]—although some commenters recommended adding additional examples, as detailed below.

b. Final Section 322.3(b)

Section 322.3(b) of the Final Rule, like the proposed rule, prohibits misrepresenting any material aspect of any MARS, to prevent deception. The Final Rule also adopts proposed §§ 322.3(b)(1)–(7) without substantive modification, but adds five examples of prohibited misrepresentations: (a) Misrepresentations about whether consumers will receive legal services; (b) misrepresentations of the benefits and costs of using alternatives to for-profit MARS to obtain relief, such as working with the consumer's lender or servicer directly or consulting with a nonprofit housing counselor; (c) misrepresentations regarding the amount or percentage of debts that consumers may save by purchasing MARS; (d) misrepresentations regarding the total costs consumers must pay to purchase MARS; and (e) misrepresentations regarding the terms, conditions, or limitations of any offer of MARS the provider obtains from the consumer's lender or servicer, including the amount of time the consumer has to accept or reject the offer.[199]

A claim is "deceptive" under Section 5 of the FTC Act if there is "a representation or omission of fact that is likely to mislead consumers acting reasonably under the circumstances, and that representation or omission is material." [200] A representation is material if it is likely to influence consumers' decisions or conduct.[201] The types of misrepresentations specified in §§ 322.3(b)(1)–(12) of the Final Rule are presumed to be material to consumers because they pertain to the cost, central characteristics, efficacy, or other important attributes of MARS.[202]

The exemplar misrepresentations specified in the Final Rule track the types of false or misleading claims that the Commission and the states have challenged in law enforcement actions against MARS providers, as described in § II.C. of this SBP, and also address additional deceptive practices identified in the comments.

Sections 322.3(b)(1) and (2) prohibit MARS providers from misrepresenting "[t]he likelihood of negotiating, obtaining, or arranging any represented service or result" and "the amount of time it will take" to do so. As discussed in § II of this SBP, MARS providers commonly persuade consumers to purchase their services with false or misleading promises that they can achieve specific successful results in a short time frame.[203] This type of information is central to consumers' decisions to purchase MARS.

Section 322.3(b)(3) prohibits misrepresentations that any MARS is "affiliated with, endorsed or approved by, or otherwise associated with" the government, nonprofit housing programs, or consumers' lenders or servicers. To confer greater legitimacy on their services, MARS providers frequently falsely claim that their services are associated with such trusted third-party entities or programs.[204] When these claims are made expressly, as they frequently are, they are presumed to be material to consumers' purchasing decisions.[205] Even when affiliation, endorsement, or approval are implied, such claims are clearly material because some consumers are more likely to purchase MARS they believe are endorsed or approved by the government, non-profit programs, or their lender or servicer.

Sections 322.3(b)(4) and (5) bar misrepresentations concerning consumers' payment and other obligations under their mortgage loans and the amount owed on them. MARS providers, for example, often falsely state or imply that once consumers retain a MARS provider, their obligations to pay their mortgages are suspended and their lenders will not foreclose.[206] In fact, consumers who stop making payments may incur additional fees and charges and lose their homes, regardless of whether they have retained a MARS provider. The purported benefit of immunity from foreclosure is material to consumers' decisions to purchase MARS and whether to continue making payments on their mortgages. Section 322.3(b)(4)

call), *available at http://www.ft.com/cms/s/0/d6df8bec-82fe-11df-8b15-00144feabdc0.html;* David Streitfeld & Louise Story, Bank of America to Reduce Mortgage Balances, N.Y. Times, Mar. 24, 2010, *available at http://www.nytimes.com/2010/03/25/business/25housing.html* (Bank of America offers mortgage balance reductions up to 30% to borrowers at least 60 days delinquent on their loans). How effective a consumer may be in leveraging delinquency is highly dependent on the particular lender, the type of loan, and the consumer's financial situation.

[197] *See* § 322.4(c).

[198] CUUS at 4 ("Consumers Union supports the non-exclusive enumeration of other misrepresentations that give rise to a violation under the proposed rule."); CSBS at 3 ("We endorse the Commission's effort to prohibit misrepresentations of any material aspect of any MARS."); LOLLAF at 3 ("The prohibited misrepresentations enumerated in the proposed rule accurately target the deceptive conduct that it is intended to prevent and may help dispel the misconceptions that consumers hold regarding MARS providers."); MBA at 2.

[199] Sections 322.3(b)(8)–(12).

[200] Federal Trade Commission Policy Statement on Deception, *appended to In re Cliffdale Assocs., Inc.,* 103 F.T.C. 110, 174–83 (1984) ("Deception Policy Statement").

[201] *Id.* at 182–83.

[202] *Id.* at 182–83.

[203] *See supra* notes 70 & 75.

[204] *See supra* notes 72–74.

[205] *See* Deception Policy Statement, *supra* note 200, at 182.

[206] *See, e.g., FTC* v. *Fed. Loan Modification Law Ctr., LLP,* No. SACV09–401 CJC (MLGx), Mem. Supp. TRO at 15 (C.D. Cal., Amd. Compl. filed June 24, 2009) (defendant allegedly instructing consumers to stop making mortgage payments because such payments were unnecessary or would adversely affect consumer's ability to obtain a loan modification).

will prohibit any such misrepresentations regarding the obligation of consumers to make payments on their current mortgages and the consequences of failing to pay. Additionally, § 322.3(b)(5) prohibits providers from misrepresenting the terms or conditions of consumers' current loans—for example, by falsely representing that the terms are unfavorable in some regard in order to persuade consumers to purchase MARS that purportedly will result in consumers obtaining more favorable terms. Information regarding the terms and conditions of consumers' loans is material to them because it is likely to influence their decision whether to purchase MARS.

Section 322.3(b)(6) prohibits misrepresentations of MARS providers' refund, exchange, or cancellation policies, including the "likelihood of obtaining a full or partial refund." MARS providers commonly tout their liberal refund and cancellation policies, often to give consumers a sense of security that the upfront fee they are asked to pay will be refunded if the provider is unsuccessful. In fact, many providers do not provide refunds or have restrictive cancellation policies.[207] Refund and cancellation policies are important considerations for consumers in deciding whether to purchase MARS.[208] As detailed in § III.E. of this SBP, the Final Rule effectively allows consumers to withdraw from MARS at any time, and prohibits MARS providers from collecting advance fees. Section 322.3(b)(6) will help ensure that MARS providers do not misrepresent to consumers that they are, in fact, obligated to continue to use the provider's services. This provision will also help ensure that providers do not misrepresent whether they will refund fees they collect—in compliance with § 322.5 of the Final Rule—after the consumer has accepted the mortgage relief delivered.[209]

Section 322.3(b)(7) prohibits misrepresentations that a MARS provider has achieved a represented result or has a right to claim, charge, or demand money from the consumer. This provision will protect consumers from MARS providers who make false claims as to whether they are entitled to receive fees. As detailed in § III.E. of this SBP, the Final Rule prohibits providers from collecting any fees until the consumer has accepted the results delivered by the provider. Section 322.3(b)(7) will help to prevent MARS providers from circumventing the advance fee ban in the Final Rule by misrepresenting that consumers owe fees before they have accepted the results delivered by the provider. Additionally, the claim as to results obtained is material to consumers' decisions whether or not to pay the providers.[210]

Section 322.3(b)(8) prohibits providers from misrepresenting that consumers will "receive legal representation." The record demonstrates that MARS providers commonly mislead consumers into believing that they offer legal services and that they employ attorneys who will represent consumers in legal proceedings.[211] Further, MARS providers often falsely claim to be law firms or affiliated with attorneys.[212] Whether licensed legal professionals will be working on consumers' behalf is material because some consumers may believe that attorneys are adept at negotiating with lenders or services and, thus, that having their assistance will increase the likelihood of obtaining mortgage relief.

Section 322.3(b)(9) prohibits misrepresentations concerning "[t]he 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." As discussed in § II.A. of this SBP, consumers sometimes can obtain mortgage relief at no cost from nonprofit housing counselor programs or by working directly with their lenders or servicers. For-profit MARS providers, therefore, have an incentive to make false or misleading claims about the effectiveness and value of these forms of competing assistance. The FTC has charged in its law enforcement actions that some MARS providers, in fact, make such claims.[213] Information about potential alternatives to for-profit MARS is likely to influence consumers' decisions regarding whether to purchase MARS from a for-profit provider, and if so, at what price.[214]

Section 322.3(b)(10) prohibits MARS providers from misrepresenting the "amount of money or the percentage of the debt amount that a consumer may save by using the mortgage assistance relief service." Commonly MARS providers have claimed that they can obtain specific interest rate reductions and other concessions from lenders, when, in reality, the results are true only for few, if any, consumers.[215] This provision will prohibit providers from promising more savings than they can

[207] *See supra* note 77.

[208] The TSR Rule similarly prohibits misrepresentations about telemarketers' refund and cancellation policies. *See* 6 CFR 310.3(a)(2)(iv). In numerous individual cases, the Commission has challenged as deceptive misrepresentations concerning the refund and cancellation polices of MARS providers. *See* FTC Case List, *supra* note 28.

[209] Thus, for example, if a MARS provider represents that the fee it collects once the consumer has accepted the result the provider has delivered may later be refundable under certain conditions (*e.g.*, the consumer decides his or her monthly payments are unaffordable), then any failure by the provider to observe this policy would constitute a violation of § 322.3(b)(6).

[210] Section 322.3(b)(7) of the Final Rule makes one non-substantive modification to the proposed provision. Proposed § 322.3(b)(7) prohibited misrepresenting "[t]hat the mortgage assistance relief service provider has completed the represented services, as specified in § 322.5, or otherwise has a right to claim, demand, charge, collect or receive payment or other consideration." For clarity, the Final Rule removes the phrase, "as specified in § 322.5," and the word "otherwise."

[211] *See supra* notes 85–86; OPLC at 2–3 ("Often mortgage assistance relief services (MARS) providers will imply that they will represent the homeowners in legal proceedings, or otherwise suggest or state that they have attorneys on staff that will resolve the homeowners' legal proceedings. The list of prohibited representations should include a prohibition on such implications or statements. * * *"); Francis at 1 (noting concern that some MARS providers use an attorney's name in their marketing and mislead consumers "as to whether or not an attorney-client relationship will exist"). One comment recommended that the Rule require MARS providers who advertise legal services to disclose whether an attorney will represent consumers in foreclosure proceedings and to provide the name of such attorney, and require that any MARS provider that uses the name of a law firm or attorney disclose whether it employs attorneys licensed to practice law in the consumer's state and whether they would represent the consumer in foreclosure proceedings. Francis at 1. The Commission believes that requiring these disclosures is unnecessary in light of the prohibition on express or implied misrepresentations that a consumer will receive legal representation. The Commission believes that a general statement that a MARS provider offers legal services, in the absence of a qualifying disclosure, is likely to convey an implied claim that the attorney is properly licensed and will represent consumers in a foreclosure action.

[212] *See supra* notes 84–88 and accompanying text.

[213] *See, e.g., FTC* v. *Loss Mitigation Servs., Inc.,* No. SACV09–800 DOC (ANX) (C.D. Cal. filed July 13, 2009) (alleging that defendants represented on their Web site that "Representing Yourself Can Be Hazardous!" and that "you will be offered less of a modification or short sale than you could really get"); *FTC* v. *Truman Foreclosure Assistance, LLC,* No. 09–23543, Mem. Supp. P.I. at 20 (S.D. Fla. filed Nov. 23, 2009) (alleging that defendants' Web sites stated "Don't go through this alone. You need professional help at a time like this.").

[214] It is a deceptive practice for advertisers to make false or misleading comparisons between their product and that of competing products. *See, e.g., Novartis Corp.* v. *FTC,* 223 F.3d 783 (DC Cir. 2000) (advertising by drug company was deceptive because it falsely claimed that its pain pills were superior to other analgesics for treating back pain); *Kraft, Inc.* v. *FTC,* 970 F.2d 311, 322 (7th Cir. 1992) (advertising was deceptive because it falsely implied Kraft's cheese slices had more calcium than imitation cheese slices).

[215] *See, e.g., FTC* v. *Data Med. Capital, Inc.,* No. SA–CV–99–1266 AHS (Eex), Mem. Supp. Contempt at 12 (C.D. Cal. filed May 27, 2009) (alleging that defendant claimed it could reduce consumers' interest rates to 2 to 5 percent).

deliver, including any promised reduction in the interest rate on a mortgage loan—a consideration of central importance to consumers.

Section 322.3(b)(11) prohibits MARS providers from misrepresenting the "total cost to purchase the mortgage assistance relief service." This provision is designed to prevent providers from making deceptive claims about the amount of their fees—a pivotal fact for consumers considering whether to purchase MARS.

Finally, § 322.3(b)(12) prohibits MARS providers from misrepresenting "[t]he 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." As discussed in § III.E. of this SBP, the Final Rule allows consumers to reject the results obtained by MARS providers, in which case they do not have to pay the provider's fee. When a MARS provider obtains an offer for a loan modification or other mortgage relief and presents it to the consumer, the terms, conditions, and limitations of the offer are material to the consumer's decision whether to accept it and pay the provider's fee. Additionally, it is material for consumers to know how much time they have to accept or reject the offer for mortgage relief, so that they make a timely decision. This provision will ensure that providers do not deceive consumers regarding the results they have obtained and do not make misrepresentations that pressure them into accepting unfavorable terms.[216] It is thus reasonably related to preventing providers from undermining the ability of consumers to accept or reject the offer.

c. Section 322.3(c): Substantiation

Commission law enforcement actions reveal that MARS providers often make representations about the benefits, performance, or efficacy of their services.[217] MARS providers must have substantiation for such claims at the time they are made. The Final Rule therefore specifies that it is a violation of the Rule to:

> Mak[e] 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.

Section 322.3(c) also clarifies the types of evidence that MARS providers must possess and rely upon to comply with § 322.3(c) when representing the "benefits, performance, or efficacy" of any MARS. This provision encompasses a wide variety of claims, including but not limited to: the provider's ability to save consumers a specific amount of money (*e.g.*, a reduction in interest rate or monthly payments), the likelihood that the provider will secure a loan modification or other results for consumers, and the amount of time it will take for the provider to secure a loan modification or other result.

Advertisers and marketers that make objective claims about their products must have a "reasonable basis" to substantiate them.[218] In the particular context of MARS, when making claims regarding the performance, benefits, or efficacy of these services, providers must possess a reasonable basis in the form of "competent and reliable evidence" to support the claim.[219] Thus, when a MARS provider represents that it will save consumers money or reduce their debt amount or interest rate, this claim must be supported by competent and reliable, methodologically sound evidence showing that consumers who purchase the service generally will obtain the advertised results, i.e., that the typical consumer who purchases MARS from that provider will achieve that result.[220]

Providers cannot circumvent the substantiation requirements by making general, non-specific claims. Thus, for example, if a MARS provider makes only a general savings claim (e.g., "we will help you reduce your mortgage payments"), without specifying a percentage or amount of savings, these claims are likely to convey that consumers can expect to achieve a result that will be beneficial to them and that the benefits will be substantial.[221]

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[216] Additionally, to the extent that providers obtain trial loan modifications for consumers, § 322.3(b)(12) prohibits providers from misrepresenting that these loan modifications are permanent.

[217] *See* FTC Case List, *supra* note 28.

[218] It is an unfair and deceptive practice, in violation of Section 5 of the FTC Act, to make an express or implied objective claim without a reasonable basis supporting it. *See, e.g., FTC* v. *Pantron I Corp.,* 33 F.2d 1088, 1096 (9th Cir. 1994); *Removatron Int'l Corp.,* 111 F.T.C. 206, 296–99 (1988), *aff'd,* 884 F.2d 1489 (1st Cir. 1989); *In re Thompson Med. Co.,* 104 F.T.C. 648, 813 (1984), *aff'd,* 791 F.2d 189 (DC Cir. 1986); *see also generally* 1984 Policy Statement Regarding Advertising Substantiation, *appended to Thompson Med. Co.,* 104 F.T.C. at 813 (Advertising Substantiation Policy Statement); Amended Franchise Rule, 16 CFR 436.5(s), 436.9(c); *Amended Franchise Rule Statement of Basis and Purpose,* 72 FR 15444, 15449 (Mar. 30, 2007).

[219] As discussed in the SBP addressing amendments to the TSR regarding debt relief services, claims concerning the benefits, performance, or efficacy of debt relief services must be supported by competent and reliable evidence. *See TSR; Final Rule,* 75 FR 48458, 48500 n.574 and accompanying text (Aug. 10, 2010).

In addition, in order to comply with § 322.3(b), the prohibition against misrepresentations, a provider must not make false or misleading statements regarding the level of support it has for a claim.

[220] It is deceptive to make unqualified performance claims that are only true for some consumers, because reasonable consumers are likely to interpret such claims to apply to the typical consumer. *See FTC* v. *Five-Star Auto Club, Inc.,* 97 F. Supp. 2d 502, 528–29 (S.D.N.Y. 2000) (holding that in the face of express earnings claims for multi-level marketing scheme, it was reasonable for consumers to have assumed the promised rewards were achieved by the typical participant); *Chrysler Corp.* v. *FTC,* 561 F.2d 357, 363 (DC Cir. 1977); *In re Ford Motor Co.,* 87 F.T.C. 756, 778, *aff'd in part and remanded in part,* 87 F.T.C. 792 (1976); *In re J. B. Williams Co.,* 68 F.T.C. 481, 539 (1965), *aff'd as modified,* 381 F.2d 884 (6th Cir. 1967); *FTC* v. *Feil,* 285 F.2d 879, 885–87 & n.19 (9th Cir. 1960); *cf.* Guides Concerning the Use of Endorsements and Testimonials in Advertising, 16 CFR 255.2 ("An advertisement containing an endorsement relating the experience of one or more consumers on a central or key attribute of the product or service also will likely be interpreted as representing that the endorser's experience is representative of what consumers will generally achieve with the advertised product or service. * * *"); *In re Cliffdale Assocs.,* 103 F.T.C. 110, 171–73 (1984); *Porter & Dietsch, Inc.* v. *FTC,* 605 F.2d 294, 302–03 (7th Cir. 1979).

Although providers may use samples of their historical data to substantiate savings claims, these samples must be representative of the entire relevant population of past customers. Providers using samples must, among other things, employ appropriate sampling techniques, proper statistical analysis, and safeguards for reducing bias and random error. Providers may not cherry-pick specific categories of consumers or exclude others in order to inflate the savings. *See, e.g., In re Kroger Co.,* 98 F.T.C. 639, 741–46 (1979) (initial decision), *aff'd,* 98 F.T.C. at 721 (1981) (claims based on sampling were deceptive because certain categories were systematically excluded and because the advertiser failed to ensure that individuals who selected the sample were unbiased); *FTC* v. *Litton Indus., Inc.,* 97 F.T.C. 1, 70–72 (1981) (claims touting superiority of microwave oven were deceptive because the advertiser based them on a biased survey of "Litton-authorized" service agencies), *enforced as modified,* 676 F.2d 364 (9th Cir. 1982); *Bristol Myers* v. *FTC,* 185 F.2d 58 (1950) (holding advertisements to be deceptive where they claimed that dentists used one brand of toothpaste "2 to 1 over any other [brand]" when, in fact, the vast majority of dentists surveyed offered no response). Additionally, the relationship between past experience and anticipated future results must be an "apples-to-apples" comparison. If there have been material changes to the MARS that could affect the applicability of historical experience to future results, any claims made must account for the likely effect of those changes. *See* Amended Franchise Rule, 16 CFR 437.5(s)(3)(ii).

[221] An unqualified efficacy claim conveys to consumers that the result or benefit will be

Under the Final Rule, the provider must have competent and reliable evidence showing that consumers obtain such results.

D. Section 322.4: Disclosures Required in Commercial Communications

Proposed § 322.4 would require that MARS providers disclose certain material information to prevent deception and thereby assist consumers in making informed decisions about purchasing MARS.[222] The Final Rule adopts all of these proposed disclosures. In addition, it requires one new disclosure: To inform consumers of the potential adverse consequences of not making mortgage payments. Further, the Final Rule expands the proposed disclosure regarding the total cost of the service to include: (1) Consumers' rights to withdraw from the service and to accept or reject any offer of mortgage relief the provider obtains from the lender or servicer; (2) the fact that consumers do not have to pay the provider if they reject the offer; and (3) the cost of the services if they accept the offer. The Final Rule also modifies the structure of the proposal to clarify that the disclosures in this provision almost all fall into three main categories: (1) Disclosures that providers must make in all "general commercial communications" (a term now defined in § 322.2(c)(1)), such as television or radio advertisements; (2) disclosures that providers must make in all "consumer-specific commercial communications" (a term now defined in § 322.2(c)(2)), such as telemarketing calls; and (3) disclosures that the provider must make in all communications.[223] The Final Rule broadens the conditions under which the disclosures must be provided, such that all required disclosures (except for one) must be provided in all general commercial communications and in all consumer-specific commercial communications. The disclosures regarding total cost and the consumer's right to withdraw from the service and reject mortgage relief offers need only be made in consumer-specific commercial communications.

1. Proposed Disclosures

The proposed rule[224] required MARS providers to disclose, in every commercial communication and every communication directed at a specific consumer prior to the consumer entering an agreement to purchase MARS, that the provider "is a for-profit business not associated with the government. This offer has not been approved by the government or your lender."[225] The proposed rule also included two disclosures that were required only in communications directed at a specific consumer prior to the consumer entering into an agreement to purchase MARS: (1) The full amount the consumer must pay for the service; and (2) that "[e]ven if you buy our service, your lender may not agree to change your loan."[226] Commenters who addressed these disclosures generally supported them, but some urged that all of the disclosures be required in every communication or advocated for requiring additional disclosures.[227]

2. Disclosures Required by the Final Rule

The Commission has determined to adopt the proposed rule with four basic changes. First, the Final Rule adds headings to § 322.4(a)–(c), which clarify that the disclosures fall into three categories: "Disclosures in All General Commercial Communications"; "Disclosures in All Consumer-Specific Commercial Communications"; and "Disclosures in All General Commercial Communications, Consumer-Specific Commercial Communications, and Other Communications." Second, the Final Rule has added a new triggered disclosure in § 322.4(c): "If you stop paying your mortgage, you could lose your home and damage your credit rating." MARS providers must make this disclosure if they advise consumers, expressly or by implication, to discontinue making their mortgage payments. Third, § 322.4(b)(1) of the Final Rule expands the proposed total cost disclosure to include the following information:

"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.

Fourth, as suggested by the comments, the Final Rule provides that, with one exception—the disclosure of total cost and the right to cancel the service at any time—all of the required disclosures must be made in every communication with consumers prior to the consumers entering into an agreement to purchase MARS.[228] As

meaningful and not *de minimis*. *See P. Lorillard Co.* v. *FTC,* 186 F.2d 52, 57 (4th Cir. 1950) (challenging advertising that claimed that a brand of cigarettes was lowest in nicotine, tar, and resins in part because the difference from other brands was insignificant); *In re Sun Co.,* 115 F.T.C. 560 (1992) (consent order) (alleging that advertising for high octane gasoline represented that it would provide superior power "that would be significant to consumers"); Guides for the Use of Environmental Marketing Claims, 16 CFR 260.6(c) (1998) ("Marketers should avoid implications of significant environmental benefits if the benefit is in fact negligible."); FTC Enforcement Policy Statement on Food Advertising, 59 FR 28388, 28395 & n.96 (June 1, 1994), *available at http://www.ftc.gov/bcp/policystmt/ad-food.shtm* ("The Commission shares FDA's view that health claims should not be asserted for foods that do not significantly contribute to the claimed benefit. A claim about the benefit of a product carries with it the implication that the benefit is significant.").

[222] The Commission concludes that the disclosures adopted in the Final Rule are consistent with the First Amendment. It is well established that the government may "require that a commercial message appear in such a form, or to include such additional information, warnings, and disclaimers, as are necessary to prevent deception." *Va. Bd of Pharmacy* v. *Va. Citizens Consumer Council,* 425 U.S. 748, 771–72 n.24 (1976); *see also Milavetz* v. *United States,* 130 S. Ct. 1324, 1340–41 (2010) (upholding the constitutionality of a Bankruptcy Code provision that required debt relief agencies to make certain disclosures in their advertisement); *Zauderer* v. *Office of Disciplinary Counsel,* 471 U.S. 626, 651 (1985) ("[W]arning[s] or disclaimer[s] might be appropriately required * * * in order to dissipate the possibility of consumer confusion or deception.").

[223] *See supra* note 140.

[224] In the NPRM, the Commission sought comment and empirical data bearing on the costs and benefits of the disclosure requirements set forth in the proposed rule. No comments provided such data.

[225] Proposed §§ 322.4(a), 322.3(b)(2).

[226] The latter disclosure would not be required when a MARS provider offers only to stop, prevent, or postpone a foreclosure sale or repossession, as described in § 322.2(i)(1).

[227] *See* CUUS at 4 (stating that "Consumers Union supports the Rule's disclosure requirements listed in Sec. 322.4," but proposing expanded distribution and additional disclosures); CSBS at 3 (stating that "state regulators believe that the disclosures required under § 322.4 are generally appropriate," but proposing expanded distribution and additional disclosures); MA AG at 3 (stating that "I support the types of disclosures required in the proposed rule," but proposing expanded distribution); LOLLAF at 3 (stating that "[t]he required disclosures enumerated in the proposal will assist consumers who consider using a MARS provider," but proposing additional disclosures); NAAG at 4 (stating that "we do generally support enhanced disclosure requirements," but proposing additional disclosures); NYC DCA at 5–8 (suggesting expanded distribution and additional disclosures); *see also* NCLC at 3; OPLC at 3. One commenter suggested that MARS providers be required to provide consumer disclosures in the form of an FTC-drafted "bill of rights," which would include information on consumers' legal rights, the risks associated with purchasing MARS, and information on free services. NYC DCA at 7. The Commission recognizes the value of consumer education about MARS but declines to adopt this recommendation. The Final Rule requires disclosure of the key information in a manner that the Commission believes will assist consumers in avoiding deception and will help ensure that consumers will notice and comprehend it.

[228] As discussed in Section II.B, MARS providers often disseminate advertisements that instruct

Continued

explained below, the Commission believes the disclosures in the Final Rule are appropriate, because each of them either is necessary to prevent deception or is reasonably related to preventing deception.[229]

a. Disclosures Required Both in General Commercial Communications and Consumer-Specific Commercial Communications

Sections 322.4(a)(1) and 322.4(b)(2) of the Final Rule adopt, without substantive modification, the approach in the proposed rule and require MARS providers to disclose clearly and prominently, in each general commercial communication and consumer-specific commercial communication, that the MARS provider "is not associated with the government, and * * * [the] service is not approved by the government or your lender." As described above, there are many government, nonprofit, lender and servicer programs providing a wide array of services that MARS providers have mimicked. The Commission and state law enforcement officials have brought numerous law enforcement actions against for-profit MARS providers who have misrepresented their affiliation with a government agency, lender, or servicer.[230] These providers have used a variety of misleading techniques, including adopting trade names, URLs, or symbols that resemble those associated with government programs.[231] Given that the government, for-profit entities, and nonprofit entities assist financially distressed consumers with their mortgages and in light of the frequency of deceptive affiliation claims, the Commission concludes that requiring MARS providers to disclose their nonaffiliation with government or other programs is reasonably related to the goal of preventing deception.[232]

Sections 322.4(a)(2) and 322.4(b)(3) of the Final Rule, which adopt the proposal without substantive modification,[233] require MARS providers to disclose clearly and prominently in all their general and consumer-specific commercial communications that "[e]ven if you accept this offer and use our service, your lender may not agree to change your loan." [234] In light of the widespread deceptive success and "guarantee" claims in this industry,[235] this disclosure will ensure that consumers do not use MARS under the misimpression that they will, or are very likely to, receive a successful result. Thus, requiring such a disclosure is reasonably related to the goal of preventing deception.[236]

Section 322.4(c) of the Final Rule, which was not included in the proposed rule, also requires that if MARS providers advise consumers, expressly or by implication, to stop making mortgage payments, they must warn consumers: "If you stop paying your mortgage, you could lose your home and damage your credit rating." [237] This disclosure must be provided clearly and prominently in all communications in which the triggering statement is made. Moreover, unlike the other disclosures in § 322.4, this disclosure is not limited to commercial communications occurring prior to the consumer agreeing to enroll in the service. Thus, even if the consumer has already agreed to use MARS, the provider must make this disclosure if, and when, it advises consumers to stop making timely payments. Additionally, this disclosure must also be made in close proximity to the specific triggering claim, to ensure that the net impression consumers take away reflects both the information in the triggering claim and the information in the triggered disclosure. The record demonstrates that MARS providers frequently encourage consumers, often through deception, to stop paying their mortgages and instead pay providers.[238] Consumers who rely on these deceptive statements frequently suffer grave financial harm.[239] The Commission determines, therefore, that requiring MARS providers who encourage consumers not to pay their mortgages to disclose the risks of following this advice is necessary to prevent deception.[240]

b. Disclosure Required Only in Consumer-Specific Commercial Communications

Section 322.4(b)(1) retains, but also expands, the requirement in the proposed rule that MARS providers disclose, clearly and prominently, in all communications directed at specific consumers, the total amount the consumer will have to pay to purchase, receive, and use the service. Specifically, in addition to this cost information, the Final Rule requires that providers inform consumers that they (a) may withdraw from the service at any time, and (b) have the right to reject any offer of mortgage relief that the provider obtains from the servicer or lender and, (c) if they do so, they owe nothing to the provider. As detailed in § III.E. of this SBP, the Final Rule

consumers to call a telephone number or contact an email address, and once consumers do so, the providers begin to interact with them on an individual level. During these individual interactions, MARS providers commonly contradict or obfuscate disclaimers made in general advertising. *See, e.g., FTC* v. *Fed. Loan Modification Law Ctr., LLP,* No. SACV09–401 CJC (MLGx) (C.D. Cal. filed Apr. 3, 2009) (alleging that false success rate claims and other deceptive claims often were made during telemarketing calls with consumers); *FTC* v. *Loss Mitigation Servs., Inc.,* No. SACV09–800 DOC (ANX) (C.D. Cal. filed July 13, 2009) (same). As discussed below, the Commission therefore concludes that it is not sufficient to make the disclosures only in general advertisements.

[229] The Final Rule also includes a small number of minor, non-substantive modifications to ensure that these requirements are clear and easy to understand.

[230] *See supra* notes 72–74.

[231] *See, e.g., FTC* v. *Fed. Housing Modification Dep't, Inc.,* No. 09–CV–01753 (D.D.C. filed Sept. 16, 2009) (alleging use of direct mail material with seal depicting U.S. Capitol with words "NATIONS HOUSING MODIFICATION CENTER" superimposed); FTC v. Ryan, No. 1:09–00535 (HHK) (D.D.C., Amend. Compl. filed Mar. 25, 2009) (alleging use of government-like seal that read "United States—Department of Housing" on defendant's Web sites with URLs "*http://bailout.hud-gov.us*" and "*http://bailout.dohgov.us*" and that featured prominent button linking to official U.S. government Web site).

[232] *Supra* note 105.

[233] In order to clarify the application of this provision, however, the Final Rule includes two non-substantive modifications. First, the Final Rule clarifies that this disclosure applies to any MARS provider who represents, "expressly or by implication, that consumers will receive" MARS. This replaces the language of the proposed rule that stated that this disclosure applied to any MARS provider that "advertises any represented [mortgage relief]." Second, the Final Rule replaces the word "buy" in the proposal with the phrase "accept this offer and use."

[234] This disclosure is required in all cases except when the only MARS offered is the service or result described in § 322.2(i)(1)—*i.e.,* to stop, prevent or postpone any mortgage or deed of trust foreclosure sale, any repossession of the consumer's property, or otherwise save the consumer's dwelling from foreclosure or repossession.

[235] *Supra* note 75.

[236] *Supra* note 105. In the absence of a qualification, an efficacy claim may convey a greater likelihood of success than often is the case.

[237] Commenters supported this requirement. *See* NAAG at 4 (Rule should prohibit MARS providers "from representing that a consumer 'should stop making mortgage payments'."); CUUS at 5 ("[I]t would also be beneficial for MARS providers to disclose to consumers the consequences of not paying their mortgages (such as loss of their home and damage to their credit rating)."); CSBS at 3 ("[D]isclosures should include the fact that consumers are not exempt from making their home payments simply because they have decided to pursue MARS.").

[238] *See supra* note 82; CUNA at 2 (Consumers "are often instructed to stop making mortgage payments.").

[239] *Id.*

[240] It can be an unfair or deceptive practice to advise consumers to take a certain action without disclosing the attendant material adverse risks or consequences. *See, e.g., In re North Am. Philips Corp.,* 111 F.T.C. 139, 175–84 (1988); *In re Int'l Harvester Co.,* 104 F.T.C. 949, 1066–67 (unfair practice to conceal "fuel-geysering" hazard when using tractors). In Int'l Harvester, the Commission noted that it "frequently has decided that the omission of product safety information is an unfair and deceptive practice." *Id.* at 1045 (quoting *Firestone Tire & Rubber Co.,* 81 F.T.C. 398, 456 (1972)).

prohibits providers from collecting fees until the consumer has accepted the result obtained by the provider. The Commission determines that, to effectuate the advance fee ban, it also is necessary for the provider to inform consumers that they may withdraw from the service, and may accept or reject the result delivered by the provider. Thus, this disclosure is reasonably related to preventing unfair and deceptive acts and practices by MARS providers.

As in the proposed rule, § 322.4(b)(1) of the Final Rule also requires providers to disclose the total cost of their services.[241] To the extent that a provider bases its fee on a fixed percentage of the amount of money the consumer saves as a result of the service (instead of charging a flat fee), it must disclose this percentage.[242] This disclosure is limited to communications directed at a specific consumer because MARS providers often charge consumers different amounts based on their individual circumstances. In such cases, it would be very difficult or impossible to provide accurate information about total cost in commercial communications directed at general audiences. Nevertheless, the record shows that many MARS providers do not inform individual consumers about their fees prior to the time of contracting.[243] The total cost of a MARS is perhaps the most material information for consumers in making decisions whether to enter into a transaction with the provider. Requiring this disclosure will help protect consumers from being misled by providers who give incomplete, inaccurate, or confusing cost information. This disclosure, therefore, is reasonably related to the prevention of deception.

3. Disclosures Not Adopted

The Commission declines to adopt some modifications to the disclosure requirements that some commenters suggested. The reasons are set forth below. As a general matter, the disclosures required in the Final Rule are focused on responding to the core unfair and deceptive acts and practices that the Commission has identified through its law enforcement actions and through public comments. Adding more disclosure requirements, even to the extent they might provide some help to some consumers, risks overshadowing more important information or overloading consumers with too much information.[244]

Two commenters suggested that requiring MARS providers to disclose their historical performance could help consumers understand the risks in purchasing MARS from them.[245] Performance data, if it could be calculated in a useful, non-misleading way, likely would be valuable information to consumers in deciding whether to purchase MARS. The Commission has concluded, however, that requiring MARS providers to disclose their performance data is impracticable. Given the broad variety of results MARS providers might be able to obtain, they would have to incorporate many potential variables to calculate success rates for consumers. For example, one consumer may consider a short sale a success, while another may consider only a loan modification to be a success. It is, therefore, impracticable to develop accurate and comparable performance data that providers could disclose to consumers. Moreover, requiring disclosure of historical performance data would not be feasible for the large number of MARS providers who are new market entrants, because they lack past data on which to base a valid historical performance claim. Further, shifting market conditions and changes in government and other assistance programs could have substantial effects on the reliability of historical performance data as a predictor of future success.[246] The Commission concludes that, to prevent providers from deceiving consumers regarding their performance, it is enough that: (1) § 322.3(b)(1) of the Final Rule prohibits MARS providers from misrepresenting the likelihood that purchasing MARS will result in a successful outcome, and (2) §§ 322.4(a)(2) and 322.4(b)(3) require providers to disclose that lenders may not agree to modify loans even if consumers purchase MARS.[247]

Four commenters suggested that MARS providers be required to disclose that MARS are available for free or at lower cost from nonprofit housing counseling agencies, such as those certified by HUD, and disclose the contact information for these agencies.[248] Although some consumers would benefit from this information, it is already available from other sources, including the agencies themselves. In addition, the Commission is mindful of the need to limit the number of disclosures to maximize their effectiveness. As noted above, the greater the number of disclosures, the higher the risk of overloading consumers such that they do not read or comprehend any of the information. For these reasons, the Commission determines that the Final Rule's prohibition on misrepresenting the availability, performance, cost, or characteristics of any alternative means for consumers to obtain MARS, which includes misrepresentations regarding any nonprofit housing counseling agency or program, is sufficient.[249]

Finally, one commenter suggested that MARS providers be required to provide their physical address and landline telephone number.[250] Many MARS providers, like other businesses, routinely make contact information available to prospective customers and do not need to be compelled to do so. In addition, after the consumer agrees to use a provider's services, the prohibition on advance fees in the Final Rule means that the provider will have to communicate with the consumer to proffer the results and obtain payment. There is no information in the record to support the conclusion that MARS providers generally are not already making their contact information available, or that they generally would not make such information available to get paid. In the absence of information

[241] Providers may not evade this disclosure requirement, in whole or in part, by labeling their fees or charges as "penalties" or other terms. This provision requires that providers disclose all of the costs the consumer will have to pay the provider in connection with the mortgage assistance relief service.

[242] Further, regardless of whether the provider discloses its fee as a flat amount or percentage of savings, it may not later charge the consumer a larger amount or percentage than initially disclosed. Doing so would clearly violate § 322.3(b)(11) of the Final Rule.

[243] *See* NCRC Report, *supra* note 76, at 21.

[244] Consumer research shows that the ability of consumers to process information and make rational choices may be impaired if the quantity of the information they receive is too great. *See generally,* Yu-Chen Chen *et al., The Effects of Information Overload on Consumers' Subjective State Towards Buying Decision in the Internet Shopping Environment,* 8(1) Electronic Comm. Res. & Applications 48 (2009); Byung-Kwan Lee & Wei-Na Lee, *The Effect of Information Overload on Consumer Choice Quality in an On-Line Environment,* 21(3) Psychol. & Marketing 159, 177 (2004).

[245] LOLLAF at 4; CUUS at 5–6 (adding that historical performance data would only be meaningful if a MARS provider had been in business long enough to have amassed a sufficient record). In contrast, a consortium of state regulators urged the Commission to prohibit MARS providers from disclosing such information because performance figures can be easily manipulated and could mislead consumers. CSBS at 3.

[246] For similar reasons, the Commission declined to require providers to disclose their drop out rates in amending the TSR to address debt relief services. *See TSR; Final Rule,* 75 FR 48458, 48497 & nn. 531–32 (Aug. 10, 2010).

[247] *See supra* §§ III.C.2.b. and III.D.2.

[248] LOLLAF at 3–4 (require disclosure that MARS services are available for free from HUD-certified counseling agencies); CSBS at 3 (require disclosure that MARS services can be obtained from non-profit and government organizations for little or no cost); LFSV at 3; NAAG at 4–5.

[249] *See* § 322.3(b)(9).

[250] NYC DCA at 6.

in the record SE showing that contact information is or will be lacking, the Commission declines to include in the Final Rule a requirement that MARS providers must disclose this information.

E. Section 322.5: Prohibition on Collection of Advance Fees and Related Disclosures

The proposed rule banned MARS providers from requiring that consumers pay in advance for their services, *i.e.,* prior to providers delivering the promised results. The Commission has determined to adopt an advance fee ban in the Final Rule, but with two significant revisions to the ban in the proposed rule. First, the Final Rule prohibits a provider of any mortgage assistance relief service—including loan modifications or other forms of MARS—from collecting any fees until the provider negotiates, and the consumer executes, a written agreement for mortgage relief with the lender or servicer. Second, to effectuate this provision, the Final Rule also requires MARS providers, at the time of forwarding the offer of mortgage relief, to disclose that consumers have the right to accept or reject the offer, and to provide consumers with a notice from their lender or servicer disclosing the material differences between the terms, conditions, and limitations of consumers' current loans and those associated with the offer for mortgage relief. These provisions supplant the proposed rule's allowance of fees once (1) the provider delivers an offer from the servicer or lender for a mortgage loan modification meeting certain minimum requirements; or (2) in the case of providers offering MARS other than loan modifications, the provider delivers the result that it represented it would deliver. The reasons for these alterations to the proposed rule are discussed below.

1. *Proposed Rule and Public Comments Received*

The advance fee ban in the proposed rule included two separate provisions, one addressing the marketing of MARS generally and the other addressing the marketing of MARS specifically to obtain loan modifications. The first provision in the proposed rule, § 322.5(a), prohibited MARS providers from requesting or receiving payment until they achieved all of the results that: (1) The provider had represented that the service would achieve; and (2) would be consistent with consumers' reasonable expectations about the service. The second provision, proposed § 322.5(b), prohibited MARS providers that represented that they would obtain a loan modification from requesting or receiving payment until they had achieved a modification meeting certain specifications, namely: The contractual change to one or more terms of an existing dwelling loan between the consumer and the owner of such debt that substantially reduces the consumer's scheduled periodic payments, where the change is (1) Permanent for a period of five years or more; or (2) Will become permanent for a period of five years or more once the consumer successfully completes a trial period of three months or less.

The proposed rule also required MARS providers, prior to collecting payment, to furnish to consumers documentation showing that they have secured an offer of mortgage relief from the consumer's lender or servicer.

a. Comments Supporting the Advance Fee Ban

A large number of commenters supported the proposed advance fee ban.[251] NAAG's comment, representing 40 attorneys general, urged the Commission to adopt proposed § 322.5, arguing that it was "critical" and "the linchpin of effective deterrence of fraudulent practices" by MARS providers.[252] According to NAAG, "[t]he collection of advance fees virtually ensures that consumers will have no recourse when consultants fail to perform services, as is generally the case."[253] Three state attorneys general who joined the NAAG comment also submitted individual comments offering similar reasons for supporting the proposed advance fee ban.[254] In addition, a coalition of state regulators of financial institutions supported the proposed ban, arguing that it would curb abuses in the MARS industry.[255] NAAG, individual state attorneys general, and the financial institution regulators specifically recommended that a final rule eliminate the possibility of MARS providers evading the ban by charging fees on a piecemeal basis before they have delivered all of the results they represented.[256] NAAG and the individual state attorneys general noted that many MARS providers split their service into discrete steps and then demand most of their fees after completing relatively insignificant initial steps, such as answering a phone call or sending the consumer preliminary forms.[257]

A wide array of consumer advocates, community organizations, and legal service providers also submitted comments generally supporting the proposed advance fee ban.[258] These comments argued that a ban is necessary to ensure that providers deliver the results they promise and to curb deception and abuse.[259] Like those of the state law enforcement agencies and financial regulators, some of these comments also urged the Commission to

[251] As detailed in the NPRM, many of these commenters recommended at the ANPR stage that the Commission include an advance fee ban. *See MARS NPRM,* 74 FR at 10808 & nn.19–21. In addition, some commenters who did not comment on the NPRM had advocated an advance fee ban at the ANPR stage. *See* CRC (ANPR) at 4 ("Banning advance fees is a crucial component to any effort to reduce * * * unfair and deceptive practices in the loan modification industry and will likely push many scam artists out of our communities. The FTC should ban the collection of advance fees outright * * *."); Shriver at 2 (recommending prohibition on up-front fees); NCLR at 1 (recommending that up-front fees be banned); CMC at 8 ("The CMC would support a ban or limitation on the collection of advance fees by MARS providers."); Chase at 3 ("[T]he payment of advance fees should be banned because there is no guarantee the MARS provider will be successful * * *."); HPC at 2 (arguing that consumers should not be required to pay up-front fees).

[252] NAAG at 2–3; *see also* NAAG (ANPR) at 9 ("A ban on advance fees * * * is necessary for any meaningful mortgage consultant regulation * * *. A key provision of any rule regulating mortgage consultants is that no fee may be charged or collected until after the mortgage consultant has fully performed each and every service the mortgage consultant contracted to perform or represented that he or she would perform.").

[253] NAAG at 2.

[254] *See, e.g.,* MN AG at 2–3; MA AG at 1; OH AG at 1; *see also, e.g.,* NYC DCA at 3–5 (New York City Department of Consumer Affairs stating support for advance fee ban).

[255] *See* CSBS at 3.

[256] *See* NAAG at 3; MN AG at 3; CSBS at 4; MA AG at 2. Some commenters also noted that they have observed MARS providers that charge fees piecemeal in order to circumvent state statutory advance fee bans. *See* NAAG at 3; MN AG at 3; MA AG at 2.

[257] NAAG at 3; MN AG at 3; MA AG at 2 ("[U]nder an exemption for piecemeal fees, providers would continue the widespread current practice of front loading piecemeal fees, so that the provider quickly obtains a substantial payment that is disproportionate to the amount of services provided.").

[258] *See* CRL; LFSV at 2–3; LCCR at 4; WMC at 1; NCLC at 3; LOLLAF at 4; CUUS at 6–8.

[259] *See, e.g.,* CUUS at 7 ("The prohibitions on advance fee payments is the most effective tool in this proposed rule to drive bad actors from the marketplace, making room for the legitimate companies to fill in the void and provide quality, honest services and products to consumers."); NCLC at 3 ("The single most important provision is section 322.5 * * *. Wrongdoers are attracted to mortgage assistance relief services by the potential for extracting large payments from homeowners without performing any work or providing anything of value. Requiring mortgage assistance relief services (MARS) providers to earn their fee before being paid will rid the market of those who specialize in nothing more than 'take the money and run.'"); LCCR at 4 ("The ban will also protect struggling homeowners by incentivizing MARS providers to represent their capabilities in a way that reflects services they can realistically provide in a timely manner.").

prohibit MARS providers from collecting fees piecemeal.[260]

Comments from the financial services industry, including a trade association representing mortgage brokers and another representing financial institutions, also supported the advance fee ban.[261] In addition, several California attorneys who provide MARS supported an advance fee ban for non-attorney MARS providers, asserting that it would curb their abuses.[262]

In the NPRM, the Commission requested comment on possible alternatives to the proposed advance fee ban, *e.g.,* permitting a limited advance fee or allowing providers to require consumers to set fees aside in a dedicated account.[263] In response to this request, state attorneys general and regulators argued that the alternatives on which the Commission requested comment would be inadequate to prevent deception and unfairness.[264] Several consumer group comments similarly recommended that the Commission not adopt either of these alternatives. For example, three commenters specifically opposed allowing providers to collect a fixed, limited advance fee;[265] two of the three argued that providers would collect any upfront fee amount permitted and never provide any benefits to consumers.[266] Other commenters urged the Commission not to permit providers to force consumers to set aside fees in dedicated accounts.[267] Among other reasons, these commenters asserted that allowing MARS providers to require such accounts would place the onus on consumers to recover the deposited funds if providers failed to perform.[268]

b. Comments Opposing the Proposed Advance Fee Ban

A number of MARS providers, many of them attorneys,[269] submitted comments opposing the proposed advance fee ban.[270] These commenters offered several reasons for their opposition. First, MARS providers argued that their services frequently confer substantial benefits on consumers, including collecting, reviewing, and explaining to consumers the paperwork sent by lenders and servicers;[271] making repeated phone calls on behalf of consumers to lenders and servicers to ensure that they have received necessary information and documents;[272] advising consumers on whether they would be eligible for a loan modification or other alternative;[273] recommending that consumers consider bankruptcy;[274] and offering emotional support.[275] At least two MARS providers submitted comments claiming that they have secured loan modifications for a large number of their customers,[276] although they offered no data or other substantiation for these claims.

Second, MARS providers asserted that, without the ability to collect fees in advance, legitimate MARS providers would be unable to stay in business and would stop providing services, leaving consumers either without assistance or vulnerable to illegitimate providers.[277] These commenters argued that MARS providers need advance fees to cover their ongoing operating costs—*e.g.,* for payroll, office space, and equipment—as well as the direct costs of seeking modifications, all of which they incur prior to obtaining the modifications.[278] The commenters claimed that, as a result of delays and other problems lenders and servicers cause, it can take from several months to a year to obtain a modification, a long time to go without being paid.[279] The commenters also argued that they need consumers' payments upfront because most consumers who purchase MARS are in financial distress and may be unwilling or unable to pay the amount owed to the provider even when the provider has completely fulfilled its promises.[280]

2. Legal Basis

a. Unfairness

Based on the record in this proceeding, the Commission concludes that it is an unfair act or practice for MARS providers to charge advance fees, because: (1) It causes or is likely to

[260] *See* LFSV at 2; LCCR at 8; LOLLAF at 5 ("Allowing any fees to be collected prior to providing a permanent loan modification presents MARS providers with a back door opportunity to extract significant sums of money without any benefit provided to the consumer.").

[261] *See, e.g.,* MBA at 2–3; AFSA at 5. AFSA argued that banning advance fees is the best way to ensure that providers deliver a beneficial service to consumers.

[262] *See* Greenfield at 2 ("We applaud the basic restrictions that are proposed on the ability of MARS providers * * * to request and accept advance fees. These restrictions are warranted because there is ample evidence from the state Attorneys General and other sources in California and nationwide that persons who are looking to take advantage of distressed consumers are gravitating toward this relatively new field.").

[263] 75 FR at 10730–31. For purposes of discussion in this Section of the SBP, the Commission uses the phrase "dedicated account" to include any account into which a MARS provider might request or require consumers to set aside fees to ensure that the provider can later collect them. The term encompasses an "escrow account," a phrase frequently used in the real estate context to describe an account controlled by a third-party administrator into which a consumer places a deposit for the purchase of a home. It also encompasses a "trust account," a phrase most commonly used to describe funds paid by clients to attorneys, which attorneys set aside and from which they later collect or withdraw their fees. The public comments and other materials in the record sometimes use these phrases interchangeably, and the Commission intends for "dedicated accounts" to include all of these mechanisms, and any other variations, for setting aside consumer funds.

[264] *See* NAAG at 2–3; MA AG at 2; CSBS at 4; *see also* NYC DCA at 5. Specifically, NAAG raised concerns that the use of dedicated accounts would not protect consumers because (as demonstrated in one law enforcement action described in its comment) providers might inappropriately access the funds set aside or refuse to return those funds to consumers. NAAG at 2–3. In response to similar concerns about permitting dedicated accounts in the provision of debt relief services, for purposes of its recent amendments to the TSR, the Commission imposed several conditions for using such accounts to ensure that providers do not improperly obtain or control the funds. *See TSR; Final Rule,* 75 FR at 49490–91.

[265] CUUS at 6; LCCR at 4; LOLLAF at 5.

[266] LOLLAF at 5; CUUS at 6.

[267] LFSV at 3; CUUS at 7; WMC at 2; LOLLAF at 5.

[268] LFSV at 3; LOLLAF at 5.

[269] *See, e.g.,* Mobley; Deal; Rogers; Dargon; Holler; Giles; 1st ALC. Many of the objections that MARS providers who are attorneys raised to the proposed advance fee ban applied equally to non-attorney MARS providers. Other objections were attorney-specific.

[270] *See, e.g.,* MFP (non-attorney provider); Metropolis (same); Rate Modifications (same); Fortress (same).

[271] *See, e.g.,* Giles at 3–4; Dargon at 2.

[272] *See, e.g.,* Dargon at 2; Goldberg at 2; Greenfield at 4.

[273] *See, e.g.,* 1st ALC at 8.

[274] *See, e.g.,* Giles at 3.

[275] *See, e.g.,* Giles at 3 ("I do the 'hand holding' throughout the process and I am the one that assures them they are not going to lose their homes."). One commenter also noted that, even when unsuccessful at obtaining a loan modification, he often can force a delay in his customers' foreclosure proceedings so that they can remain in their homes for an additional period of time. *See* Carr at 3.

[276] *See* Rogers at 2 (stating that his firm has obtained trial modifications for over 90% of its customers and has never failed to convert a trial modification into a permanent modification); Hawthorne at 1 ("I have over 600 success stories, and i [sic] get 80 loan modifications in a month for our clients.").

[277] *See, e.g.,* Sygit at 1; Rate Modifications at 1; Rogers at 9–10; Wallace at 1; Holler at 1; Giles at 3; Dargon at 1, 3; Carr at 5; Goldberg at 1–2; Deal at 4. One comment submitted by a group of attorneys who provide MARS suggested that many attorneys in California have already stopped offering these services to consumers as a result of that state's advance fee ban, which recently became applicable to attorneys. *See* Greenfield at 4.

[278] *See, e.g.,* Rogers at 9; Dix at 1; GLS at 1; Hunter at 1 ("How are the lights, phones, computers, marketing, and payroll to be met if we only receive compensation down the road?").

[279] *See, e.g.,* Rogers at 9; Peters at 1; GLS at 1; Dargon at 3; Giles at 3 (noting that "a successful loan modification takes a year, and is never accomplished in less than six (6) months"); Greenfield at 4 ("Mortgage loan modifications often take from six months to a year to reach a resolution.").

[280] USHS at 1; Rogers at 9; ARS/Peters at 1; GLS at 1; ARS/Peters at 1 (stating that, under California law barring upfront fees, "I am having to spend hours chasing down payments from clients and getting the run around"); Deal at 5 ("I am not interested in chasing clients who fail to pay. It is usually a waste of time and money.").

cause substantial injury to consumers; (2) the injury is not outweighed by countervailing benefits to consumers or competition; and (3) the injury is not reasonably avoidable by consumers themselves.[281] To prevent this injury, the Final Rule bans MARS providers from collecting advance fees for their services.

(1) Consumer Injury from Advance Fees

The record shows that charging fees for MARS prior to delivering results—the most common business model in this industry [282]—causes or is likely to cause substantial injury to consumers. Consumers in financial distress suffer monetary harm—in the hundreds or thousands of dollars—when, following sales pitches frequently characterized by high pressure and deception, they use their scarce funds to pay in advance for promised results that rarely materialize.[283] When MARS providers fail to perform, consumers may lose funds they need to make monthly mortgage payments and thus may lose their homes as well.

(a) Consumers Are Injured Because They Pay for Services That Are Never Provided

The record shows that MARS providers do not achieve successful results for the vast majority of their customers. Consumers who pay advance fees but do not receive promised benefits lose the often considerable sums they have paid for MARS services (typically hundreds or thousands of dollars), funds financially-distressed consumers often need to make mortgage payments or meet other basic needs.[284]

The FTC and state law enforcement agencies have collectively filed over two hundred cases against MARS providers.[285] These cases typically have alleged that the defendants employed deceptive success claims to entice consumers to purchase their services, and then did not produce the results they promised.[286] In one recent FTC action, for example, the court found that defendants successfully obtained loan modifications for fewer than 5% of their customers, despite their frequent claims of a 90% or 100% success rate.[287] Similarly, the court in another FTC lawsuit concluded that the defendants had a success rate of "no more than between 1% and 10%." [288] The Illinois Attorney General likewise submitted a comment stating that in the majority of its lawsuits against MARS providers, virtually none of the defendants' customers appear to have receive promised services or results.[289]

Consumers are especially unlikely to obtain the claimed results if the MARS provider has promised a loan modification.[290] Many consumers who purchase services from MARS providers are not even eligible for the government programs that offer incentives for lenders and servicers to make loan modifications.[291] Apart from these programs, lenders and servicers often are unwilling to modify the terms of loans or forgive fees and penalties as an alternative to foreclosure.[292] Even if lenders and servicers might be amenable to modification, many MARS providers often do little or no work for their customers—for example, neglecting to contact lenders or servicers or failing to respond to their requests for basic information—thereby increasing the

[281] 15 U.S.C. 45(n).

[282] *See supra* notes 47–49 and accompanying text. In the Commission's law enforcement actions, MARS providers uniformly have charged advance fees to consumers. *See* FTC Case List, *supra* note 28. *But see* USHS at 1 (MARS provider stating that he only collects fees after obtaining a trial modification for his customers).

[283] *See TSR; Final Rule,* 75 FR at 48482. Moreover, this practice creates incentives for MARS providers that are fundamentally at odds with the interests of consumers—to expend their resources on soliciting customers and collecting fees, rather than providing services. *See also id.* at 48484.

[284] *See, e.g.,* NCRC (ANPR) at 3 ("The high costs of loan modification and foreclosure rescue services may also prevent financially stressed consumers from being able to pay their regular mortgage payment, if they buy into companies' promises. If the company does not deliver, they may be unable to correct the delinquency for lack of these funds."); NAAG (ANPR) at 10 ("Paying the fee upfront likely means that some of the consumer's other bills will not be paid or that the consumer will have to use credit cards or funds from friends or family."); MN AG (ANPR) at 2 ("These advance fees often make it even more difficult for the homeowner—and the loan modification or foreclosure rescue consultant—to effectively resolve the homeowner's financial dilemma."); *see also TSR; Final Rule,* 75 FR at 48484.

[285] *Financial Services and Products: The Role of the Federal Trade Commission in Protecting Consumers, Hearing Before the S. Comm. on Commerce, Sci. & Transp.,* 111th Cong. 6 (2010) (testimony of FTC).

[286] *See, e.g.,* FTC Case List, *supra* note 28; NAAG (ANPR) at 6 ("In our experience, we have found that services provided by foreclosure rescue services companies result only in costs to consumers. There are no benefits. The companies collect an upfront fee that consumers can ill-afford to pay. Consumers then submit financial information to the companies and the companies promise to forward the information to the consumers' loan servicers and obtain a loan modification offer. In the majority of cases, the companies do nothing with the consumers' information. The consumers then end up turning to a non-profit for help, calling their servicers themselves, or falling further behind on their mortgage payments as they wait for the promised loan modification offer that never materializes."); *see also, e.g.,* Press Release, Cal. Att'y Gen., *Four Arrested, Five Wanted for Fleecing Hundreds of Homeowners Seeking Foreclosure Relief* (May 20, 2010) (criminal matter alleging that, "[i]n almost every case, no loan modifications were completed [by defendants], as promised," although they promoted 90% to 100% success rates), *available at http://ag.ca.gov/newsalerts/release.php?id=1923;* NAAG (ANPR) at 3 ("As of July 1, 2009, the Office of the Illinois Attorney General had identified roughly 170 companies operating in Illinois that appeared to have offered or were presently offering foreclosure rescue services that violated Illinois state laws. The majority of these companies take impermissible up-front fees and then fail to deliver promised services."); MN AG (ANPR) at 2 ("As a general rule, these companies provide no service, or at most, simply submit paperwork to the homeowner's mortgage company."); Chase (ANPR) at 1 ("Chase's experience has been that MARS entities disrupt the loan modification process and provide little value in exchange for the high fees they charge.").

[287] *FTC* v. *Data Med. Capital, Inc.,* No. SA–CV–99–1266 AHS (Eex), Contempt Or. at 55 (C.D. Cal. filed Jan. 15, 2010).

[288] *FTC* v. *Truman Foreclosure Assistance, LLC,* No. 09–23543, Order Granting Prelim. Injunct. at 11 (S.D. Fla. entered Jan. 11, 2010); *see also, e.g., FTC* v. *Federal Loan Modification Ctr., LLP,* No. SACV 09–401 CJC (MLGx), Mem. Sup. Pls. Mot. Supp. Summ. J. at 13 (C.D. Cal. filed Oct. 6, 2010) (alleging that company obtained results for consumers at a rate ranging from 8.9% to 17.76%); *FTC* v. *Loss Mitigation Servs., Inc.,* No. SACV09–800 DOC (ANX), Rep. Mem. Supp. Prelim. Injunct. at 2 (C.D. Cal. filed Aug. 13, 2009) (alleging that, even according to statistics self reported by defendant, "only 27% of [defendant's] clients were 'approved' for a loan modification, and only 16% found the modification acceptable"); *FTC* v. *US Foreclosure Relief Corp.,* No. SACV09–768 JVS (MGX), Second Int. Rep. Temp. Receiver at 4 (C.D. Cal. filed Sept. 17, 2009) (estimating that 21% of defendants' customers were approved for loan modifications); *FTC* v. *LucasLawCenter "Inc.",* No. SACV–09–770 DOC (ANX), Mem. Supp. TRO at 19 (C.D. Cal. filed July 7, 2009) (alleging that "[n]early every consumer who is promised a loan modification never received any offer to modify their home loans"); *FTC* v. *Freedom Foreclosure Prevention Specialists, LLC,* No. 2:09–cv–01167–FJM (D. Ariz. June 1, 2009) (alleging that defendants only completed loan modifications for about 6% of customers).

[289] *See* IL AG (June 30, 2010) at 2–4; *see also* GAO Report, *supra* note 45, Executive Summary (finding that "the most active [MARS] scheme is one in which individuals or companies charge a fee for services not rendered").

[290] *See, e.g.,* FTC Case List, *supra* note 28.

[291] *See, e.g.,* Manuel Adelino et al., *Why Don't Lenders Renegotiate More Home Mortgages? Redefaults, Self-Cures, and Securitization* 3 (Federal Reserve Bank of Atlanta, Working Paper No. 2009–17a, 2009), *available at http://www.bos.frb.org/economic/ppdp/2009/ppdp0904.pdf* (finding that lender provided monthly payment-lowering modifications to only 3% of seriously delinquent loans in 2007 and 2008); NCLC at 6 (pointing to "[o]ne analysis of statistics for modifications made in May 2009 [which] showed that only 12% reduced the interest rate or wrote-off fees or principal").

[292] *See supra* note 291; *see also, e.g.,* Alan M. White, *Deleveraging the American Homeowner: The Failure of 2008 Voluntary Mortgage Contract Modifications,* 41 Conn. L. Rev. 1107, 1111 (2009) (arguing, *inter alia,* that "[n]o single servicer or group of servicer * * * has any incentive to organize a pause in foreclosures or organized deleveraging program to benefit the group"). *But see* Press Release, HOPE NOW, *HOPE NOW Reports More Than 476,000 Loan Modifications in First Quarter of 2010* (May 10, 2010) (coalition including mortgage servicers announcing that its members have offered 2.88 million loan modifications to consumers), *available at http://www.hopenow.com/press_release/files/1Q%20Data%20Release_05_10_10.pdf.*

odds even further that their customers will not receive the promised results.[293]

In addition to past law enforcement actions, the significant and growing number of consumer complaints about MARS providers strongly suggests that they are continuing to fail to deliver the results they promise. For example, one coalition of government and private groups that collects consumer complaints regarding MARS received 3,461 consumer complaints against MARS providers between April and August of 2010.[294] Similarly, state and local consumer protection agencies reported that fraudulent offers of help to save homes from foreclosure was the fastest growing complaint category in 2009.[295]

The Commission's extensive experience with consumer complaints teaches that such complaints—while not a representative sample of MARS consumers—are the "tip of the iceberg" in terms of the actual levels of consumer dissatisfaction.[296] The Commission has decades of experience in its law enforcement work in drawing inferences from the number and types of consumer complaints. In this matter, the frequency and consistency of the conduct described in consumer complaints raises, at a minimum, a strong inference that this conduct is widespread in the MARS industry. The complaint data corroborates the other evidence in the record discussed above that MARS providers, after collecting substantial advance fees, fail to deliver promised results for most consumers.

(b) The Context in Which MARS Are Offered Has Contributed to the Substantial Injury

The Commission concludes that several aspects of the marketing of MARS have contributed to the substantial injury caused by charging advance fees. First, MARS providers direct their claims to financially distressed consumers who often are desperate for any solution to their mortgage problems and thus are vulnerable to the providers' purported solutions.[297] The Commission has long held that the risk of injury is exacerbated in situations in which sellers exercise undue influence over susceptible classes of purchasers.[298]

Second, MARS providers frequently use high pressure sales tactics in selling their services.[299] Thus, the manner in which MARS are sold impedes the free exercise of consumer decision making, a traditional hallmark of an unfair practice.[300]

Third, the transactions in which consumers agree to purchase MARS and make advance payments often take place in the context of extensive deception.[301] To induce consumers to purchase their services and pay advance fees, MARS providers make aggressive performance claims. As discussed above, in their ads and in follow-up telemarketing and email interactions with consumers, MARS providers commonly claim that there is a high probability, or even a guarantee, that they will obtain dramatic reductions in payments or other mortgage relief.[302] To increase the credibility of these claims, many MARS providers misrepresent that they have special expertise in mortgage relief assistance and a close affiliation with the government, a non-profit program, or the consumer's lender or servicer.[303] Morever, providers seek to allay concerns consumers might have about paying in advance by falsely claiming that they will provide refunds if they do not obtain the promised results.[304]

Finally, charging advance fees for MARS requires consumers to bear the full risk of the possible failure of the provider to perform, even though the provider is in a better position to assume risk. When selling MARS to consumers, only the MARS provider knows how frequently, and under what circumstances, it has been successful in the past. Consumers, in contrast, are not likely to know whether a successful outcome is likely for them. Consumers are injured by a business model that forces them to bear the full risk of nonperformance and the resulting harm, particularly, as in this context, where the seller is in a better position to know and account for the risks.[305]

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[293] *See supra* note 79.

[294] *See* Loan Modification Scam Prevention Network (LMSPN), *National Loan Modification Scam Database Report—August 2010, available at http://www.preventloanscams.org/tools/assets/files/August-LMSPN-Report-Final.pdf;* LMSPN, *National Loan Modification Scam Database Report—July 2010, available at http://www.preventloanscams.org/tools/assets/files/July-LMSPN-Report-Final.pdf;* LMSPN, *National Loan Modification Scam Database Report—June 2010,* available at *http://www.preventloanscams.org/newsroom/publications_and_testimony?id=0011;* LMSPN, *National Loan Modification Scam Database Report—May 2010, available at http://www.preventloanscams.org/tools/assets/files/May-LMSPN-Report-Final.pdf;* LMSPN, *National Loan Modification Scam Database Report—April 2010, available at http://www.preventloanscams.org/tools/assets/files/April-LMSPN-Report-Final.pdf.*

[295] Consumer Fed'n of Am., *2009 Consumer Complaint Survey Report* 25 (July 27, 2010) (surveying state and local government agencies regarding their consumer complaints), *available at http://www.consumerfed.org/elements/www.consumerfed.org/file/Consumer_Complaint_Survey_Report072009.pdf.* Moreover, the Financial Crimes Enforcement Network reported that financial institutions submitted about 3,000 suspicious activity reports related to loan modification and foreclosure rescue scams in 2009. FinCEN, *Loan Modification and Foreclosure Rescue Scams—Evolving Trends and Patterns in Bank Secrecy Act Reporting* at 10 (May 2010), *available at http://www.fincen.gov/news_room/rp/files/MLFLoanMODForeclosure.pdf (FinCEN, Foreclosure Rescue Fraud Report May 2010).*

[296] *See, e.g.,* Dennis E. Garrett, *The Frequency and Distribution of Better Business Bureau Complaints: An Analysis Based on Exchange Transactions,* 17 J. Consumer Satisfaction, Dissatisfaction, & Complaining Behav. 88, 90 (2004) (noting that only a small percentage of dissatisfied consumers complain to third-party entities or agencies); Jeanne Hogarth et al., *Problems with Credit Cards: An Exploration of Consumer Complaining Behaviors,* 14 J. Consumer Satisfaction, Dissatisfaction, & Complaining Behav. 88, 98 (2001) (finding that only 7% of consumers having problems with their credit card company complain to third-party entities or agencies).

[297] *See* Unfairness Policy Statement, *supra* note 187, at 1074 (noting that the Commission may consider the "exercise [of] undue influence over highly susceptible classes of purchasers" as part of the unfairness analysis).

[298] *Id.* at 1074 n.3.

[299] *See, e.g., FTC* v. *Loss Mitigation Servs., Inc.,* No. SACV09–800 DOC (ANX), Mem. Supp. TRO at 17 (C.D. Cal. filed July 13, 2009) ("Defendants [allegedly] create[d] an atmosphere of pressure and urgency to encourage consumers to pay the up-front fee. In numerous instances, Defendants' representatives have sent consumers emails transmitting [defendants'] loan modification application that includes arbitrary deadlines and other warnings to pressure consumers to return the information fast * * * [including statements that] '[i]f the Application Process and Mitigation Process are not handled with precision and a sense of urgency you could very likely lose your home' and '[i]t is extremely important that this application be faxed back by the (3) day deadline to avoid cancellation of the file.'"); *FTC* v. *Truman Foreclosure Assistance, LLC,* No. 09–23543, Mem. Supp. P.I. at 14–15 (S.D. Fla. filed Nov. 23, 2009) (alleging that defendants' Web sites stated, "[t]he single-most important factor in stopping your foreclosure is SPEED! Time is not your friend" and that defendants' solicitations stated "[y]ou must act immediately," and "URGENT NOTICE: Please Call Immediately!"); *FTC* v. *Data Med. Capital Inc.,* No. SA–CV–99–1266 AHS (Eex), Mem. Supp. App. Contempt at 8 (C.D. Cal. filed May 27, 2009) ("The fuel for [defendant's alleged] scheme was the desperate plight of consumers facing a recessionary economy and a free falling real estate market. * * * [T]elemarketers were trained to * * * 'capitalize on fear' and 'create urgency.'").

[300] *See TSR; Final Rule,* 75 FR at 48485 & n.379 (citing Unfairness Policy Statement, *supra* note 187, at 1074); *In re Amrep,* 102 F.T.C. 1362 (1983), *aff'd,* 768 F. 2d 1171 (10th Cir. 1985); *In re Horizon Corp.,* 97 F.T.C. 464 (1981); *In re Sw. Sunsites,* 105 F.T.C. 7, 340 (1985), aff'd, 785 F. 2d 1431 (9th Cir. 1986).

[301] As the Commission recently concluded in promulgating the debt relief amendments to the TSR, transactions characterized by deception exacerbate the potential for consumer injury. *See TSR; Final Rule,* 75 FR at 48485.

[302] *Supra* note 75.

[303] *Supra* notes 72–74.

[304] *See supra* note 77.

[305] *See TSR; Final Rule,* 75 FR at 48485 (citing *Cooling Off Period For Door-to-Door Sales; Trade Regulations Rule and Statement of Basis and Purpose,* 37 FR 22934, 22947 (Oct. 26, 1972) (codified at 16 CFR 429)); *Preservation of Consumers' Claims and Defenses, Statement of Basis and Purpose,* 40 FR 53506, 53523 (Nov. 18, 1975) (codified at 16 CFR 433) (same); *In re Orkin Exterminating,* 108 F.T.C. 263, 364 ("By raising the

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Thus, the Commission concludes that the practice of charging an advance fee for MARS causes or is likely to cause substantial consumer injury.[306]

(2) Benefits to Consumers or Competition From Advanced Fees

The second factor in the unfairness analysis under Section 5(n) of the FTC Act is a consideration of whether an act or practice has benefits to consumers and competition and, if so, whether they outweigh the actual or likely harm to consumers. MARS provider commenters posited two main arguments to support their contention that charging advance fees is beneficial to consumers.

First, the providers argued that, in exchange for their upfront fees, they provide significant benefits to consumers in the form of completed services and successful results.[307] However, the rulemaking record demonstrates that the vast majority of consumers fail to receive successful loan modifications or other forms of mortgage assistance promised.[308] In the ANPR and NPRM, the Commission specifically requested empirical evidence on the success rates of MARS providers in delivering promised results.[309] No such evidence was submitted. Although a few comments from MARS providers included anecdotes and unsupported assertions of success,[310] the bulk of the comments[311] and the Commission's law enforcement experience provide strong evidence that MARS providers rarely deliver the results they promise.

Second, MARS providers have asserted that an advance fee ban would impose undue burdens on them, because: (1) They would not have the cash flow necessary to fund their day-to-day operations;[312] and (2) they might not get paid for the services they rendered given the precarious financial situation of their customers.[313] As a result, according to these commenters, many MARS providers could not afford to stay in business, and would therefore no longer be able to provide consumers the benefits of their services.[314]

There is scant evidence in the rulemaking record to support this argument, and no industry members submitted cost data to back up this claim.[315] The Commission cannot predict with precision the impact of an advance fee ban, but recognizes it may force some MARS providers to capitalize adequately to fund their initial operations, until they begin receiving fees generated by their delivery of services.[316] Companies in many other lines of business capitalize for this purpose. Thus, although the advance fee ban in the Final Rule may result in new business models,[317] there is no evidence in the record to substantiate the claim that MARS providers will not be able to operate if they are paid after they deliver results to their customers.[318]

A ban on advance fees would shift some of the risk of nonperformance under the contract from consumers to MARS providers. At present, consumers bear the full risk—typically, they must pay thousands of dollars up front with no assurance that they will ever receive any benefit in return. The poor performance of this industry makes it likely that consumers will be harmed if they continue to bear the full risk of nonperformance.[319] Prohibiting the charging of advance fees reallocates some of this risk to MARS providers and gives them a powerful incentive to actually deliver results.

In short, the Commission concludes that charging advance fees for MARS

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fees, Orkin unilaterally shifted the risk of inflation that it had assumed under the pre-1975 contracts to its pre-1975 customers."), *aff'd* 849 F.2d 1354 (11th Cir. 1988); *In re Thompson Med. Co.,* 104 F.T.C. 648 (1984) (noting that marketers must provide a high level of substantiation to support "claim[s] whose truth or falsity would be difficult or impossible for consumers to evaluate by themselves").

[306] For similar reasons, the TSR prohibits advance fees for three types of services that often are promoted deceptively to consumers in financial crisis: debt relief services, credit repair services, and certain loan offers. *See* 16 CFR 310.4(a); TSR; *Final Rule,* 75 FR at 48484–85. The Credit Repair Organizations Act also bans the collection of advance fees for credit repair services. 15 U.S.C. 1679b(b).

[307] *See supra* § III.E.1.b.

[308] As noted earlier, MARS providers suggest that, even in instances where they do not secure the promised result, they offer consumers other services that are beneficial to them, such as day-to-day assistance in communicating with servicers or lenders, delays in foreclosure proceedings, and emotional support. *See supra* § III.E.1.b. There is no evidence in the record establishing the frequency with which providers deliver these "benefits." In any event, providers generally do not advertise such services or ancillary "benefits," but instead solicit customers by touting the end result, such as a modified loan. Presumably, this is because consumers are much more interested in receiving, and much more willing to pay for, the promised result. *See TSR; Final Rule,* 75 FR at 48479 (dismissing arguments that debt relief service providers offer ancillary services such as education and financial advice because industry members did not provide evidence to establish how many providers offer the services, how extensive they are, or how much they cost to provide).

[309] *MARS ANPR,* 74 FR at 26137; *MARS NPRM,* 75 FR at 10727, 10729.

[310] Only one MARS commenter offered a self-reported success rate, stating that he places over 90% of his clients into trial or permanent loan modifications. *See* Rogers at 1. However, this commenter did not submit any additional information or data supporting this claim. Another commenter reported anecdotal accounts of a small number of consumers for whom he purportedly obtained loan modifications. *See* Parkey (audio files). Another MARS provider reported that it has over "600 success stories" and secures over 80 loan modifications per month. *See, e.g.,* Metropolis at 1. This commenter also failed to submit information or data supporting this claim, defining "success story," or indicating the percentage of its customers who received modifications out of the total who purchased the services.

[311] *See supra* § III.E.1.

[312] *See supra* § III.E.1.b.; *see also, e.g.,* Gutner (ANPR) at 1 ("[L]oan modification is not as simple as filling out a few forms and then it is done. Loan modification is a long and involved process. * * * Loan modification companies have expenses just like any other company—payroll, lease, insurance, equipment etc."); TNLMA (ANPR) at 5 ("[MARS providers] incur significant costs before the consumer's mortgage is ready to be modified.").

[313] *See supra* § III.E.1.b.; *see also, e.g.,* TNLMA (ANPR) at 5 ("Nearly all professions, from attorneys to accountants to personal trainers, charge advance fees. * * * The reason these other professions charge fees 'up-front' is to avoid the risk of being 'stiffed' at the end of a laboriously costly effort.").

[314] *See supra* § III.E.1.b. One commenter argued, alternatively, that the advance fee ban would compel legitimate MARS providers to charge consumers higher fees to account for the risk of nonpayment. Rogers at 18. There is no evidence in the record substantiating this theory. Assuming that MARS providers compete with one another, it is not clear that they would be able to raise prices with impunity, thereby passing this cost on to consumers.

[315] Notably, FTC law enforcement actions suggest that a predominant portion of providers' costs are dedicated to marketing and sales, instead of the process of assisting consumers obtain mortgage relief. *See, e.g., FTC* v. *US Foreclosure Relief Corp.,* No. SACV09–768 JVS (MGX), Prelim. Rep. Temp. Receiver at 9 (C.D. Cal. filed July 15, 2009) ("[T]he typical commission [for a MARS provider's telephone sales people] was $450 for a fully paid sale—*i.e.,* $2,500—with an extra $25 if the consumer paid by debit card or wire transfer.").

[316] *See, e.g.,* LCCR at 4 ("The for-profit business should be able to capitalize its business in a manner so that it can carry forward these nominal fees as operating costs and then incorporate that operating cost into the fee obtained from the consumer *after* the services are rendered."). *See generally TSR; Final Rule,* 75 FR 48458 (Aug. 10, 2010).

[317] In connection with the FTC's recent amendments to the TSR to curb deception and abuse in debt relief services, industry representatives similarly argued that they would be unable to pay their operating costs without collecting advance fees. *See TSR; Final Rule,* 75 FR at 48486. In fact, after the Commission issued the TSR amendments, a major debt relief trade association stated that the rule, while providing a "significant capital challenge" to the industry, would "allow good companies that are getting results for consumers" to survive. Press Release, The Ass'n of Settlement Cos., *TASC Announces Support for FTC Debt Settlement Rules* (Aug. 17, 2010), *available at http://www.marketwire.com/press-release/TASC-Announces-Support-for-FTC-Debt-Settlement-Rules-1305731.htm.*

[318] *See TSR; Final Rule,* 75 FR at 48486; *Truth in Lending—Final Rule; Fed Res. Brd. Official Staff Commentary,* 75 FR 58509, 58518 (Sept. 24, 2010) (compensation restrictions for mortgage brokers may result in new business models, but "the Board does not believe mortgage brokerage firms will no longer be able to compete in the marketplace unless they can continue to engage in compensation practices the Board has found to be unfair.").

[319] Increased revenue or profit for a seller, alone, is not a benefit to consumers or competition for purposes of unfairness analysis. *See In re Orkin Exterminating Comp., Inc.,* 108 F.T.C. 263, 365–66 (1986), *aff'd,* 849 F.2d 1354, 1363 (11th Cir. 1988).

does not provide benefits to consumers or competition, and, even if such benefits were to exist, they would not outweigh the substantial injury this practice demonstrably causes or is likely to cause to consumers.

(3) Reasonably Avoidable Harm

The third prong of the unfairness analysis under Section 5(n) of the FTC Act requires the Commission to consider whether consumers could reasonably avoid the harm caused by an act or practice. The Commission finds an act or practice unfair "not to second-guess the wisdom of particular consumer decisions, but rather to halt some form of seller behavior that unreasonably creates or takes advantage of an obstacle to the free exercise of consumer decision making." [320] The extent to which a consumer can reasonably avoid injury is determined in part by whether the consumer can make an informed choice.[321] In this regard, the Unfairness Policy Statement explains that certain types of sales techniques may effectively prevent consumers from making informed decisions and that corrective action may therefore be necessary.[322]

For harm to be reasonably avoidable, consumers must have "reason to anticipate the impending harm and the means to avoid it." [323] As discussed above, the deceptive success and other claims MARS providers disseminate prevent or substantially hinder the ability of consumers to recognize the risks they face in paying advance fees to MARS providers. This is especially so because consumers often are under dire pressure to make decisions quickly. Moreover, consumers have little experience with purchasing services to stave off foreclosure, which is not a routine consumer transaction, whereas the provider has presumably handled the transaction many times.

Once they have paid in advance and learned that a MARS provider has not obtained a result they are willing to accept, consumers cannot reasonably eliminate or mitigate the harm.[324] As discussed above, MARS providers rarely provide refunds for nonperformance.[325] In addition, although consumers may have the right under state law to bring breach of contract actions to recover advance fees from MARS providers who do not perform, many consumers are unaware of their legal rights or are unable to afford the costs and risks of litigation.[326] Thus, the Commission finds that consumers cannot reasonably avoid the injuries they face in connection with MARS providers charging advance fees.

(4) Public Policy Concerning Advance Fees

Section 5(n) of the FTC Act permits the Commission to consider established public policies in determining whether an act or practice is unfair, although those policies cannot be the primary basis for that determination.[327] At least 20 states currently prohibit charging advance fees for MARS because of its adverse impact on consumers.[328] Consistent with these state statutes and their law enforcement experience, over 40 attorneys general filed comments strongly advocating an FTC rule prohibiting advance fees for MARS.[329] Thus, public policies embodied in state laws and law enforcement further support the Commission's finding that this practice is unfair.[330]

For the reasons set forth above, the Commission concludes that charging an advance fee for MARS is an unfair act or practice under Section 5(n) of the FTC Act.[331]

b. The Advance Fee Ban Is Reasonably Related to the Goal of Preventing Deception

As explained above, the Omnibus Appropriations Act, as clarified by the Credit Card Act, authorized the FTC not only to prohibit conduct that is itself unfair or deceptive, but also to adopt rules that are reasonably related to preventing unfair or deceptive conduct in connection with MARS.[332] For the reasons detailed here, the Commission concludes that an advance fee ban for MARS is reasonably related to the goal of protecting consumers from the deception that is widespread in the offering of these services.

As detailed in Section II of this SBP, MARS providers commonly make deceptive claims as to the results they will obtain. These claims induce consumers to pay advance fees of hundreds or thousands of dollars for results the providers typically do not deliver. Because the likelihood of consumers pursuing judicial remedies against nonperformance is small,[333] MARS providers have little incentive to perform, and in fact many do not.[334] The advance fee ban proposed in § 322.5 realigns the incentives of MARS providers to deliver on their promises, because they will not be paid until they deliver results that the consumer finds acceptable.[335] As a result, the ban is

[320] Unfairness Policy Statement, *supra* note 187, at 1074.

[321] *Id.*

[322] *Id.*

[323] *Orkin Exterminating Co.,* 108 F.T.C. 263, 366 (1986), *aff'd,* 849 F.2d 1354, 1368 (11th Cir. 1988); *see Int'l Harvester Co.,* 104 F.T.C. 949, 1061 (1984) ("whether some consequence is 'reasonably avoidable' depends not just on whether they know the physical steps to take in order to prevent it, but also whether they understand the necessity of actually taking those steps.").

[324] *See Int'l Harvester Co.,* 104 F.T.C. at 366 (Consumers "seek to mitigate the damage afterward if they are aware of potential avenues toward that end.").

[325] Even if MARS providers granted refunds, it would not be sufficient to eliminate the harm to consumers from paying the advance fee because financially distressed consumers are deprived of the use of the money from the time of payment to the time of refund and because the process of obtaining a refund from a MARS provider imposes costs on them. *See FTC* v. *Think Achievement Corp.,* 312 F. 3d 259, 261 (7th Cir. 2002) ("This might be a tenable argument if obtaining a refunds were costless, but of course it is not. No one would buy something knowing that it was worthless and that therefore he would have to get a refund of the purchase price.").

[326] See Unfairness Policy Statement, *supra* note 187, at 1074 n.19 ("In some senses any injury can be avoided—for example, * * * by private legal actions for damages—but these courses may be too expensive to be practicable for individual consumers to pursue."); *see also In re Orkin Exterminating,* 108 F.T.C. at 379–80 (Oliver, Chmn., concurring) (suing for breach of contract is not a reasonable means for consumers to avoid injury).

[327] 15 U.S.C. 45(n).

[328] *See supra* note 98.

[329] *See* NAAG at 2–3; NAAG (ANPR) at 9; MN AG (ANPR) at 4; MA AG (ANPR) at 2; OH AG (ANPR) at 3.

[330] Unfairness Policy Statement, *supra* note 187, at 1075 ("Conversely, statutes or other sources of public policy may affirmatively allow for a practice that the Commission tentatively views as unfair. The existence of such policies will then give the agency reason to reconsider its assessment of whether the practice is actually injurious in its net effects.").

[331] As noted earlier, the Commission reached the same conclusion, for similar reasons, with respect to the charging of an advance fee for four other products or services covered by the TSR that have been routinely misrepresented: debt relief services, credit repair services, money recovery services, and guaranteed loans or other extensions of credit. *See Telemarketing Sales Rule Statement of Basis and Purpose,* 68 FR 4580, 4614 (Jan. 29, 2003) (codified at 6 CFR 310.4(a)). Although the TSR declares the charging of advance fees in these contexts to be "abusive"—the term used in the Telemarketing Act—the Commission used the unfairness test set forth in Section 5(n) of the FTC Act in finding that the practice was abusive. *See* 75 FR at 48482–87; *TSR: Notice of Proposed Rulemaking,* 67 FR 4492–4511 (Jan. 30, 2002).

[332] *See supra* note 105.

[333] *See supra* note 326.

[334] *See supra* § III.E.3. In addition, purchases of MARS typically are a one-time event, and thus reputational costs are unlikely to be a major deterrent for providers.

[335] *See, e.g.,* LOLLAF at 4; CRL at 5 ("[W]e are supportive of the comprehensive ban on advance fees proposed by the FTC, which would align the incentives of MARS providers and consumers."); NAAG at 5 ("Requiring these companies to obtain the promised loan modification as a condition of being paid will substantially reduce their incentive for making false or inflated promises of foreclosure assistance."); LCCR at 4 ("The ban will * * * incentiviz[e] MARS providers to represent their capabilities in a way that reflects services they can realistically provide in a timely manner. After all,

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likely to discourage providers from making deceptive claims and is thus reasonably related to the goal of preventing deception.[336] Although the Final Rule prohibits deceptive representations and mandates certain disclosures, there is no assurance that these measures will be effective in every case or that all providers will abide by them. The advance fee ban will provide additional protection against continued deception in this industry,

3. The Ban on Advance Payments

Section 322.5 of the Final Rule provides that:

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) 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

The notice must be made in a clear and prominent manner, on a separate written page, and preceded by the 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, (i) the fact that the consumer may not qualify for a permanent mortgage loan modification, and (ii) the likely amount of the scheduled periodic payments and any arrears, payments, or fees that the consumer would owe in failing to qualify.

This provision is intended to prevent MARS providers from requesting or receiving any fees or any other form of compensation, including an equity stake in consumers' property, until they have delivered a loan modification or another result the consumer accepts.

a. The Consumer Acceptance Requirement

Section 322.5(a) of the Final Rule prohibits a MARS provider from collecting a fee 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." This provision will ensure that MARS providers only collect fees after they have delivered a concession or other result from the lender or servicer and the consumer has accepted that result.

The proposed rule did not require such acceptance, but instead allowed a provider to collect a fee once it had (1) in the case of providers promoting mortgage loan modifications, "[o]btained a mortgage loan modification [as defined in the proposed rule] for the consumer" and delivered a written offer from the lender or servicer for a loan modification to the consumer; or (2) in the case of providers offering MARS other than loan modifications, "[a]chieved all of the results that * * * [t]he provider represented, expressly or by implication, to the consumer that the service would achieve, and * * * [that are] consistent with consumers' reasonable expectations about the service" and delivered documentation of these results to consumers. Under the proposed rule, payment was contingent upon either delivering a specific result defined in the rule (*e.g.,* a "mortgage loan modification") or obtaining the results the MARS provider promised at the time the consumer agreed to use the service. The Final Rule, however, requires that payment be contingent upon consumer acceptance of results the provider presents.[337] Regardless of how the result the provider delivers compares to what it promoted or promised at the time the consumer agreed to use its service, the provider still must secure a written agreement between the consumer and his or her lender or servicer accepting the results delivered before collecting any fees. The Commission has adopted an approach different from that in the proposed rule because it concludes that the new approach strikes a better balance between protecting consumers and ensuring that MARS providers can collect fees for beneficial results they achieve.

At the same time, the Final Rule permits providers to collect fees if they

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the sooner the providers are able to make good on the representations to the consumer, the sooner they will be able to charge their fees."); CUUS at 6 ("[W]e believe that imposing this requirement will force for-profit MARS providers to sell their services only to those they can reasonably expect to help rather than anyone they can sign up to generate advance fees even when there is no hope of offering them the help they seek."); *MARS NPRM,* 75 FR at 10719 n.148.

[336] *See supra* note 105.

[337] The Commission cautions that providers not attempt to evade the requirements of § 322.5(a) by entering a contract with consumers signed at the outset specifying the consumer's preapproval, for example, that any offer that involves a certain type of concession from the lender or servicer will be deemed acceptable. Moreover, the provider may not rely on authority obtained through a power of attorney at the time or before the time of contracting to execute an agreement incorporating the offer of mortgage relief from the lender or servicer on the consumer's behalf, because the Commission would not regard the consumer as having accepted the offer—as required under § 322.5(a). The Commission further cautions that providers not use deceptive or unfair practices to convince consumers to accept concessions to which they would not otherwise agree, as doing so may constitute a violation of § 322.5(a) and other provisions of the Rule, including § 322.3(b)(12).

deliver results that, although different from what they promised to consumers, are ultimately acceptable to consumers. It avoids disputes over what the provider actually promised, and allows consumers to make the decision about whether the offered mortgage relief is satisfactory to them. It also ensures that the consumer receives a result that he or she determines to be beneficial—for example, a loan modification with a particular reduction in monthly payments [338] or lasting a specific duration. This approach is similar to the one taken in the TSR's advance fee ban for debt relief services.[339]

The Commission warns that securing consumer acceptance to an offer will not immunize a provider from other violations of the Rule. Providers cannot misrepresent the results consumers will receive if they use MARS. For example, if a provider represents to a consumer that it will obtain a reduction in the amount of interest, principal balance, or monthly payments, but only obtains a forbearance agreement, then, regardless of whether the consumer accepts the forbearance agreement, that provider has made a misrepresentation in violation of § 322.3(b) of the Final Rule. In order to comply with § 322.3(b), the provider should qualify its claims sufficiently so that a reasonable consumer would understand that he or she may not receive a reduction in the amount of interest, principal balance, or monthly payments.

Further, as described above, § 322.5(b) of the Final Rule requires providers to inform consumers: (a) that they do not have to pay any fees to the MARS provider unless and until they accept the result that the provider has delivered, and (b) the total amount in fees consumers will have to pay the provider if they accept that result. Additionally, Section 322.5(c) of the Final Rule requires providers to furnish the consumer with a written notice from the consumer's lender or servicer describing all "material differences" between the terms, conditions, and limitations of the consumer's current mortgage loan and those associated with the offer for mortgage relief, including but not limited to differences in the principal balance; contract interest rate, including the maximum rate and any adjustable rates, if applicable; amount and number of the consumer's scheduled periodic payments on the loan; monthly amounts owed for principal, interest, taxes, and any mortgage insurance on the loan; amount of any delinquent payments owing or outstanding; assessed fees or penalties; or term of the loan. Based on its law enforcement experience and the rulemaking record, the Commission concludes that these factors are essential to consumers' ability to compare the mortgage relief offered with their current mortgage loan and, thus, whether they should accept it. Requiring that the lender or servicer prepare the written disclosure also better ensures that the information provided is consistent with the terms of the offer, and mitigates against the risk that MARS providers would mislead consumers about the offer.

Section 322.5(d) also specifies that in cases where the mortgage relief offer obtained from the lender or servicer is a trial loan modification, the notice from the lender or servicer that the provider must furnish to the consumer with the offer of mortgage assistance must include: (1) that the consumer may not qualify for a permanent modification, and (2) if the consumer does not qualify, the likely amount of the scheduled periodic payments that he will have to pay and any arrearages or fees that may accumulate. Some commenters recommended that the proposed rule be changed to prohibit providers from collecting fees for obtaining a trial modification, because most consumers who receive trial modifications do not receive permanent modifications that would substantially reduce the amount they pay on their loans.[340] The Commission has determined that, in light of the changes in the Final Rule, including the advance fee ban and related disclosures, such a prohibition is unnecessary. As noted above, § 322.5 will ensure that consumers are told that they are being offered a trial modification and ensure that they have the opportunity to reject the offer.

Given that, under the advance fee ban provision, providers must deliver a written agreement from the servicer or lender to the consumer, and obtain the consumer's written acceptance of that agreement, the Final Rule requires that the disclosures in §§ 322.5(b)–(d) also be made in writing, each on a separate page from the agreement. These disclosures must also be made "at the time that the * * * provider furnishes the consumer with a written agreement to be executed" by the consumer. Sections 322.5(b)–(d) will ensure that consumers receive this critical information when they are in a position either to accept or reject the result secured by the provider.[341] These disclosures are necessary to effectuate the advance fee ban and, accordingly, are reasonably related to the prevention of deceptive or unfair practices.

b. Prohibition on Advance Fees for Piecemeal Services

As detailed above, NAAG and several other commenters strongly supported the proposed rule's prohibition on the practice of collecting advance fees for piecemeal services.[342] The Commission agrees that without such a prohibition, many MARS providers would attempt to collect fees for discrete tasks that fall short of, and often may never lead to, the result promised. These individual tasks might include: conducting an initial consultation with the consumer;

[338] In response to the proposed rule, which sets forth specific requirements as to the result that entities promoting loan modifications must deliver before collecting fees, some commenters recommended that the Final Rule add requirements that MARS providers obtain a "sustainable" or "affordable" loan modification for the consumer. *See, e.g.,* LOLLAF at 4, 6; LFSV at 3; CSBS at 4; NCLC at 18; LCCR at 4–5 ("We believe that MARS providers who negotiate mortgage loan modifications for homeowners in exchange for compensation must confer a real benefit in the form of a modified mortgage that is affordable and sustainable."). Some of these commenters noted that many consumers who have obtained loan modifications have subsequently re-defaulted, or are at risk of doing so, and therefore that the Commission should adopt specific benchmarks for determining if a loan modification will benefit the consumer (for example, by reducing their monthly payments by at least 20% for five years or by employing HAMP guidelines for interest rates).

Because the Final Rule requires that the consumer consent to the result delivered by the provider, it will help ensure that consumers only pay fees for loan modifications that they believe to be affordable and sustainable. Consumers' ability to make monthly payments vary depending on their circumstances and over time. The requirements of government programs like the MHA and servicer policies also may change. By making payment of fees contingent upon consumer acceptance, the Final Rule gives each consumer the ability to determine, based on her individual circumstances, the type of loan modification that would best assist her. Therefore, the Commission believes it is unnecessary to adopt an affordability requirement for loan modifications.

[339] *See* 16 CFR 310.4(a)(5)(i)(A) (prohibiting debt relief providers from collecting fees until, *inter alia,* the customer has executed the debt relief agreement).

[340] *See, e.g.,* NYC DCA at 4; NCLC at 17–18 (also arguing that consumers who enter trial modifications frequently suffer a number of negative consequences, including harm to their creditworthiness and, if they do not qualify for a permanent modification, significant arrearages that can result in foreclosure).

[341] This disclosure also complements § 322.3(b)(7), which prohibits providers from misrepresenting that they have the right to claim or charge a fee. Under § 322.3(b)(7), providers may not circumvent this written disclosure by misrepresenting expressly or by implication—orally or otherwise—that the consumer must pay providers' fees.

[342] *See, e.g.,* NAAG (ANPR) at 5 ("We are now seeing consultants offering these services piecemeal. For example, some companies represent they will help consumers gather their financial documents and prepare the information to submit to their mortgage servicer for a fee. Then, for another fee, the companies represent that they will facilitate communication between the consumers and their mortgage servicer."); *see also* CSBS at 4; LCCR at 8; MA AG at 2; NAAG at 3.

reviewing or auditing the consumer's mortgage loan documents; [343] gathering financial or other information from the borrower; sending an application or other request to the lender or servicer; facilitating communications between the borrower and the lender or servicer; or responding on behalf of the consumer to requests from the lender or servicer. The record demonstrates that many MARS providers currently charge discrete fees for these types of tasks, in some instances to evade state advance fee bans.[344]

Section 322.5 of the Final Rule, although modified, still prohibits MARS providers from collecting fees for piecemeal services. Section 322.5(a) requires the provider to secure the consumer's written agreement to accepting the mortgage relief it has obtained; thus, providers will be unable to charge a fee for intermediate services unless and until the consumer accepts the result the MARS provider obtains from the consumer's lender or servicer.

c. Documentation Requirement

Under § 322.5 of the Final Rule, MARS providers must provide consumers with documentary proof of the results they achieved before requesting or receiving payment. Section 322.5(a) of the Final Rule requires providers to give consumers a written offer—for the consumer to accept or reject—from the lender or servicer setting forth the mortgage relief they have obtained for the consumer, such as a forbearance agreement, short sale, or deed-in-lieu of foreclosure transaction; waiver of an acceleration clause; opportunity to cure default or reinstate a loan; or repayment plan. The documentation required is a comprehensive written instrument that memorializes a lender's or servicer's agreement to offer the concession.

4. Additional Provisions Not Adopted in the Final Rule

In the NPRM, the Commission requested comment on whether the Final Rule should: (1) Limit or cap providers' advance fees; (2) allow providers to use independent third-party escrow accounts to hold fees until they achieve results; and (3) include a right to cancel. Based on the record, the Commission declines to adopt any of these approaches.

a. *Fee Caps*

Some commenters recommended that the Commission allow advance fees, but set limits (or caps) on them.[345] Other commenters argued that the FTC should not adopt caps as a substitute for an advance fee ban.[346] Two of the latter group of commenters asserted that providers would abuse such a provision by simply signing up as many consumers as possible and collecting any fees permitted upfront without providing any benefits to consumers.[347] A third group of commenters, although supportive of an advance fee ban, argued that the Commission should also limit MARS providers to charging back-end fees that are "reasonable" or "not excessive." [348]

As in the recent adoption of debt relief amendments to the TSR, and for the same reasons,[349] the Commission declines to set caps on the fees MARS providers can receive. While the FTC concludes that the collection of advance fees by MARS providers is an unfair act or practice, it has made no such determination about the *amount* of fees charged.[350] In general, the competitive market should establish the prices MARS providers charge,[351] and the Commission's role is to remove obstacles to consumers making the informed choices that are necessary to a properly functioning market.

b. Use of Dedicated Accounts

In the NPRM, the Commission requested comment on whether, in the event the Rule bans advance fees, MARS providers should be allowed to request or require that consumers place any such fees in a dedicated bank account.[352] The Final Rule does not permit MARS providers, other than attorneys, to request or require consumers to pay fees into any type of account prior to completing their services.[353] The overwhelming weight of comments opposed allowing the use of such accounts,[354] because, among other things, some unscrupulous MARS providers might misuse funds held in dedicated accounts,[355] and permitting dedicated accounts would place undue burdens on consumers to recover money they paid into the accounts if providers do not deliver the results consumers finds acceptable.[356] There is nothing in

[343] *See supra* note 56 and accompanying text.

[344] *See supra* note 342.

[345] Baughman at 1; Hunter at 1; Casey at 1. Some state statutes include fee caps for MARS providers. For example, Maine limits providers to a $75 up-front fee. *See* Me. Rev. Stat. Ann. tit. 32, § 6174–A.

[346] *See, e.g.,* MBA at 3; CSBS at 4; MA AG at 1; CUUS at 6; CRL at 2.

[347] LOLLAF at 5 ("Allowing any fees to be collected prior to providing a permanent loan modification presents MARS providers with a back door opportunity to extract significant sums of money without any benefit provided to the consumer."); CUUS at 6 ("It may seem innocent enough to allow a small initial fee of $25.00 or $50.00. At first glance, this fee may not seem particularly burdensome to consumers. However, this may incentivize certain for-profit MARS providers to simply sign up as many people as possible only for the initial fee, and nothing else. The small fees could potentially add up to sizeable profits for MARS companies, depending on the aggressive nature of the MARS provider's marketing campaign.").

[348] LFSV at 2–3; LOLLAF at 5; NCLC (ANPR) at 13; *see also* MA AG at 2 (recommending that the Commission consider a "sliding scale" fee cap as a complement to the advance fee ban); LCCR at 7–8 (same).

[349] *See TSR; Final Rule,* 75 FR at 48488 (finding that fee setting is best done by a competitive market, that the Commission's role is to remove obstacles to consumers making informed choices in the market, and that the amended TSR is designed to ensure that the debt relief market functions properly).

[350] The purpose of the FTC's unfairness doctrine is not to allow the Commission to obtain better bargains for consumers than they can obtain in the marketplace. *See, e.g., Am. Fin. Servs. Ass'n* v. *FTC,* 767 F.2d 957, 964 (DC Cir. 1985). Instead, it is to prohibit acts and practices that may unreasonably create or take advantage of an obstacle to consumers' ability to make informed choices. *See id.* at 976.

[351] A federally established maximum advance fee might well become the de facto *actual* fee for MARS. F.M. *Scherer, Focal Point Pricing and Conscious Parallelism, in* Competition Pol'y, Domestic & Int'l 89–97 (2000); F. M. Scherer, Industrial Market Structure and Economic Performance 190–93, 204 (1st ed. 1980). Further, fee caps can quickly become obsolete, as changes in market conditions and technologies render the fixed maximum fee too low (*e.g.,* if the costs of providing the service rise) or too high (*e.g.,* if new technology lowers the cost of providing the service or if market participants would compete on price absent regulation). *United States.* v. *Trenton Potteries Co.,* 273 U.S. 392, 397 (1927) ("The reasonable price fixed today may through economic and business changes become the unreasonable price of tomorrow.").

[352] *See* 75 FR at 10721, 10729–30.

[353] As discussed in § III.G., the Final Rule exempts attorneys from the advance fee ban if they meet certain conditions, including depositing such fees into their client trust accounts.

[354] *See, e.g.,* CUUS at 7; CSBS at 4. Only a single commenter recommended that the Rule allow providers (other than attorneys) to use such accounts, and that commenter provided no analysis of the costs and benefits of his proposal. *See* Goldberg at 4 ("Even escrowing funds through dedicated trust accounts is a better alternative and less of a financial burden on the consumer."). An additional comment noted that MARS providers may use dedicated accounts under Nevada's relevant statute. *See* Hirsch at 1; *see also* Nev. Rev. Stat. § 645F.300, et seq.

[355] OPLC at 1; NYC DCA at 5 ("Given the high cost and potential for improper access to funds by MARS providers, the FTC should apply the prohibition on collection of fees in advance of permanent loan modifications to payments held in escrow accounts."); NAAG at 2 ("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.").

[356] LFSV at 3; NCLC at 15; LOLLAF at 5 ("[E]scrowing funds and not allowing MARS providers to access them without providing a benefit, does not provide a significant safeguard to protect consumers from abusive MARS providers. Consumers who seek to recover fees may have to bring a lawsuit to either recover them from escrow or to claw back the fees paid to a MARS provider.").

the record indicating that non-attorney MARS providers currently use dedicated accounts with any frequency to deposit advance fees or that an infrastructure to support such accounts exists. Without more information as to how MARS providers would use dedicated accounts and whether consumers would be adequately protected, and in light of widespread deceptive and unfair acts and practices by MARS providers, the Commission declines to permit providers to request or require that consumers place advance fees for MARS in such accounts.[357]

c. Right To Cancel

The proposed rule did not include a right to cancel. However, the NPRM solicited comments on whether the Final Rule should give consumers the right to cancel their contracts with MARS providers without obligation for a certain period of time often referred to as a "cooling off period."

Several commenters recommended including a right to cancel in the Final Rule as a complement to the advance fee ban.[358] Many of these commenters observed that consumers considering whether to purchase MARS often are facing an immediate crisis and may not take the time they need to make well-informed decisions.[359] They further noted that MARS providers often engage in aggressive sales tactics that may overcome any hesitancy on the part of consumers.[360] According to these commenters, a right to cancel would provide consumers with an opportunity to discuss purchasing MARS with trusted confidants,[361] reconsider their decision free of aggressive sales tactics,[362] and assess whether the service is beneficial for them.

The Commission declines to include a right to cancel provision in the Final Rule. Under § 322.5 of the Final Rule, even if a consumer enters into an agreement to use a MARS provider in circumstances undermining his or her ability to make a well-informed decision, the consumer has no obligation to pay any money to the MARS provider until he or she accepts an offered result. The consumer is free to reject offers that he or she believes are unsatisfactory. If the consumer never accepts an offer, he or she is never obligated to pay the provider. Thus, a right to cancel would provide little additional benefit to consumers.[363]

F. Section 322.6: Substantial Assistance or Support

The proposed rule prohibited any person within the FTC's jurisdiction under the FTC Act [364] from providing "substantial assistance or support" to any MARS provider if the person "knows or consciously avoids knowing that the provider is engaged in any act or practice that violates this rule." The Final Rule adopts the proposed provision with a single, minor modification.

Public comments generally supported a prohibition on providing substantial assistance or support to another who is violating the Rule.[365] Several commenters asserted that such a measure would prevent MARS providers from using "lead generators" or mortgage brokers to supply contact information for potential customers,[366] thus making it more difficult for deceptive MARS providers to operate. For example, a consumer group explained that such a provision would be valuable because entities that assist and facilitate fraudulent MARS providers often receive a substantial portion of the funds obtained from consumers for mortgage assistance relief services.[367] As discussed below, a number of commenters supported a substantial assistance or support provision, but recommended including a different knowledge standard in a final rule than in the proposed rule.[368]

1. Substantial Assistance

Many MARS providers rely on, or work in conjunction with, other entities to advertise their services and operate their businesses. The Final Rule provision applies to substantial—i.e., more than casual or incidental—assistance or support that such entities provide to MARS providers.[369] Substantial assistance could include such critical support functions as lead generation, telemarketing and other marketing support,[370] payment processing,[371] back-end handling of consumer files,[372] and customer referrals.

A common example of those who provide substantial assistance to MARS providers are so-called "lead generators." Lead generators obtain the contact information of consumers, i.e. leads, who have indicated interest in MARS by visiting the lead generator's

[357] The amended TSR allows debt relief providers to establish dedicated accounts for consumer payments pending completion of the services, subject to several conditions to ensure that consumers are protected. 16 CFR 310.4(a)(5)(ii). There are fundamental differences between debt settlement services and MARS, however, that make this distinction an appropriate one. Consumers typically pay for debt settlement services by making monthly payments, which include a portion of the provider's fees as well as savings towards settlements. It is only after consumers save enough money to fund a likely settlement—a process that can take many months or years—that the provider begins negotiating with the creditor to reduce the debt. MARS services, on the other hand, generally do not include this "forced savings" function; rather, consumers simply pay the provider's fees in a single or small number of payments. Any relief, such as a loan modification, that the MARS provider obtains typically would not involve a lump sum payment for which the consumer would have to save. Moreover, the record in the TSR proceeding showed that it is the usual practice in the debt settlement industry to use dedicated accounts and that a structure is already in place to administer these accounts, consisting of established, independent firms that manage accounts that the consumers own and control. *TSR; Final Rule,* 75 FR at 48490–91 & n.451. One such firm manages approximately 250,000 accounts for consumers enrolled with various debt settlement companies. Global Client Solutions, (Oct. 9, 2009) at 2, available at *http://www.ftc.gov/os/comments/tsrdebtrelief/543670-00138.pdf.* No such infrastructure exists in the MARS industry.

[358] *See* LOLLAF at 6; NCLC at 13; CUUS at 7; LFSV at 1–2.

[359] *See, e.g.,* CSBS at 4; CUUS at 7; LFSV at 2; NYC DCA at 10; NCLC at 14; LOLLAF at 6.

[360] *Id.*

[361] *See* NCLC at 14; LFSV at 2.

[362] *See* LOLLAF at 6; NCLC at 14.

[363] The Commission also declined to include a right to cancel in the debt relief amendments to the TSR. *See TSR; Final Rule,* 75 FR at 48488.

[364] The Final Rule explicitly exempts from the definition of "person" any individuals or entities outside the FTC's jurisdiction. *See* § 322.2(k).

[365] *See* CSBS at 4 ("The state regulators support the Commission's proposal to prohibit any person from providing substantial assistance or support to a MARS provider if that person knows or consciously avoids knowing that the provider is violating any provision of the proposed rule."); *see also* CUUS at 8 (supporting prohibition but suggesting alternate standard); NYC DCA at 9 (same); NAR at 2 (same).

[366] *See, e.g.,* CUUS at 8; NY DCA at 9.

[367] CUUS at 8.

[368] *See* CUUS at 8; NYC DCA at 9.

[369] *See TSR Statement of Basis and Purpose,* 60 FR 43842, 43852 (1995) ("The Commission further believes that the ordinary understanding of the qualifying word 'substantial' encompasses the notion that the requisite assistance must consist of more than mere casual or incidental dealing with a seller or telemarketer that is unrelated to a violation of the Rule.").

[370] *See, e.g., FTC* v. *Kirkland Young, LLC,* No. 09–23507, Mem. Supp. TRO at 9 (S.D. Fla. filed Nov. 24, 2009) (alleging that Defendant employed another entity to make some of its telemarketing calls to consumers).

[371] Frequently, MARS providers rely on the services of payment processors to handle credit card payments. *See, e.g., FTC* v. *Loss Mitigation Servs., Inc.,* No. SACV09–800 DOC (ANx) (C.D. Cal. filed July 13, 2009); *FTC* v. *LucasLawCenter "Inc.",* No. SACV09–770 DOC(ANx) (C.D. Cal. filed July 7, 2010) (third-party papers filed by payment processor); Pls. Opp. Mot. Decl. Relief (C.D. Cal. filed Nov. 20, 2009). In other industries, the FTC has sued payment processors that billed consumers for products or services despite indications that those products or services were illusory on an assistance and facilitating theory. *See, e.g., FTC* v. *InterBill, Ltd.,* No. 06–cv–01644–JCM–PAL (D. Nev. Dec. 26, 2006); *FTC* v. *Your Money Access, LLC,* No. 07–5174 (E.D. Pa. filed Dec. 6, 2007).

[372] *See, e.g., FTC* v. *Fed. Loan Modification Law Ctr., LLP,* No. SACV09–401 CJC (MLGx), Reply to Resp. Order To Show Cause at 9 (C.D. Cal. filed April 22, 2009) (alleging that defendants contracted with another entity to process backlog of consumer files and negotiate with lenders on behalf of those consumers).

website in response to advertisements disseminated either by the lead generators themselves,[373] or through a network of Internet advertisers.[374] Lead generators then sell the consumer information to MARS providers.[375] In some instances, lead generators route consumers who run Internet searches for government foreclosure assistance programs directly to MARS providers' websites.[376]

2. The Knowledge Standard

Under the proposed rule, those who provided substantial assistance to MARS providers would be liable if they knew or consciously avoided knowing that the providers were violating the rule. Some commenters suggested modifications to this knowledge standard. Specifically, two commenters advocated changing the "knows or consciously avoids knowing" standard to a "knew or should have known" standard, claiming that the former standard would allow those who provide substantial assistance to escape liability by failing to monitor the conduct of the MARS providers they are assisting.[377] Conversely, another commenter argued that the "knows or consciously avoids knowing" standard in the proposed rule was too strong, expressing concern that those who provide substantial assistance would be presumed to know of the rule violations of the MARS providers they are assisting.[378]

The Commission retains the "knows or consciously avoids knowing" standard in the Final Rule. As the Commission stated in including the same standard in the assisting and facilitating provision of the TSR:

> [t]he 'conscious avoidance' standard is intended to capture the situation where actual knowledge cannot be proven, but there are facts and evidence that support an inference of deliberate ignorance on the part of a person that [the wrongdoer] is engaged in an act or practice that violates [the Rule]."[379]

The standard thus neither permits third parties providing substantial assistance and support to turn a "blind eye" to the Rule violations of MARS providers, nor presumes that such third parties have the requisite knowledge simply because they provided the assistance or support. If those who provide substantial assistance or support to MARS providers receive or become aware of information that reasonably calls into question the legality of the MARS provider's practices, they will be liable if they continue to assist and support that provider.[380] In general, the determination of whether a person had the requisite knowledge will depend on a variety of factors such as the person's relationship to the MARS provider, the nature and extent of the person's degree of involvement in the operations of the MARS provider, and the nature of the provider's violations.

3. Legal Basis

a. Preventing Deception

The Commission concludes that § 322.6 is reasonably related to preventing deceptive conduct by MARS providers. As noted above, MARS providers frequently rely upon the assistance and support of other persons for essential tasks such as identifying potential customers, marketing, back-room operations, and payment processing. This support makes it possible for MARS providers engaged in deception to efficiently operate on a wide scale. Prohibiting such persons from providing substantial and knowing assistance or support to MARS providers is likely to make it more difficult for providers to engage in deceptive conduct.

b. Unfairness

Applying the three-prong test under Section 5(n) of the FTC Act, the Commission concludes that it is an unfair practice to knowingly, or with conscious avoidance of knowledge, provide substantial assistance to a MARS provider engaged in violations of the Rule.[381] First, this practice causes or is likely to cause substantial consumer injury by enhancing and expanding the provider's ability to engage in the harmful conduct. For example, using lead generators often allows MARS providers to promote their services more widely and effectively, leading to substantial injury to consumers if those providers engage in violations of the Rule.[382] Second, no commenters submitted information suggesting that there were any benefits to consumers or competition from knowingly giving substantial assistance to MARS providers who are violating the Rule,[383]

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[373] Lead generators themselves often may also qualify as "mortgage assistance relief service providers" and thus be liable for primary violations of the Rule, because many of these entities "arrang[e] for others to provide" MARS. *See* § 322.2(j). For example, if a lead generator disseminates advertisements containing misrepresentations to entice consumers to provide their contact information, and then passes that information on to another entity that will provide MARS, the lead generator would likely be in violation of § 322.3 of the Final Rule. The Commission also has brought actions under Section 5 of the FTC Act against lead generators for the deceptive claims they disseminated. *See e.g. FTC* v. *Dominant Leads, LLC,* No. 1:10–cv–0997 (D.D.C. filed Jun. 15, 2010); *see also United States* v. *Ryan,* No. 09–00173–CJC (C.D. Cal. filed July 14, 2009) (criminal complaint against lead generator named as defendant in FTC action); *FTC* v. *Ryan,* No. 1:09–00535 (HHK) (D.D.C. filed Mar. 25, 2009); *FTC* v. *Cantkier,* No. 1:09–cv–00894 (D.D.C. Am. Complaint filed July 10, 2009).

[374] Additionally, advertising affiliate network companies may serve as intermediaries between advertisers and lead generator Web sites. Such companies also could be held liable if they knowingly provide substantial assistance to MARS providers who violate the Rule.

[375] *See, e.g., FTC* v. *Kirkland Young, LLC,* No. 09–23507, Mem. Supp. TRO at 9 (S.D. Fla. filed Nov. 24, 2009) (alleging that defendant employed lead generators to leave messages with consumers via outbound telemarketing calls); *FTC* v. *Truman Foreclosure Assistance, LLC,* No. 09–23543 (S.D. Fla. filed Nov. 23, 2009); *FTC* v. *Hope Now Modifications, LLC,* No. 1:09–cv–01204–JBS–JS (D.N.J. filed Mar. 17, 2009).

[376] *See, e.g., FTC* v. *One or More Unknown Parties Misrepresenting their Affiliation with the Making Home Affordable Program,* No. 09–894 (D.D.C. filed May 14, 2009).

[377] *See* CUUS (Mar. 26, 2010) at 8 ("Failure to verify a company's integrity in the face of clear and reasonable evidence to the contrary should expose an entity or individual to liability."); NYC DCA (Mar. 29, 2010) at 9.

[378] *See* NAR at 2 (provision would implicate real estate professionals who help consumers conduct short sales, when the consumers are referred to them by MARS providers).

[379] *TSR Statement of Basis and Purpose,* 60 FR 43842, 43852 (Aug. 23, 1995).

[380] *United States.* v. *Dish Network, L.L.C.,* 667 F. Supp. 2d 952, 961 (C.D. Ill. 2009) (finding United States properly pled knowledge or conscious avoidance of knowledge when it alleged that defendant received complaints that its dealers were violating the TSR but continued paying the dealers to telemarket); *FTC* v. *Global Mkting Group, Inc.,* 594 F. Supp. 2d 1281, 1288 (M.D. Fla. 2008) (finding that defendant at a minimum consciously avoided knowing of TSR violations where it processed consumer payments to telemarketers; reviewed, edited, and approved telemarketers' sales scripts; and handled complaints and law enforcement inquiries).

[381] Federal courts have held that providing knowing substantial assistance to others who engaged in unlawful conduct is an unfair practice. *See, e.g., FTC* v. *Neovi, Inc.,* 598 F. Supp. 2d 1104 (S.D. Cal. 2008), *aff'd,* 604 F.3d 1150 (9th Cir. 2010) (holding that defendants engaged in unfair acts by creating checks they knew were often requested by unauthorized parties); *FTC* v. *Accusearch, Inc.,* No. 06–CV–105–D, 2007 WL 4356786 (D. Wyo. Sept. 28, 2007) (holding that defendants engaged in unfair practices by selling phone records obtained by other parties through deception); *FTC* v. *Windward Mktg.,* No. Civ.A. 1:96–CV–615F, 1997 WL 33642380 (N.D. Ga. Sept. 30, 1997) (holding that defendants engaged in unfair acts by depositing unauthorized bank drafts obtained by a deceptive telemarketing operation).

[382] Lead generators may possess the contact information of thousands of consumers that otherwise might be unavailable to a small MARS provider. The MARS provider can use that information to target more consumers with deceptive advertisements, contact consumers less expensively, or both, than it could in the absence of such information. *See, e.g.,* CUUS at 8, NY DCA at 9.

[383] To the extent the substantial assistance and facilitation provision makes it more difficult or expensive for MARS providers to hire third-party service providers, the Commission concludes that any such costs are outweighed by the benefits of more effectively preventing deceptive or unfair conduct by MARS providers.

and the Commission is not aware of any such benefits. To the extent any such benefits exist, they clearly are outweighed by the substantial injury this conduct causes consumers. Finally, the consumer injury caused by Rule violations that are substantially facilitated by third parties is not reasonably avoidable by consumers, who have no way of knowing that the MARS providers with whom they contract are engaged in violations of the Rule.

G. Section 322.7: Exemptions

The proposed rule exempted attorneys licensed to practice law in the state where the consumer resides from: (1) The prohibition on instructing consumers not to contact or communicate with their lenders; and (2) the advance fee ban, but only if the attorney was providing legal counsel in connection with preparing or filing legal documents in a bankruptcy or other legal proceeding. As the Commission explained in the NPRM, this proposed exemption was intended to allow attorneys who provide MARS as part of the practice of law to perform without undue burden useful legal services for consumers, while still covering attorneys who might harm consumers in offering or providing MARS.[384]

The Commission received numerous comments on this proposed exemption from attorneys and attorney organizations, consumer groups, and others. Indeed, the proposed rule's treatment of attorneys was the issue most addressed in the comments. Several commenters, including NAAG, an association of mortgage bankers, consumer groups, and others supported a limited exemption like that in the proposed rule.[385] Other commenters, including several consumer groups, a public interest law firm, and a consortium of state banking regulators, supported a broader exemption (especially with regard to the prohibition on advance fees),[386] or a complete exemption for attorneys.[387]

Based on the record, the Commission has determined to include a broader exemption for attorneys in the Final Rule. Generally speaking, attorneys who provide MARS are exempt from the Rule if they: (1) Provide MARS as part of the practice of law; (2) are licensed to practice law in the state where their clients or their clients' dwellings are located; and (3) comply with all state laws and licensing regulations covering the same subjects as the Final Rule. Attorneys who meet these standards are exempt from all of the provisions of the Final Rule except its advance fee ban. Such attorneys will be exempt from the advance fee ban in § 322.5, but only if they deposit advance fees received from their clients into a "client trust account" (as defined in a new provision, § 322.2(b)) and comply with all state laws and licensing regulations governing these accounts.[388]

1. Comments in Support of a Limited Exemption

In support of a limited attorney exemption, several commenters cited significant (and increasing) attorney involvement in MARS, both in affiliation with non-attorney providers or as providers themselves.[389] According to these commenters, attorneys frequently have engaged in the same deceptive or unfair conduct as that of other MARS providers.[390] For example, the Illinois Attorney General asserted that, since approximately December 2009, attorneys played some role (including participating in or assisting others in the conduct at issue) in 40% of the MARS companies reviewed by that agency in response to complaints.[391]

In addition, NAAG asserted that attorneys, and MARS providers who affiliate with them, have been successful in circumventing state MARS laws by invoking attorney exemptions in these laws.[392] NAAG's comment also discussed the propensity of attorneys to act as fronts for MARS companies and the recent trend of national MARS providers to retain "local counsel" to attempt to take advantage of attorney exemptions in state MARS laws.[393] Other commenters, echoing the concerns of state law enforcers, contended that unscrupulous MARS providers would evade the Rule if its

[384] *MARS NPRM,* 75 FR at 10724–25.

[385] NAAG at 3–4; MBA at 4 (The definition in the rule should retain the integrity of the licensed attorney within state laws and rules regulating the practice of law to remain effective and those outside that standard should be prosecuted."); NYC DCA at 4 (recommending that the Commission prohibit collection of advance fees by attorneys "not directly involved with legal services in connection with either the preparation and filing of a bankruptcy petition or court proceedings to avoid a foreclosure"); IL AG (ANPR) at 2; MA AG (ANPR) at 9 (recommending that the Commission adopt a provision similar to Massachusetts state law). One commenter argued that attorneys should not be exempted from the advance fee ban restrictions, even when performing legal services in connection with a bankruptcy petition or some other legal proceeding. CUUS at 8–9.

[386] NCLC at 7 ("[L]egitimate attorneys play a critical role in providing bona fide and valuable assistance to consumers seeking loan modifications and other forms of mortgage-related assistance."); LSFV at 4 ("Those seeking advice, who are likely in or facing mortgage default, may need specific advice regarding the contractual and tax implications of a loan modification, which HUD-approved counselors may not be qualified to provide."); Lawyers' Committee at 9 ("[I]n many situations short of legal action, there is a legitimate need for attorneys to provide legal advice or transactional services to their clients."); CSBS at 4 ("[W]e believe that limiting the exemption to preparing and filing for bankruptcy petitions or other documents in a bankruptcy or other court or administrative proceeding, is unduly narrow and might interfere with the ability of attorneys to offer legitimate counsel and advice to their clients.").

[387] ABA at 1 ("[T]he ABA urges the FTC to modify the rule to expand its existing attorney exemption to exclude lawyers engaged in the practice of law from the entire proposed rule, not just certain narrow provisions of the rule."); Rogers at 15 ("Prohibit loan modification companies from taking up-front fees unless they are licensed attorneys regularly conducting business out of publicly accessible office space in the state in which they provide loan modification services."); IL RELA at 1.

[388] As discussed in Section I.A, the Dodd-Frank Act will transfer rulemaking authority with respect to this Rule to a new Bureau of Consumer Financial Protection, effective as of the transfer date, Dodd-Frank Act, Public Law 111–203, 124 Stat. 1376, which is currently designated as July 21, 2011. *BCFP; Designated Transfer Date,* 75 FR 57252. The new Bureau will not have authority with respect to activities engaged in as part of the practice of law, but will retain authority over attorneys to the extent they offer consumer financial products or services outside the scope of an attorney-client relationship and to the extent they are subject to certain enumerated consumer laws or authorities transferred to the agency, including the Final Rule in this proceeding. Dodd-Frank Act § 1027(e)(3). The Commission will continue to have authority to enforce the Rule, including against attorneys.

[389] *See, e.g.,* Lawyers' Committee at 9 (attorneys team up with MARS providers, or act independently to scam consumers); NAAG at 3 (attorneys' participation ranged from working as employees of MARS companies to operating their own companies); MBA at 4 ("[W]e are aware of attorneys who have 'rented' their licenses to mortgage assistance relief providers."); *see also* IL AG (ANPR) (reporting that "33 percent of the [MARS] companies we have dealt with are owned by attorneys, while 38 percent have some link to the legal profession").

[390] *See, e.g.,* CSBS at 4 ("[A]n increasing number of attorneys have engaged in deception and unfairness in connection with mortgage assistance relief services."); NAAG at 3 (by way of example reporting that attorneys participated in half of the mortgage foreclosure rescue companies for which the Illinois Attorney General received complaints on March 18 and 19, 2010); CUUS at 8 (commenter has "received many complaints about attorneys' involvement in fraudulent MARS schemes"); Lawyers' Committee at 9 ("The intersection between legal services and mortgage assistance relief services is well documented in the increasing number of reports of attorneys teaming up with MARS providers to scam consumers."); NCLC at 4 (acknowledging that "attorneys have been among those perpetrating abusive MARS activities"); *see also* NAAG (ANPR) at 13 ("[W]e have received many complaints regarding attorneys who are offering loan modification business. These attorneys generally provide no legal services for consumers and present the same problems as mortgage consultants in general.").

[391] IL AG at 2.

[392] NAAG at 3 ("The exemption for attorneys has been particularly abused."); MN AG (ANPR) at 5 ("This Office is aware of several loan modification and foreclosure rescue companies that have affiliated with licensed attorneys in other states in an effort to circumvent state law.").

[393] NAAG at 3.

attorney exemption were not sufficiently limited.[394]

2. Comments in Support of a Broader Exemption

Despite their recognition that some attorneys have engaged in unfair or deceptive practices in connection with MARS, several commenters argued that broadening the attorney exemption was necessary to preserve consumers' access to valuable legal services.[395] These commenters contended that many consumers who are having difficulty paying their mortgages may benefit from legal services, but that such assistance may be considered MARS and thus subject to the Rule.[396] The commenters claimed the proposed rule would cover legal services such as advising consumers on bankruptcy laws, unwinding sale-leaseback transactions,[397] resolving violations of fair lending laws, disputing charges that servicers had assessed improperly, and counseling on the tax implications of short sales.[398] The commenters asserted that a significant portion of the MARS work attorneys perform does not involve litigation and thus would not be eligible for the proposed rule's exemption from the advance fee ban.[399] Absent a broader exemption from the advance fee ban, according to these commenters, many attorneys would stop performing legal services for consumers seeking to avoid foreclosure.[400]

The comments favoring a broader attorney exemption suggested a number of changes to the proposed rule. A few commenters asserted that the exemption from the advance fee ban should apply to all legal services, not just legal services related to litigation[401] or those provided by attorneys in the same state where the consumer resides.[402] Several commenters recommended that, in lieu of an advance fee ban, attorneys be permitted to place fees in a client trust account and draw on them as legal work is completed.[403] State banking regulators asked the Commission to consider creating an exemption based on state law attorney exemptions, noting that the Michigan Credit Services Act exempts attorneys who do not provide covered credit services on a regular and continuing basis.[404]

Many commenters, nearly all of whom are attorneys who provide MARS[405] or organizations that represent them,[406] including the American Bar Association (ABA)[407] and some state bars,[408] recommended that the Commission completely exempt attorneys engaged in the practice of law.[409] In particular, the ABA proposed that the Commission exempt any "licensed attorney engaged in the practice of law and those individuals acting under the direction of the attorney."[410]

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[394] NCLC at 2–3; Lawyers' Committee at 9; LSFV at 4.

[395] NCLC at 7 ("[L]egitimate attorneys play a critical role in providing bona fide and valuable assistance to consumers seeking loan modifications and other forms of mortgage-related assistance."); LSFV at 4 ("Those seeking advice, who are likely in or facing mortgage default, may need specific advice regarding the contractual and tax implications of a loan modification, which HUD-approved counselors may not be qualified to provide."); Lawyers' Committee at 9 ("[I]n many situations short of legal action, there is a legitimate need for attorneys to provide legal advice or transactional services to their clients.").

[396] *See supra note* 395. Attorney commenters also asserted that they provide useful legal services to consumers facing the possible loss of their homes. *See, e.g.,* ABA at 1 ("[T]he rule would make it difficult or impossible for many consumer debtors to obtain the legal services that they desperately need to help negotiate changes to their residential mortgages with their lenders and keep their homes"); Mobley at 1 ("It is essential to have competent legal representation when negotiating a loan modification. While the government and servicers continually advise homeowners that loan modifications can be done without a third party's help and that free help is available, statistics show that this advice has done nothing to help homeowners."); Carr at 2 ("[M]any lawyers also offer their client a defense against foreclosure, mitigation or diversionary representation (where available) and ultimately (if necessary) a bankruptcy petition filing to protect their homes if the negotiation attempt should fail. Further, lawyers are uniquely qualified to assist the homeowner to understand the legal implications of and determine which of the bewildering panoply of alternatives facing them will be the most effective in their unique circumstances."); E. Davidson at 1 ("Involvement of an attorneys at the earliest possible time, is an important vehicle for borrowers in either litigating or settling with the servicer or holder of the loan."); Legalprise at 1 (adversarial system works best if both lender and consumer have legal counsel); Greenfield at 3 (distressed homeowners have a "significant need for legal services"); Dargon at 3 ("But don't strangle legitimate attorneys in your efforts to regulate hucksters and scam artists. Putting us out of business would harm our clients greatly, and will only make the foreclosure crisis worse and punish the very people who most need the services."); Giles at 1–2 (discussing representation of clients in foreclosure mediation with lenders).

[397] *See supra* note 43.

[398] *See supra* notes 396–97; *see also* NCLC (ANPR) at 14 (noting that "an attorney's more beneficial and traditional role of analyzing a client's paperwork and advising the client of potential claims and options may also fit within the definition of mortgage assistance relief").

[399] In its survey of NACA and NABCA members, *see supra* note 44, NCLC reported that 38% of the 298 attorneys who responded claimed that they perform MARS "not in connection with a court or administrative proceeding or bankruptcy petition." NCLC at 6.

[400] LFSV at 4 ("Licensed attorneys and public accountants in our community are prepared and capable of providing this important and potentially useful advice, but may choose to avoid contracting with consumers to address these questions for fear that they may run afoul of the Commission's proposed Rule."); NCLC at 6 ("Attorneys are likely to cease representing homeowners because of the risk that clients with unreasonable expectations would not pay."); *see also* CSBS at 4.

[401] *See, e.g.,* CSBS at 4 ("[W]e believe that limiting the exemption to preparing and filing for bankruptcy petitions or other documents in a bankruptcy or other court or administrative proceeding, is unduly narrow and might interfere with the ability of attorneys to offer legitimate counsel and advice to their clients.").

[402] *See, e.g.,* NCLC at 8 ("The [proposed rule] overlooks circumstances in which a homeowner would need to retain an attorney in another state. This is most likely to occur with second homes and rental properties. When a mortgage holder or servicer initiates a foreclosure action, the foreclosure process will take place where the dwelling is located and the homeowner will need an attorney licensed in that jurisdiction, even if it is not where the homeowner resides.").

[403] *See, e.g.,* NCLC at 15; *see also* Mobley at 2; Rogers at 20–21; Carr at 10; Bronson at 9. A coalition of consumer groups cautioned that attorneys should be allowed to collect fees in client trust accounts only if they offer MARS as part of the authorized practice of law and do not split fees with non-attorneys. NCLC at 15.

[404] CSBS at 5; *see also* NCLC at 13 (suggesting that the Commission should consider allowing the states to adopt alternative methods of regulating attorney conduct). *But see* NAAG at 3 ("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.").

[405] *See, e.g.,* Deal; Greenfield; Rogers; Carr, Davidson, Dix, Holler, Shaw, Peters, Dargon; Giles.

[406] *See, e.g.,* IL RELA.

[407] ABA at 11.

[408] IL St. Bar Assoc.; ME St. Bar Assoc., MO Bar, WI St. Bar, MI St. Bar., GA St. Bar, OR St. Bar.

[409] *See, e.g.,* ABA at 1 ("[T]he ABA urges the FTC to modify the rule to expand its existing attorney exemption to exclude lawyers engaged in the practice of law from the entire proposed rule, not just certain narrow provisions of the rule."); Rogers at 15 ("Prohibit loan modification companies from taking up-front fees unless they are licensed attorneys regularly conducting business out of publicly accessible office space in the state in which they provide loan modification services."); IL RELA at 1.

[410] ABA at 11. The issue of the jurisdiction in which an attorney must be licensed to qualify for the exemption is discussed *infra* § III.G.3.c.(2).

The ABA also urged the Commission to reconcile the exemption in the Final Rule with the attorney exemption in HUD's proposed rule under the SAFE Act. *See supra* notes 99–103 and accompanying text. As discussed in Section II.C., HUD's proposed rule imposes standards for the licensing and registration of loan originators, which HUD intends to encompass third-party loan modification specialists. The HUD proposed rule would exempt licensed attorneys who provide covered services "as an ancillary matter to the attorney's representation of the client," unless the attorney is compensated by a mortgage loan originator. Safe Mortgage Licensing Act, 24 CFR 3400.103(e)(6). The Commission declines to adopt the exemption proposed by HUD. As a matter of law, the Commission in this proceeding would not be bound by a decision on the part of HUD to adopt a certain exemption for licensed attorneys based on a rulemaking record in a different proceeding to implement a different statute. In any event, reconciliation of two rules is premature given that the HUD Rule is only at the proposal stage. As discussed below, the FTC has concluded that the record in this proceeding warrants a different treatment of attorneys than the exemption in the proposed HUD Rule.

a. General Objections to Covering Attorneys

Comments advocating for a broader or complete attorney exemption made the following main points: (1) It is unnecessary to cover attorneys because strict state laws and licensing regulations governing attorney behavior already provide adequate protection for consumers; [411] (2) the proposed rule's requirements conflict with the manner in which attorneys traditionally have offered and charged for their legal services; [412] and (3) the proposed rule would cause attorneys to stop providing legal services to financially distressed consumers.[413]

Attorney commenters contended that federal regulation of attorneys who provide MARS is unnecessary, because existing state laws and licensing regulations impose extensive restrictions and duties on attorneys.[414] For example, according to commenters, these laws and regulations obligate attorneys to work diligently and competently on behalf of their clients and to charge only reasonable fees.[415] Several commenters also argued that state laws and regulations offer unique protections when attorneys collect fees and expenses in advance of providing services.[416] According to the ABA, nearly every state court system has adopted laws and regulations requiring attorneys to deposit advance payments of fees and expenses into a client trust account that must comply with certain requirements.[417] Violations of state laws and regulations governing attorney conduct can result in sanctions and other disciplinary action, including disbarment.[418] Accordingly, these commenters urged the Commission to exempt attorneys entirely from the Final Rule and defer entirely to state enforcement against attorneys who violate applicable state laws or licensing regulations.[419]

b. Objections to Specific Provisions Covering Attorneys

In addition to their general objections to the proposed rule applying to attorneys, the commenters objected to applying some of its provisions to attorneys. These comments, submitted by attorneys and organizations representing them, contended that a number of the proposed rule's provisions were inconsistent with the practice of law and the state laws and regulations that govern it.[420] In some instances, according to these commenters, the requirements would undermine attorneys' ethical obligations to their clients. In other instances, the requirements would be cumbersome or excessive in light of comprehensive state laws governing how attorneys promote and charge for their services. In particular, they raised concerns about subjecting attorneys to the advance fee ban, the prohibition on instructing consumers not to communicate with their lenders or servicers, the required disclosures, and recordkeeping and compliance requirements.

First, several commenters urged the FTC to exempt attorneys entirely from the advance fee ban. According to the ABA, the advance fee ban in the proposed rule, which conditioned the receipt of payment on achieving the promised result, conflicted with well-established state laws and regulations permitting attorneys and clients to agree to a variety of fee arrangements, including flat fees, contingency fees, or hourly fees.[421] According to the ABA, the advance fee ban effectively would restrict attorneys to charging contingency fees for MARS.[422]

Attorney commenters contended that an advance fee ban would render them unable to pay their operating costs [423] and expose them to a high risk of non-payment,[424] thereby causing many

[411] *See* ABA at 8 ("The primary reason to regulate those providing mortgage assistance relief services to consumers is to keep them honest and ensure proper government oversight over them. But because lawyers already have substantial fiduciary duties to their clients that are strictly enforced by the state supreme courts and state bars that license and oversee the lawyers, this rationale for regulating MARS providers simply does not apply to lawyers who are already licensed by their state courts and bars."); Lawson at 1 ("Attorneys are regulated by the bar associations, they do not need to be regulated on another level."); Mobley at 2 ("In deciding to provide broader attorney exemptions in the rule, the FTC should consider that attorneys already are regulated by the states, are subject to strict ethical standards, and misconduct leads to severe sanctions. In fact, the Rules of Professional Conduct implemented in most states already provide for the investigation and discipline of the majority of the dishonest and unfair acts this rule is written to prevent."); Carr at 5 ("In addition lawyers are licensed professionals bound to follow a code of ethics promulgated by the bar associations in the states in which they practice and hence the activities described in the rule are already in effect 'policed' at the state level, when in my opinion all regulation of this type more properly resides.").

[412] *See* ABA at 3–5; Deal at 8 ("Attorneys are well regulated by their bar associations."); Carr at 5.

[413] *See* ABA at 8 ("As a result of these burdensome mandates, many lawyers who currently help consumers renegotiate their mortgages or avoid foreclosure as a part of their practice might stop handling these types of cases altogether rather than comply with these new regulations."); Greenfield at 3–4 (reporting that many attorneys, including herself, discontinued providing MARS after California passed a law that prohibited attorneys from collecting advance fees); Mobley at 2 ("Reputable attorneys experienced in loan modifications and other mortgage law issues would not be able to continue to practice. * * *"); Carr at 5 ("I and many others in the profession predict that lawyers will henceforth shun this field if the rule is adopted in its present form. * * *"); Deal at 4 ("The practical effect of [the Rule] is that attorneys will not be willing to work for clients needing these services, and people who need legal services will not be able to obtain them."); Giles at 4 ("If you pass this rule, it will drive lawyers like myself out of the market, and the number of permanent HAMPs that are executed will drop precipitously."); Rogers at 1 ("The proposed FTC rules, as they stand, will result in the wholesale elimination of reputable and capable attorneys who help desperate homeowners.").

[414] *See, e.g.,* Deal at 1 ("[The FTC] proposes to regulate the relationship between the attorney and client, which up until now has been the jurisdiction of state bar associations and state supreme courts."). The ABA also emphasized that the agents and employees of attorneys must comply with the same ethical rules. ABA at 8.

[415] *See, e.g.,* ABA at 8.

[416] *See, e.g.,* ABA at 6–9; Mobley at 2; Rogers at 16; Bronson at 5.

[417] ABA at 9; *see also* NCLC at 11 ("Attorneys in many states have long been required to escrow unearned fees, and client trust accounts are recognized as an appropriate method of protecting money that remains the property of the client until earned by the attorney.").

[418] ABA at 9; Mobley at 2; Rogers at 16, 20–21 ("Violation of the rules of an IOLTA account, which is often audited, can easily result in the disbarment of an attorney. Therefore, it is unlikely attorneys would often violate the escrow requirements."); Carr at 10; *see also* NCLC ("A client who is injured by an attorney removing funds from a trust account will have recourse to the jurisdiction's attorney discipline system, many of which include client recovery funds to provide redress in exactly this situation."); Deal at 1 ("If I fail to behave ethically and fairly towards my clients I can be disciplined and ordered to refund fees.").

[419] *See, e.g.,* ABA at 9; Mobley at 2.

[420] *See, e.g.,* ABA at 3–7; IL RELA at 1–2; IL St. Bar Assoc. at 1; Carr at 4–5; Bronson at 9.

[421] *See, e.g.,* ABA at 6–7; *see also* Bronson at 2 ("Historically, attorneys have billed either on an hourly basis, a flat rate basis or on a contingency basis. All of these methods are legal and within the boundaries of the rules of ethics governing attorneys as long as they are clearly described in a written retainer agreement provided to the client."); Dargon at 2 (charges clients a flat fee of $2500; clients value a "predictable, definitive fee that includes representation throughout the process regardless of the complexity or duration").

[422] ABA at 7; *see also* Bronson at 2 ("Without the ability to take a retainer and charge for their time and effort regardless of whether they are successful, most attorneys will not be able to offer expert loan modification advice and services."); Greenfield at 5 ("An attorney who attempts to negotiate but is unable to achieve a mortgage loan modification for her client is still entitled to be paid for legal services actually rendered."); Dargon at 2 ("If the FTC removes the up-front fee, it will effectively create a contingency area of law akin to personal injury—only without an insurance company or solvent defendant at the end of the case to absorb the attorneys' fees.").

[423] *See, e.g.,* Mobley at 2 ("Attorneys simply cannot operate a firm without collecting upfront fees."); Greenfield at 5 ("Requiring an attorney to wait to be paid until a permanent modification is approved by the servicer is unreasonable when the actual time that elapses could be six months to one year."); Rogers at 9–10; Giles at 3; Dargon at 1, 3; Carr at 5; Deal at 4.

[424] *See, e.g.,* ABA at 8 ("[L]awyers who try to help their consumer clients to renegotiate their mortgages or avoid foreclosure * * * would be prohibited from charging an advance fee, thereby greatly increasing the risk that the lawyer would not receive payment for the legal services provided.");

Continued

attorneys to discontinue providing these types of services.[425] According to the commenters, the proposed rule's limitation of the exemption to attorneys engaged in bankruptcy or other legal proceedings would exclude many forms of legal work for which attorneys regularly collect fees in advance.[426] Therefore, these commenters recommended that a final rule should allow them to place advance fees in a client trust account and withdraw them as they perform services.[427]

Second, some attorney commenters recommended exempting attorneys from the prohibition on instructing consumers not to contact their lenders or servicers. According to the ABA, clients typically expect attorneys they retain to act as their representative in dealing with other parties, such as lenders and servicers.[428] In general, the commenters argued that imposing this prohibition would undermine attorneys' effectiveness as legal counsel and possibly jeopardize the attorney-client privilege.[429] Some commenters also recommended that the exemption from this prohibition apply to attorneys who are lawfully licensed in any state,[430] noting that the exemption in the proposed rule would prevent attorneys from giving such an instruction to their out-of-state clients.[431]

Third, some commenters argued that attorneys should not be subject to the proposed rule's disclosure requirements.[432] The ABA criticized two disclosures in particular: (1) The disclosure that providers are for-profit businesses not affiliated with the government or the consumer's lender or servicer, because in the attorney context this non-affiliation disclosure is unnecessary and potentially confusing to consumers;[433] and (2) the total cost disclosure, because it would mandate that attorneys charge a flat fee for their services even though they commonly charge fees on an hourly or other basis.[434]

Finally, several commenters argued that attorneys should be exempt from the proposed rule's record keeping and compliance requirements. The ABA and other attorney organizations claimed that requiring attorneys to comply with the requirements to maintain records of their interactions and transactions with clients and to produce them for FTC inspection during an investigation or law enforcement action would undermine attorney-client confidentiality and the attorney-client relationship.[435]

3. The Attorney Exemption in the Final Rule

In the Final Rule, the Commission has broadened the attorney exemption. An attorney is exempt from the Rule, except the advance fee ban, if he or she: (1) Provides MARS as part of the practice of law; (2) is licensed to practice law in the state where the client or the client's dwelling is located; and (3) complies with applicable state laws and regulations relating to the same general types of conduct the Rule addresses, namely, the competent and diligent provision of legal services, communication with clients, charging and receipt of fees, promotion of services, and not engaging in fraudulent or deceitful conduct. In addition, an attorney that meets these criteria is exempt from the advance fee ban if the attorney deposits any advance fees in a client trust account and complies with all state laws and licensing regulations relating to the use of those accounts. The attorney exemption in the Final Rule strikes a balance between allowing consumers to continue to have access to bona fide legal assistance,[436] while at the same time preventing or deterring unfair or deceptive practices by attorneys.[437]

a. The Commission's Determination Not To Exempt All Attorneys

As discussed above, some commenters advocated exempting from the Rule all attorneys, regardless of their activities. The Commission declines such a blanket exemption to attorneys. The record shows that a substantial number of attorneys have engaged in the types of deceptive and unfair conduct the Rule prohibits. For example, approximately 22% of the complaints that a coalition of government agencies, nonprofits, and service providers has received from consumers about loan modification fraud involve some form of

Mobley at 2 ("It is unreasonable for anyone to believe that clients are just as likely to pay their attorney bill after their legal matter is resolved as before."); Greenfield at 5 ("The Commission's position that attorneys who represent that they will 'negotiate' a mortgage loan modification cannot be compensated until a permanent modification is offered to the borrower is unreasonable and unrealistic."); Rogers at 8, 10 ("[The proposal] will virtually eradicate the practical ability of ethical, law abiding loan modification attorneys to ever get paid."); Carr at 4 ("[T]he attorneys is relegated to filing a multitude of small claims cases against clients who are largely 'judgment proof.'"); GLS at 1 ("You are telling attorneys, many of them younger (like myself), newly out of law school (like myself), and with little to no ability to carry the overhead costs of providing assistance absent receipt of some fees, that they can't collect a fee from clients who are the very definition of a credit risk until the very close of the matter. These matters typically take over 6 months to as long as a year. Statistically something like only 10% of these are 'successful'. * * * As a result, your attorneys are under mountains of debt from student loans and struggling to stay out of foreclosure themselves have only a 10% chance of getting paid after 6 months to a year of work.").

[425] *See, e.g.,* Greenfield at 4; Giles at 3 ("If the FTC says I can't collect a fee in advance, I will have to exit this field of practice."); Lawson at 2 ("Without the ability to take a retainer and charge for their time and effort regardless of whether they are successful, most attorneys will not be able to offer expert loan modification advice and services."); Dargon at 3 ("Attorneys will be loathe to take modification cases if they have no assurance of being paid for their time and effort"); IL RELA at 1; WI St. Bar at 1.

[426] *See, e.g.,* Greenfield at 5; ABA at 6–7. Alternatively, some commenters argued that the proposed rule would create incentives for attorneys to file a lawsuit or a petition for bankruptcy on behalf of their client instead of finding another potentially appropriate solution. *See, e.g.,* Mobley at 2; FL Bar at 1; OR St. Bar at 1; IL RELA at 2.

[427] *See, e.g.,* Greenfield at 4–6 (arguing that "attorneys should be permitted to request a client retainer to be held in a regulated account, and to bill a client for legal work performed on an interim basis"); Rogers at 20–21; Mobley at 2; Carr at 10; Bronson at 9.

[428] ABA at 4.

[429] *See, e.g.,* ABA at 4–5 ("Section 322.3 of the Proposed Rule would seriously undermine the confidential attorney-client relationship by prohibiting lawyers from giving certain proper legal advice to their consumer clients who live in another state, including advice to 'not contact or communicate with his or her lender or servicer'."); IL St. Bar at 1 (arguing that proposed rule "prohibits lawyers from giving their clients who live in another state appropriate legal advice by prohibiting them from advising these clients not to communicate directly with the lenders"); IL RELA at 2 (same); CCRL at 10 (arguing that it is unclear why rule should cover attorneys engaged in the "ethical practice of law"); Bronson at 9 (arguing that it is "dangerous to pass a rule that supercedes the judgment of attorneys as to whether their clients should talk to the lender or servicer"); MI St. Bar at 1; Rogers at 10–12.

[430] *See* ABA at 5; Bronson at 5.

[431] *See supra* note 430. A consortium of consumer groups also argued that the proposed exemption would not permit attorneys to represent consumers who own property in a state other than where they reside, for example, members of the military who commonly rent property in one state but reside in another. See NCLC at 8.

[432] *See* ABA at 4, 8 ; MO Bar at 1; OR St. Bar at 1; IL St. Bar Assoc. at 1; IL RELA at 2; MI St. Bar at 1; FL Bar at 1; ME St. Bar Assoc. at 1; GA St. Bar at 1; WI St. Bar at 1.

[433] ABA at 3. A consumer group also opposed requiring attorneys to make this disclosure, contending that there is little evidence that the misimpression that the disclosure is designed to cure—that the provider is affiliated with the government or the consumer's lender or servicer—actually exists with respect to attorneys. NCLC at 9.

[434] ABA at 7.

[435] *See, e.g.,* ABA at 4; IL St. Bar Assoc. at 1; OR St. Bar at 1; FL Bar at 1; NCLC at 9; Rogers at 22.

[436] As discussed above, both attorney practitioners, *see, e.g.,* ABA at 7, and consumer advocates, *see, e.g.,* NCLC at 7; LFSV at 4, have argued that the Final Rule should not curtail consumer access to legal help.

[437] As discussed above, consumer groups, law enforcers, and regulators have argued that the Final Rule should protect consumers from harm by attorneys. *See* NCLC at 8; CSBS at 4; LSFV at 4; Lawyers' Committee at 9; *see also* NAAG at 3–4; MBA at 4; NYC DCA at 4; IL AG (ANPR) at 2; MA AG (ANPR) at 9; CUUS at 8–9.

attorney participation.[438] Similarly, of the 342 MARS companies investigated by the Illinois Attorney General's Office, over 38% appeared to have had some attorney involvement, and attorneys owned—at least in part—over 17% of those companies.[439] This data is consistent with the many FTC[440] and state[441] law enforcement actions in which attorneys were found or alleged to have engaged in unfair or deceptive practices in offering or providing MARS to consumers.

Additionally, the record, including FTC and state law enforcement actions,[442] demonstrates that MARS providers have used state law exemptions for attorneys to circumvent the law and harm consumers.[443] The NAAG comment, for example, explained that the attorney exemptions in many state MARS laws have created loopholes that MARS providers have exploited to harm consumers.[444] As discussed above, these state MARS laws often exempt attorneys if they have attorney-client relationships with the consumers for whom they are providing services.[445] An attorney-client relationship by itself, however, provides no guarantee that the attorney will act in a fair and honest fashion. Not only have MARS attorneys engaged in unfair and deceptive acts and practices and used such exemptions to circumvent state law requirements, but many non-attorney MARS providers have employed or affiliated with attorneys for that same purpose.[446] MARS providers

[438] Of the 6,473 total complaints in the LMSPN database as of August 25, 2010, *see supra* note 75, the Network determined that 1,510 involved legal representation. This level of reported attorney involvement has remained consistent over the past several months. *See* Loan Modification Scam Prevention Network *June 2010 National Loan Modification Scam Database Report,* at 1 ("(LMSPN, June 2010 Report),"), *available at http://www.preventloanscams.org/tools/assets/files/June-LMSPN–Report-Final.pdf.* (noting that 33% percent of persons aged 51 and older reported attorney involvement in the loan modification scam); *Loan Modification Scam Prevention Network May 2010 National Loan Modification Scam Database Report,* at 1 ("LMSPN, *May 2010 Report*), *available at http://www.preventloanscams.org/tools/assets/files/May-LMSPN–Report-Final.pdf.* ("At the end of May, almost one-third of our reports indicated that legal representation was a part of the reported scam."); *Loan Modification Scam Prevention Network April 2010 National Loan Modification Scam Database Report,* at 2 ("LMSPN, *April 2010 Report*), *available at http://www.preventloanscams.org/tools/assets/files/April-LMSPN–Report-Final.pdf.* (noting that 20% of complaints involve attorney representation). A May 2010 LMSPN Report also found that the names of more than 20 law firms or attorneys had appeared in multiple complaints. *See* LMSPN, *May 2010 Report* at 1.

[439] *See* IL AG (June 30, 2010) at 2. More specifically, this comment stated that 17.5% of these companies were owned, at least in part, by attorneys; 15% had affiliations with attorneys; and 6% showed evidence of attorneys on their staffs.

[440] *See, e.g., FTC* v. *Washington Data Res., Inc.,* No. 8:09-cv-02309–SDM–TBM (M.D. Fla. filed Nov. 12, 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., Amd. Compl. filed Mar. 8, 2010); *FTC* v. *Fed. Loan Modification Law Ctr., LLP,* Case No. SACV09–401 CJC (MLGx) (C.D. Cal., Am. Compl. filed Oct. 1, 2010).

[441] *See, e.g., Florida* v. *Kirkland Young,* No. 09–90945–CA–03 (Fla. Cir. Ct. Dade-County Dec. 17, 2009); *North Carolina* v. *Campbell Law Firm, P.A.,* No. 09cv023738 (N.C. Super. Ct.—Wake filed Nov. 11, 2009); *Assurance of Voluntary Compliance & Discontinuance In re Airan2* (Nov. 9, 2009), *available at http://www.coloradoattorneygeneral.gov/sites/default/files/uploads/Airan2.pdf;* Press Release, Conn. Att'y Gen., *Attorney General Warns Consumers About Foreclosure Rescue Company Masquerading As Law Firm* (Aug. 10, 2009), *available at http://www.ct.gov/ag/cwp/view.asp?Q=444786&A=3673; California* v. *United First, Inc.,* No. BC 417194 (Cal Super. Ct. Los Angeles filed July 6, 2009) (alleging attorney Mitchell Roth and his law firm MW Roth, PLC falsely promised to eliminate mortgages on consumers' homes and improve their credit); *Assurance of Voluntary Compliance & Discontinuance In re Law Office of Eugene S. Alkana* (Jun. 12, 2009), *available at http://www.coloradoattorneygeneral.gov/sites/default/files/uploads/Legal%20Home%20Solutions.pdf; Assurance of Voluntary Compliance & Discontinuance In re Traut Law Group* (Jun. 11, 2009), *available at http://www.coloradoattorneygeneral.gov/sites/default/files/uploads/Traut%20Law%20Group.pdf; see also* Press Release, Office of the Cal. Att'y Gen., *Brown Sues 21 Companies and 14 Individuals Who Ripped Off Consumers Desperate For Mortgage Relief* (July 15, 2009), *available at http://ag.ca.gov/newsalerts/release.php?id=1767* (among the defendants that the California Attorney General sued were 4 attorneys and three law firms); *Cincinnati Bar Ass'n.* v. *Mullaney,* 119 Ohio St. 3d 412 (2008). Federal and state criminal authorities also have prosecuted attorneys who have engaged in foreclosure rescue fraud. *See, e.g.,* Amanda Bronstad, *Crackdown on California Attorneys For Mortgage Fraud a State-Federal Joint Effort,* Nat'l L.J., Oct. 12, 2010 (Orange County district attorney's office brought criminal charges against an attorney in connection with his defrauding more than 400 homeowners with promises to modify mortgage loans in exchange for advance fees); Ameet Sachdev, *Lawyer Convicted of Mortgage-Rescue Fraud,* Chi. Trib., July 13, 2010 (Attorney radio personality found guilty of federal criminal charges in connection with bilking homeowners in fraudulent foreclosure rescue scheme), *available at http://www.chicagotribune.com/business/ct-biz-0713-chicago-law-20100713,0,3981512.column;* Press Release, Dist, Att'y Queens Cnty., *Seventeen Individuals—Including Two Attorneys—Charged in Massive Multi-Million Dollar Real Estate Fraud: Ringleaders Allegedly Targeted Distressed Homeowners in Mortgage Rescue Scams* (May 13, 2010), *available at http://www.queensda.org/newpressreleases/2010/may/huggins_sookraj_et%20al_05_13_2010_cmp.pdf.*

[442] *See supra* notes 55–61 and accompanying text; *see also FTC* v. *Truman Foreclosure Assistance, LLC,* No. 09–23543 (S.D. Fla. filed Nov. 23, 2009) (alleging that defendants told consumers that they were affiliated with law firm or attorneys); *FTC* v. *Fed. Housing Modification Dep't,* No. 09–CV–01753 (D.D.C. filed Sept. 16, 2009) (alleging that defendants falsely claim to have attorneys or forensic accountants on staff); *FTC* v. *Loan Modification Shop, Inc.,* No. 3:09-cv-00798 (JAP), Mem. Supp. TRO at 14 (D.N.J. filed Aug. 4, 2009) (alleging that defendants misrepresent "that it is an attorney-based company").

[443] *See, e.g.,* NAAG at 3 ("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."); IL AG (ANPR) at 2 ("Attorneys are using the [state] exemption to market and sell the same mortgage consulting services provided by non-attorneys."); *see also* NAAG at 3–4 (arguing that it is a "difficult and fact-intensive inquiry" to prove attorneys are not engaged in the practice of law, and thus they are not exempted from state laws exempting those activities).

In addition, some state consumer fraud statutes explicitly exempt attorneys, further impeding state enforcers from prosecuting attorney MARS providers for unfair or deceptive practices. *See* D.C. Code Ann. § 28–3903(c)(2)(C) (prohibiting the Department of Consumer Protection from applying the statute to the "professional services of clergymen, lawyers [and others]"); Md. Code Ann., Com. Law § 13–104(1) (the statute "does not apply to * * * [t]he professional services of a * * * lawyer"); N.C. Gen. Stat. § 75–1.1 (2005) (exempting "member[s] of a learned profession"); *see also Sharp* v. *Gailor,* 510 S.E.2d 702, 704 (N.C. App. 1999) (holding that unfair and deceptive trade practice claims against attorney are barred by a statutory exemption for "member[s] of learned profession"); Ohio Rev. Code Ann. § 1345.01(A) (consumer transactions under the Ohio Consumer Sales Practices Act do not include "transactions between attorneys, physicians, or dentists and their clients or patients").

[444] NAAG at 4 ("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 * * * 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."); IL AG (ANPR) at 2 ("Attorneys are using the exemption to market and sell the same mortgage consulting services provided by non-attorneys.").

[445] *See supra* notes 58–60, 98; *see also, e.g.,* Colo. Rev. Stat. § 6–1–1103(4)(b)(I) (exempts Colorado attorneys "while performing any activity related to the person's attorney-client relationship with a homeowner"); 765 Il. Comp. Stat. Ann. 940/5 (exempts Illinois attorneys engaged in the practice of law); Mo. Rev. Stat. § 407.935(2)(b)a9 (exempts Missouri attorneys rendering service in the course of practice); *see also* NAAG (ANPR) at 13 ("Currently, most states exempt attorneys from their mortgage rescue consultant laws."); CMC (ANPR) at 9–10. In California, the state legislature eliminated the attorney exemption from its law regulating foreclosure consultants because of concerns about evasion. *See supra* note 61.

[446] *See, e.g.,* CSBS (ANPR) at 2 (noting "attorneys who lend their name to a loan modification company, but play, little, if any direct role, in helping consumers obtain actual loan modifications"); MN AG (ANPR) at 5 ("The Office is aware of several loan modification and foreclosure rescue companies that have affiliated with licensed attorneys in other states in an effort to circumvent state law."); CRC (ANPR) at 2 ("An increasing number of attorneys are involving themselves in these unethical practices without providing any legal (or other) services, sometimes engaging in fee-splitting or even simply acting as fronts for loan modification companies who are seeking to avoid state laws that prohibit some of the practices described above but exempt attorneys."); Cal. State Bar Ethics Alert at 2 ("There is evidence that some foreclosure consultants may be attempting to avoid the statutory prohibition on collecting a fee before any services have been rendered by having a lawyer work with them in foreclosure consultations.").

increasingly have induced consumers to purchase their services by making claims that their services include specialized legal assistance from attorneys,[447] with some attorneys lending their names and credentials to these operations.[448] In these arrangements, however, the attorneys often do little or no work on behalf of consumers,[449] with non-attorneys handling most functions, including communicating with the lender or servicer.[450]

Given the prevalence of attorneys engaged in unfair and deceptive practices in providing MARS and the experience of the states with categorical exemptions for all attorneys, the Commission has decided not to exempt attorneys across-the-board from the Final Rule. The record demonstrates that such a categorical exemption would open a large loophole to the Rule that MARS providers would exploit to the detriment of consumers.

b. The Rationale for the Attorney Exemption in the Final Rule

As discussed above, attorneys' activities related to mortgage assistance relief run the gamut. At one end of the spectrum, attorneys may provide a host of valuable services for consumers unable to pay their mortgages.[451] For instance, some attorneys represent in legal proceedings consumers who are in or at risk of foreclosure,[452] or provide such consumers with non-litigation legal services, such as advising them on bankruptcy laws, unwinding sale-leaseback transactions, resolving violations of fair lending laws, disputing charges that servicers had assessed improperly, and counseling on the tax implications of short sales.[453] The Commission concludes that some attorneys might cease providing such beneficial services if they were required to comply with the provisions of the Rule.

At the other end of the spectrum, individuals with law licenses frequently engage in deceptive or unfair MARS practices or assist others who do. As with other services sold routinely through deceptive or unfair means, a broad attorney exemption can become an easy way for fraud artists to ply their trade without fear of law enforcement. Thus, the Commission concludes that merely possessing a law degree or a license to practice law is not an adequate basis for an exemption from the Rule.

The Commission's goal is to craft an exemption that enables attorneys to engage in the bona fide practice of law, but does not create a loophole for unscrupulous attorneys who themselves engage in unfair or deceptive acts and practices in selling MARS or lend their credentials to others who do so. The attorney exemption described below is designed to achieve that goal.

c. Requirements for the Exemption

(1) Practice of Law

As described above, the services that attorneys may deliver to consumers with mortgage problems can be legal or non-legal in nature. Limiting the exemption to attorneys engaged in the "practice of law" is intended to draw the distinction between legal and non-legal services, even though performed or supervised by an attorney. The "practice of law" generally encompasses providing advice or counsel that requires knowledge of the law and preparing documents, including court

[447] The FTC's review of the information produced by a media monitoring company, *see supra* note 66, showed that 25 of the 140 companies advertising MARS made reference to being attorneys or providing some form of legal assistance.

[448] *See, e.g., FTC* v. *Loss Mitigation Servs., Inc.,* No. SACV09–800 DOC (ANX), Mem. Supp. Pls. Ex Parte App. at 3 (C.D. Cal. filed Aug. 3, 2009) (alleging that "Walker Law Group" was "a sham legal operation designed to evade state law restrictions on the collection of up-front fees for loan modification and foreclosure relief"); *FTC* v. *US Foreclosure Relief Corp.,* No. SACV09–768 JVS (MGX), Prelim. Rep. Temp. Receiver at 2–3 (C.D. Cal. filed July 7, 2009) (stating that defendants' "relationship with two different lawyers was nominal at best and served primarily as a cover to dignify the business and invoke the attorney exception to advance fee prohibitions"); *FTC* v. *LucasLawCenter* "*Inc.*"*,* No. SACV–09–770 DOC (ANX), Mem. Supp. TRO at 19 (C.D. Cal. filed July 7, 2009) (alleging that "[d]espite promises to the contrary, consumers have no contact with the purported attorneys who are supposed to be negotiating with their lenders"); *FTC* v. *Fed. Loan Modification Law Ctr.,* LLP, No. SACV09–401 CJC (MLGx), Mem. Supp. *Ex Parte* TRO at 6 & n.2; (C.D. Cal. filed Apr. 6, 2009) (alleging non-attorney defendants partnered with a California-licensed attorney to exploit attorney exemption in state law); *see also* Drexel Testimony at 6 ("In exchange for the use of the attorney's name and his or her ability to charge and receive advance fees, the foreclosure consultant typically offers to perform most or all of the loan modification services. * * *"); Press Release, State Bar of Cal., *State Bar Takes Action to Aid Homeowners in Foreclosure Crisis* (Nov. 25, 2009) ("[T]he attorneys work with untrained non-attorney staff engaging in the unlawful practice of law by offering legal advice to prospective clients. [The Office of Trial Counsel] also is investigating the non-attorney staff for possible referral to law enforcement."), *available at http://www.calbar.ca.gov/state/calbar/calbar_generic.jsp?cid=10144&n=96395;* CMC (ANPR) at 10 ("[The attorneys'] communications [with the consumer] are generally 'boilerplate' that does not appear to reflect any considered review by an attorney."); OH AG (ANPR) at 5 ("[O]ur office sees foreclosure rescue companies advertise that they will provide a lawyer or legal help to that consumer. The lawyer's client, however, is actually the company, not the consumer, and at most the lawyer will file a brief template response on behalf of the consumers."); IL AG (ANPR) at 2. Similarly, financial service companies report receiving letters from attorneys who do no work but lend their names to out-of-state attorneys. AFSA at 5.

[449] IL AG (ANPR) at 2 ("While attorney mortgage consultants charge a premium for their services and aggressively market their status as legal professionals, they generally exclude—either expressly or in practice—actual legal representation or legal work from the scope of provided services."). Some MARS providers advertise the provision of legal services to consumers but then later disclaim, in fine print contracts, that they will actually provide such services. *See id.* at 2–4, 7.

[450] *See, e.g., FTC* v. *US Foreclosure Relief Corp.,* No. SACV09–768 JVS (MGX) (C.D. Cal., Amd. Compl. filed Mar. 8, 2010) (alleging defendants falsely claimed a lawyer would negotiate the terms of consumers' home loans); *FTC* v. *FTC* v. *Fed. Loan Modification Law Ctr., LLP,* No. SACV09–401 CJC (MLGx), Mem. Supp. *Ex Parte* TRO at 6 & n.2 (C.D. Cal. filed Apr. 6, 2009) (alleging "despite promises to the contrary, consumers have no contact with purported attorneys who are supposed to be negotiating with their lenders"); *see also* Chase (ANPR) at 5 ("Many MARS providers claim to be affiliated with attorneys, but typically the people performing the services are not attorneys, and the connection with the attorney is very tenuous. Calls to the MARS provider do not go to the attorney's office and addresses used by the providers are not the same as the attorney's."); OH AG (ANPR) at 5 ("[A]t most the lawyer [advertised to consumers by foreclosure rescue companies] will file a brief template response on behalf of the consumers.").

[451] In today's financial crisis, many consumers have turned to attorneys for help with their mortgages. *See, e.g.,* LFSV at 1 ("During the recent mortgage crisis, we have been dealing with a flood of borrowers whose mortgages are distressed and who have been subject to abuses by companies and individuals promising assistance with obtaining modification of those loans."); Central California Legal Services: State Bar's First Foreclosure Forum in Fresno, *available at http://www.centralcallegal.org/ccls/index.php* (call for volunteer assistance to handle the sheer number of clients who need assistance to avoid foreclosure). Many consumers at risk of losing their homes must rely on for-profit attorneys to receive legal assistance because their income levels disqualify them for non-profit legal aid. *See Income Levels for Individuals Eligible for Assistance,* 45 CFR part 1611 (2010) (publishing 2010 maximum income levels for individuals who are permitted to receive free or low cost legal help from programs funded by the Legal Services Corporation).

[452] As one example, in several states borrowers have the right to participate in supervised mediation with lenders before the home goes into judicial foreclosure. *See, e.g.,* Conn. Gen. Stat. Ann. § 8–265ee (2009) (providing for court-sponsored mediation prior to foreclosure); Nev. Rev. Stat. Ann. § 107.086 (2009) (providing for court-supervised mediation prior to foreclosure). Attorneys often represent clients in these mediation proceedings and may in some states file a petition for review on behalf of consumers if the mediation fails because lenders have acted in bad faith. *See, e.g.,* Giles at 1–2; *see also* Nev. Rev. Stat. Ann. § 107.086(5) (requiring loan holder to participate in mediation in good faith and to bring all necessary documents).

[453] *See, e.g.,* NCLC (ANPR) at 14 (noting that "an attorney's more beneficial and traditional role of analyzing a client's paperwork and advising the client of potential claims and options may also fit within the definition of mortgage assistance relief"); LSFV at 4 ("Those seeking advice, who are likely in or facing mortgage default, may need specific advice regarding the contractual and tax implications of a loan modification, which HUD-approved counselors may not be qualified to provide.").

pleadings and contracts, to secure clients' legal rights.[454] The activities that constitute the "practice of law," however, may vary based on state laws and licensing regulations, as interpreted by state courts and state bars. The Final Rule only allows an exemption for attorneys who are engaged in the "practice of law," as interpreted by the jurisdiction where the consumer or the consumer's dwelling is located.

(2) Licensing Jurisdiction

To qualify for the exemption in the Final Rule, attorneys must be licensed to practice law in the state where their clients reside or where their clients' dwellings that are the subject of the MARS are located. State attorney licensing regulations can provide an important check on the conduct of attorneys. The record shows, however, that in many cases attorneys have provided MARS in jurisdictions in which they are not licensed.[455] To ensure that exempt attorneys would be subject to the oversight and regulation of state officials, the proposed rule limited the exemption to those attorneys who were licensed to practice in the state where the consumer resides.

Some commenters, including several consumer groups, argued that the exemption in the proposed rule was too narrow because it did not include attorneys who represent clients who live in one state, but whose dwelling that is the subject of the MARS is located in another state.[456] The Commission recognizes that some consumers who are in or at risk of foreclosure may need legal assistance concerning dwellings located in a state other than the one where they reside. As an example, older persons who live in assisted living facilities located close to family may continue to own homes in other states.[457] Therefore, the Final Rule expands the attorney exemption to encompass attorneys who are licensed in the state where the consumer resides or where the dwelling is located.

The Commission declines to expand the exemption to attorneys licensed in any state, as recommended by some commenters.[458] The record, including state and FTC law enforcement, consumer complaints, and comments, demonstrates that many attorneys who have engaged in deceptive and unfair conduct that harms consumers operated on an interstate basis, including in states where they were not licensed.[459] Requiring that attorneys be licensed where the consumer or the property is located makes it more likely that state bar officials will be a "cop on the beat," deterring and preventing unlawful conduct by attorneys.

(3) Compliance With State Laws and Licensing Regulations

In addition to being licensed, attorneys must comply with all relevant state laws and licensing regulations governing their conduct for the state in which the client or the client's dwelling is located to qualify for the exemption. Specifically, these attorneys must abide by all such laws and regulations relating to the following subject matters: (1) Competent and diligent representation of clients; (2) disclosure of material information regarding their services to clients; (3) the accuracy of representations of material aspects of their legal services; (4) the request, receipt, handling, and distribution of fees from clients; and (5) prohibitions on fee-splitting with non-attorneys or aiding others in the unauthorized practice of law.

The record in this proceeding demonstrates that many attorneys involved in the provision of MARS have engaged in practices that violate one or more aspects of the applicable state laws or licensing regulations.[460] To protect consumers and avoid duplicative or inconsistent standards, the Commission has determined that it is appropriate to

[454] *See, e.g., Baron* v. *Los Angeles,* 469 P.2d 353, 357 (Cal. 1970) (adopting the definition articulated in *In re Eley* v. *Miller,* 34 N. E. 836, 837–38 (Ind. App. 1893), that the practice of law "includes legal advice and counsel, and the preparation of legal instruments and contracts by which legal rights are secured although such matter may or may not be pending in a court."); *State Bar Ass'n of Conn.* v. *Conn. Bank & Trust Co.,* 140 A.2d 863, 870 (Conn. 1958) (The practice of law "embraces the giving of legal advice on a large variety of subjects and the preparation of legal instruments covering an extensive field."); Ga. Code Ann. § 5–19–50 (defining practice of law as "(1) Representing litigants in court and preparing pleadings and other papers incident to any action or special proceedings in any court or other judicial body; (2) Conveyancing; (3) The preparation of legal instruments of all kinds whereby a legal right is secured; (4) The rendering of opinions as to the validity or invalidity of titles to real or personal property; (5) The giving of any legal advice; and (6) Any action taken for others in any matter connected with the law.").

[455] *See, e.g., FTC* v. *Fed. Loan Modification Law Ctr., LLP,* No. SACV09–401 CJC (MLGx) (law firm advertised MARS nationally while attorneys who purportedly worked for company were only licensed to practice law in California); *Assurance of Voluntary Compliance & Discontinuance In re: Airan2,* (Nov. 9, 2009) (out-of-state attorney provided MARS to Colorado consumers), *available at http://www.coloradoattorneygeneral.gov/sites/default/files/uploads/Airan2.pdf; see also* CMC at 9–10 ("These attorneys are often not licensed to practice in either the borrower's or servicer's state * * *."); CSBS at 2 ("This [increase of involvement by attorneys] includes out-of-state attorneys, many of whom are not licensed to practice law in the state where the homeowner lives * * *.").

[456] *See, e.g.,* Greenfield at 5; NCLC at 10.

[457] *See* NCLC at 4.

[458] *See* ABA at 5; Bronson at 5.

[459] *See, e.g.,* FTC Case List, *supra* note 28; *Assurance of Voluntary Compliance & Discontinuance In re Airan2* (Nov. 9, 2009), *available at http://www.coloradoattorneygeneral.gov/sites/default/files/uploads/Airan2.pdf* (alleging out-of-state attorney sold MARS without proper licenses to Colorado residents); *Assurance of Voluntary Compliance & Discontinuance In re Law Office of Eugene S. Alkana* (Jun. 12, 2009) (same), *available at http://www.coloradoattorneygeneral.gov/sites/default/files/uploads/Legal%20Home%20Solutions.pdf; Assurance of Voluntary Compliance & Discontinuance In re Traut Law Group* (Jun. 11, 2009) (same), *available at http://www.coloradoattorneygeneral.gov/sites/default/files/uploads/Traut%20Law%20Group.pdf; cf.* Model Rules of Prof'l. Conduct R. 5.5 (prescribing that an attorney may practice law in a jurisdiction other than the one in which she is admitted only under limited circumstances, and even then only on a temporary basis).

[460] *See, e.g.,* Press Release State Bar of Cal., *State Bar Takes Action to Aid Homeowners in Foreclosure Crisis* (Sept. 18, 2009) (alleging that attorneys took "fees for promised services and then failed to perform those services, communicate with their clients or return the unearned fees"), *available at http://www.calbar.ca.gov/AboutUs/News/200934.aspx; see also* Helen Hierschbiel, Working with Loan Modification Agencies, Or. St. Bar Bull. (Aug./Sept. 2009) (warning Oregon attorneys of potential ethical violations associated with working with loan modification companies), *available at http://www.osbar.org/publications/bulletin/09augsep/barcounsel.html;* Bob Lipson & David Huey, Lawyers and Buyers Beware, Was. St. Bar J. (Aug. 2009) (warning attorneys of the "potential ethical pitfalls" of "working with a loan modification company in conjunction with your practice"), *available at http://www.wsba.org/media/publications/barnews/aug09-lawyersbeware.htm;* N. J. Sup. Ct. Adv. Comm. On Prof. Ethics, Op. 716, *Lawyers Performing Loan or Mortgage Modification Services for Homeowners,* 197 N.J.L.J. 59 (Jun. 26, 2009) (citing two ethics opinions in holding that attorneys cannot pay fees to loan modification companies for referring clients, act as in-house counsel to a for-profit loan modification company, or engage in prohibited fee sharing with loan modification companies), *available at http://www.state.nj.us/dobi/bulletins/ACPE_716_UPL_45_loanmod.pdf;* Diane Karpman, Beware the Meltdown's Temptations, Cal. Bar J. (Dec. 2008) (warning the legal community about the potential ethical violations that could occur if attorneys were to go into business with non-attorneys in the loan modification market) *available at http://calbar.ca.gov/state/calbar/calbar_cbj.jsp?sCategoryPath=/Home/Attorney%20Resources/California%20Bar%20Journal/December2008&MONTH=December&YEAR=2008&sCatHtmlTitle=Discipline&sJournalCategory=YES&sCatHtmlPath=cbj/2008-12_Discipline_Ethics-Byte.html&sSubCatHtmlTitle=Ethics%20Byte;* Florida Bar, *Ethics Alert: Providing Legal Services to Distressed Homeowners* (cautioning attorneys against entering into arrangements with non-lawyers to provide services associated with loan modifications, short sales, and other forms of foreclosure-related rescue), *available at http://www.floridabar.org/TFB/TFBResources.nsf/Attachments/872C2A9D7B71F057852575690057795DE/$FILE/loanModification20092.pdf.* Additionally, the Ohio Supreme Court has sanctioned attorneys hired by a foreclosure rescue company for, *inter alia,* failing to engage in adequate preparation and failing to properly pursue clients' individual objectives. *See Cincinnati Bar Ass'n* v. *Mullaney,* 894 N.E. 2d 1210 (Ohio 2008).

generally exempt from the Final Rule attorneys who comply with the applicable state laws and regulations. Attorneys not in compliance with those laws and regulations, however, remain subject to the Rule. Examples of activities that may be in violation of state laws and regulations, and thus would render attorneys ineligible for the exemption, include: (1) Failing to work diligently and competently on behalf of clients, *i.e.,* not taking reasonable efforts to obtain mortgage assistance relief;[461] (2) neglecting to keep clients reasonably informed as to the status of their matters, including the potential for adverse outcomes;[462] (3) misrepresenting any material aspect of the legal services,[463] including the likelihood they will achieve a favorable result,[464] an affiliation with a government agency,[465] or the cost of their services;[466] (4) sharing legal fees for MARS-related services with non-attorneys;[467] (5) forming partnerships with non-attorneys in connection with offering MARS;[468] and (6) aiding MARS providers in engaging in the unauthorized practice of law, i.e., providing legal services without a license to do so.[469] If attorneys do not comply with all of these state requirements, they must comply with all of the requirements in the Final Rule.

Some state bars have initiated an increasing number of investigations of attorneys who provide MARS and, in many instances, have brought misconduct cases against them.[470] For example, the Florida Bar submitted a comment stating that it is investigating 155 pending complaints against 42 lawyers engaged in providing MARS.[471] The California Bar is currently conducting roughly 2,000 investigations related to MARS providers.[472] Vigorous state monitoring and enforcement play a vital role in reducing the incidence of unfair or deceptive conduct by attorneys involved in the provision of MARS.

Nevertheless, many state bars have limited resources for investigating and taking action against unethical attorneys involved in providing MARS.[473] State bars also typically respond only to client and competitor complaints rather than actively monitoring and investigating possible violations on their own initiative.[474] As a result, as the record demonstrates, numerous attorneys have engaged and continue to engage in unfair or deceptive practices in the provision of MARS without states taking action against them. The Commission encourages all state courts and bars to follow the example of states like Florida and California and aggressively enforce their laws and regulations covering attorneys who provide MARS as part of the practice of law. The record demonstrates, however, that the threat of bar sanctions has not been a sufficient deterrent to attorney misconduct in the sale or provision of MARS, and thus it is necessary to cover certain conduct of attorneys under the Final Rule.

d. Exemption From the Advance Fee Ban

The practices of attorneys who meet the conditions listed in 322.7(a) are entitled to a general exemption from the Final Rule. The one exception relates to the prohibition on advance fees. Under § 322.7(b) of the Final Rule, attorneys are exempt from the advance fee ban only if they: (1) Meet all of the conditions required for the general exemption; (2) deposit any advance fees they receive into a client trust account; and (3) comply with all state laws and licensing regulations governing the use of such accounts.

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[461] *See, e.g.,* Model Rules of Prof'l Conduct R. 1.1 & 1.3 (requiring attorneys to provide competent and diligent legal services).

[462] *See, e.g.,* Model Rules of Prof'l Conduct R. 1.4 (governing attorney communications with clients about their cases); *see also* Model Rules of Prof'l Conduct R. 2.1 (calling for attorneys to exercise independent professional judgment and render candid advice).

[463] *See, e.g.,* Model Rules of Prof'l Conduct R. 7.1 (general prohibition on making "false or misleading communications about the lawyer or the lawyer's services"). Attorneys also cannot engage in conduct that is dishonest, fraudulent, or deceitful. *See* Model Rules of Prof'l Conduct R. 8.4.

[464] *Id.* In some cases, state laws and regulations would prohibit attorneys from promising that they will obtain any particular mortgage relief for their clients. *See, e.g.,* FL. Rules of Prof'l Conduct R. 4–7.2(c)(F) & (G) (2010) (prohibits any communication that "contains any reference to past successes or results obtained" or "promises results").

[465] *Id.; see also* Model Rules of Prof'l Conduct R. 7.5 (generally prohibits use of firm name, letterhead, or other professional designation that is misleading, and specifies that attorneys in private practice cannot use a trade name that implies a connection with a government agency).

[466] *See* Model Rules of Prof'l Conduct R. 7.1, 7.2, & 8.4; *see also* Model Rules of Prof'l Conduct R. 1.5 (must communicate to clients the scope of representation and the basis and rate for fees, preferably in writing, before or within a reasonable time after commencing the representation).

[467] *See* Model Rules of Prof'l Conduct R. 5.4 (only under certain circumstances can lawyers or law firms share legal fees with non-lawyers).

[468] *Id.* (lawyers cannot form business partnerships with non-lawyers if any of the activities involve the practice of law). State bars have warned attorneys about the ethical problems of partnering with non-attorneys to perform MARS. *See, e.g.,* Helen Hierschbiel, *Working with Loan Modification Agencies,* Or. St. Bar Bull. (Aug./Sept. 2009) (warning Oregon attorneys of potential ethical violations associated with working with loan modification companies), *available at http://www.osbar.org/publications/bulletin/09augsep/barcounsel.html;* Bob Lipson & David Huey, Lawyers and Buyers Beware, Wash. St. Bar J. (Aug. 2009) (warning attorneys of the "potential ethical pitfalls" of "working with a loan modification company in conjunction with your practice"), *available at http://www.wsba.org/media/publications/barnews/aug09-lawyersbeware.htm;* N. J. S. Ct. Adv. Comm. Prof. in Ethics & Comm. on Unauthorized Practice of Law, *Lawyers Performing Loan or Mortgage Modification Services for Homeowners,* (Jun. 26, 2009) (citing two ethics opinions in holding that attorneys cannot pay fees to loan modification companies for referring clients, act as in-house counsel to a for-profit loan modification company, or engage in prohibited fee-sharing with loan modification companies), *available at http://www.state.nj.us/dobi/bulletins/ACPE_716_UPL_45_loanmod.pdf.*

[469] *See* Model Rules of Prof'l Conduct R. 5.5 (lawyer is not permitted to practice law in violation of the laws that regulate the legal profession in that state, nor assist another to do so). In addition, attorneys who operate what have come to be known as "loan modification mills" may violate state law if they provide MARS as part of their legal services, but delegate most of the work to non-attorneys without properly supervising the delegated work or retaining control over it. *See* Model Rules of Prof'l Conduct R. 5.3.

[470] *See, e.g.,* Press Release, State Bar of Cal., *State Bar Continues Pursuit of Attorney Modification Fraud* (Aug. 12, 2009), *available at http://www.calbar.ca.gov/state/calbar/calbar_generic.jsp?cid=10144&n=96096;* Fl. Bar, *Ethics Alert: Providing Legal Services to Distressed Homeowners, available at http://www.floridabar.org/TFB/TFBResources.nsf/Attachments/872C2A9D7B71F05785257569005795DE/$FILE/loanModification20092.pdf?; see also Cincinnati Bar Assoc.* v. *Mullaney,* 119 Ohio St. 3d 412 (2008) (disciplining attorneys involved in mortgage assistance relief services).

[471] FL Bar (July 1, 2010) at 1. In the past year, Florida has brought 32 cases alleging neglect by attorneys in providing loan modification services, which resulted in disciplinary action against four attorneys. During that time, the Florida Bar disciplined another four attorneys in connection with their advertising of MARS. *Id.*

[472] Press Release, State Bar of Cal., *Two More Loan Foreclosure Lawyers Placed on Involuntary Inactive Enrollment* (June 2, 2010), available at *http://www.calbar.ca.gov/AboutUs/News/201012.aspx.*

[473] *See, e.g.,* Deborah L. Rhode, *Institutionalizing Ethics,* 44 Case W. Res. L. Rev. 665, 694 (1994) (discussing funding constraints of bar disciplinary system).

[474] *See* ABA, Ctr. For Prof'l Responsibility. *Lawyer Regulation for A new Century: Report of the Commission on the Evaluation of Disciplinary Enforcement* vi–vii, 9–11, 75 (1992); *see also* Fred C. Zacharias, *The Future Structure and Regulation of Law Practice: Confronting Lies, Fictions, and False Paradigms in Legal Ethics Regulation,* 44 Ariz. L. Rev. 829, 871 (2002) ("[State bars] have tended to focus exclusively on cases that come to their attention easily, through complaints by allegedly aggrieved persons."); Julie Rose O'Sullivan, *Professional Discipline For Law Firms? A Response to Professor Scheneyer's Proposal,* 16 Geo. J. Legal Ethics 1, 51–52 (2002) ("[O]verwhelming majority of [bar disciplinary] proceedings continue to be founded upon complaints rather than proactive investigations").

The Commission, in contrast, frequently initiates investigations based on its own monitoring of industry practices or information from third party sources, even in the absence of a consumer or competitor complaint. The Commission also has a number of important remedial powers that bar associations may lack, including the ability to file an immediate action in Federal court for a temporary restraining order to halt ongoing violations and freeze the defendant's assets for ultimate return to injured consumers. *See* 15 U.S.C 53(b).

Given the frequency with which attorneys, and those affiliated with attorneys, have engaged in unfair and deceptive practices in connection with MARS, the Commission believes that a blanket exemption from the advance fee ban for attorneys is unwarranted and would not adequately protect consumers. At the same time, the Commission is mindful of the possible adverse consequences from imposing unnecessary fee restrictions on attorneys that would reduce the availability of beneficial legal services. On balance, the Commission has concluded that a modified, broader attorney exemption with regard to the advance fee ban is appropriate. The Final Rule therefore permits attorneys who provide MARS as part of their provision of legal services to collect advance fees if, in compliance with applicable state laws and licensing regulations, the attorney deposits such payments into a client trust account [475] and draws on them as work is performed.

Unlike other MARS providers, attorneys commonly deposit advance fees in client trust accounts and, in some jurisdictions, are legally required to do so.[476] State laws and licensing regulations strictly limit attorneys' use of funds in these accounts.[477] For example, state laws and licensing regulations mandate that attorneys keep fees deposited in the client trust accounts separate from their own funds,[478] only withdraw funds as fees are earned or expenses are incurred,[479] maintain complete records as to transactions,[480] notify clients of any withdrawals,[481] and keep the client's funds separate from other clients' funds if a dispute as to ownership of the funds is pending.[482] In some cases, attorneys also are prohibited from "front-loading" fees to expedite their withdrawal of funds from client trust accounts.[483] In addition, as discussed above, in the event attorneys misappropriate funds, state court systems and bars can take, and have taken, disciplinary action, including license revocation. Finally, state bars typically maintain client-security funds, which are capitalized by licensing fees that attorneys pay, for the purpose of compensating injured clients.[484]

To qualify for the exemption from the requirements of the advance fee ban, the Commission concludes that attorneys not only must deposit advance fees in a client trust account, but also must comply with all state laws and licensing regulations governing their use of client trust accounts for these funds.[485] The Rule does not restrict attorneys as to the type of fees they charge clients, including flat fees, contingency fees, or hourly fees, but requires that they withdraw their fees from the client trust accounts consistent with state laws and licensing regulations. These conditions are appropriate for ensuring that such attorneys do not collect and handle fees in a manner harmful to consumers. Attorneys who do not comply with all of these state requirements must comply with the advance fee ban in the Final Rule.[486]

H. Section 322.8: Waiver Not Permitted

Section 322.8 of the Final Rule, which includes only non-substantive

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[475] The Final Rule defines "client trust account" to mean a "separate account created by a licensed attorney for the purpose of holding client funds, which is: (1) [m]aintained in compliance with all applicable state laws and regulations, including licensing regulations; and (2) [l]ocated 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." § 322.2(b). This definition is consistent with the requirements of the Model Rules of Professional Conduct. *See* Model Rules of Prof'l Conduct R. 1.15.

[476] Indeed, some state laws and licensing regulations mandate that attorneys deposit flat fees, also known as fixed fees, collected in advance of performing legal services into client trust accounts, unless the client provides informed consent to a contrary fee arrangement. *See, e.g., In re Mance,* 980 A.2d 1196 (DC 2009); DC Bar, Formal Op. 355 (2010) (providing guidance to attorneys on *Mance* opinion); Minn. Lawyers Prof'l. Responsibility Bd., Formal Op. 15 (1991) (advising that attorneys must deposit advance payments into lawyer trust accounts); *see also* Colo. Rules of Prof'l Conduct R. 1.15.

[477] *See, e.g.,* Model Rules of Prof'l Conduct R. 1.15 (restrictions on the safekeeping of client property that is "in a lawyer's possession in connection with a representation"); *see also* Cal. Rules of Prof'l Conduct R. 4–100 (Preserving Identity of Funds and Property of a Client); Fla. Rules of Prof'l Conduct R. 4–1.15 (Safekeeping of Property); Ill. Rules of Prof'l Conduct R. 1.15 (same); Nev. Rules of Prof'l Conduct R. 169 (same).

[478] Model Rules of Prof'l Conduct R. 1.15(a) (funds shall be held "separate from the lawyers' own property and in a separate account where the lawyer's office is situated, or elsewhere with the consent of the client or third person").

[479] *See* Model Rules of Prof'l Conduct R. 1.15(c) ("A lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred."); *see also, e.g.,* Cal. Rules of Prof'l Conduct R. 3–700 (when client representation terminates, attorneys must promptly return any part of a fee paid in advance that has not been earned); Fla. Rules of Prof'l Conduct R. 4–1.16 (same); Ill. Rules of Prof'l Conduct R. 116 (same); Nev. Rules of Prof'l Conduct R. 166 (same).

[480] Attorneys must retain complete records as to transactional activity on the accounts. See Model Rules of Prof'l Conduct R. 1.15(a) ("Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of [five years] after termination of the representation."); *see also* Cal. Rules of Prof'l Conduct R. 4–100; Fla. Rules of Prof'l Conduct R. 4–1.15; Ill. Rules of Prof'l Conduct R. 1.15; Nev. Rules of Prof'l Conduct R. 169.

[481] *See, e.g. Mance,* 980 A. 2d at 1204 (attorney should notify client of any withdrawal so that she has an opportunity to review the amount withdrawn and, if warranted, contest it).

[482] Model Rules of Prof'l Conduct R. at 1.15(e) ("When in the course of representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claims interests, the property shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.").

[483] State courts have advised that attorneys should avoid excessive "front-loading" of fees. *See, e.g., Mance,* 980 A. 2d at 1204–05. Fees are withdrawn from client trust accounts pursuant to a mutual agreement between the attorney and client, which allows for withdrawals once attorneys achieve certain milestones. *See, e.g., id.* at 1202; *see also* Model Rules of Prof'l Conduct R. 1.15(a).

[484] *See, e.g.* State Bar of California: Client Security Funds, *available at http://www.calbar.ca.gov/Attorneys/LawyerRegulation.aspx* ("client security fund" hyperlink) (fund set up to reimburse losses resulting from attorney dishonesty); Florida State Bar: Clients' Security Fund, *available at http://www.floridabar.org/tfb/flabarwe.nsf* (follow "pubic information" hyperlink, then follow "clients' security fund" hyperlink) (fund created to help compensate losses of money or property due to attorney misappropriation or embezzlement); Attorney Registration and Disciplinary Commission of the Supreme Court of Illinois: Client Protection Program, *available at https://www.iardc.org/index.html* ("client protection program" hyperlink) (fund provided to reimburse losses resulting from dishonest conduct by attorneys); State Bar of Nevada: Clients' Security Fund, *available at http://www.nvbar.org/clientsecurityfund.htm* (fund reimburses losses to clients when attorney "betrays client's trust or misappropriates the client's funds"). There is no guarantee that consumer losses will be reimbursed from these funds. In some cases, the amount in dues collected from attorneys may be insufficient to cover reported losses from attorney misconduct. *See, e.g.,* Valerie Miller, New President Points State Bar Toward Future, Las Vegas Business Press, July 12, 2010 *available at http://www.lvbusinesspress.com/articles/2010/07/12/news/iq_36736725.txt* (reporting that in 2009, claims against the State Bar of Nevada's client-security account exceeded the amount in dues collected from attorneys). In addition, state bars often impose strict limitations on what types of losses qualify for reimbursement. For example, the Illinois client security fund limits reimbursement to losses that result from "intentional dishonesty" by the attorney. *See* Attorney Registration and Disciplinary Commission of the Supreme Court of Illinois: Client Protection Program, *available at https://www.iardc.org/index.html* ("client protection program" hyperlink).

[485] As noted in § III.E.5. of this SBP, the advance fee ban does not take effect until 60 days after issuance of the Final Rule. However, given that some states' attorney regulations require the use of client trust accounts, many lawyers who have accepted advance fees from consumers for MARS should have already placed them in trust accounts to comply with these regulations.

[486] A public interest law firm recommended that the Commission also allow state-licensed accountants to collect fees for preliminary mortgage default counseling to consumers. LFSV at 4. The comment did not elaborate on this recommendation. The Commission declines to exempt accountants from the advance fee ban. Apart from this one comment, nothing submitted on the record indicates that accountants regularly perform MARS. No accountant or organization representing that profession submitted comments in this proceeding. Moreover, accountants typically do not receive payment prior to completing their services, nor do laws or licensing regulations governing the accounting profession address this issue. *See, e.g.,* Va. Code Ann. § 54.1–4400, *et seq.*

modifications to the proposal, provides that "[i]t 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."[487] No comments were received addressing this provision. Several states include similar provisions in their statutes restricting MARS.[488] The Commission concludes that this provision is necessary to prevent MARS providers from attempting to circumvent the Rule, and, therefore, adopts this prohibition.

I. Section 322.9: Recordkeeping and Compliance Requirements

Section 322.9 of the proposed rule set forth specific categories of records MARS providers were required to retain. It also contained four compliance requirements. The Final Rule is very similar to the proposed rule, except that MARS providers no longer are required to record telephone communications with consumers unless they telemarket their services.[489]

1. Proposed Recordkeeping and Compliance Requirements

Section 322.9(a) of the proposed rule set forth specific categories of records MARS providers would be required to keep and contained a time period for retention. Specifically, for a period of 24 months from the date records are produced, the proposed rule required MARS providers to keep:

(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 enters into a contract or other agreement with the provider for any mortgage assistance relief service;

(3) Copies of all documents or telephone recordings created in connection with § 322.9 (b), which sets forth compliance requirements;

(4) All consumer files containing the names, phone numbers, dollar amounts paid, quantity of items or services purchased, and descriptions of items or services purchased, to the extent MARS providers obtain 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; and

(6) Copies of the documentation provided to the consumer in order to comply with the advance fee ban in § 322.5.

In addition, §§ 322.9(b)(1)–(4) of the proposed rule contained four compliance requirements. To monitor whether their employees and contractors are complying with the Rule, § 322.9(b)(1) required providers to:

- Conduct random, blind recording and testing of the oral representations made by persons in sales or other customer service functions;
- Establish a procedure for receiving and responding to consumer complaints; and
- Ascertain the number and nature of consumer complaints regarding transactions handled by individual employees or independent contractors.

Proposed §§ 322.9(b)(2) and (3) required that MARS providers investigate promptly and fully any consumer complaints they receive and take corrective action with respect to any employee or contractor whom the provider determines is not complying with the Rule. Finally, proposed § 322.9(b)(4) required MARS providers to create and retain documentation of their compliance with proposed § 322.9(b)(1)–(3).

2. Comments Regarding Proposed Recordkeeping and Compliance Requirements

State attorneys general and other state regulators, legal aid groups, and consumer advocates, while not addressing these recordkeeping and compliance requirements specifically, endorsed the proposed rule generally.[490] One commenter expressly stated that it supported the recordkeeping and compliance provisions.[491] Several comments proposed additional or modified compliance or recordkeeping requirements,[492] including mandating that MARS providers: (1) Upon request, provide consumers with copies of any contracts or other documents in the providers' files related to the services provided to them; [493] (2) maintain records in a form in which searches can be conducted electronically based on the name, address, and zip code of the consumer; [494] (3) keep comprehensive records of all consumers contacted, as well as the employees, independent contractors, and subcontractors of the provider; [495] (4) make available to the FTC all data, records, and other information collected in processing a consumer's case; [496] and (5) respond to consumer complaints within 14 days of receipt, resolve complaints within 30 days, and submit records of complaints and their resolution to the FTC.[497] Two commenters also recommended that the Rule require a longer recordkeeping retention period.[498]

A number of commenters—in particular, members of the legal profession—objected to the recordkeeping and compliance requirements.[499] Those commenters generally argued that the recordkeeping and compliance requirements in the proposed rule were ill-suited to attorneys and would interfere with their client relationships. These comments and the Commission's response to them are discussed above in § III.G. of this SBP.

3. Final Recordkeeping and Compliance Provisions

With one exception, the Commission adopts in the Final Rule recordkeeping and compliance requirements that are very similar to those set forth in the proposed rule. As discussed throughout this SBP, the rulemaking record, including the Commission's law enforcement experience, indicates that MARS providers frequently engage in unfair and deceptive acts and practices. The recordkeeping and compliance requirements in the Final Rule will assist the Commission in investigating and prosecuting law violations, including identifying injured consumers for purposes of paying consumer redress. Both the recordkeeping [500] and

[487] The Commission merely modified this provision to make it clearer and easier to understand. The proposed provision stated that "[a]ny attempt by any person to obtain a waiver from any consumer of any protection provided by or any right of the consumer under this rule constitutes a violation of the rule." *MARS NPRM,* 75 FR at 10737.

[488] *See supra* note 98.

[489] The Commission also made minor, non-substantive changes to the language of § 322.9 in the proposed rule, to make the Final Rule provisions clearer and easier to understand.

[490] *See, e.g.,* NAAG at 2,5; OH AG at 1; MA AG at 1; MN AG at 1, 3; NY DCA at 2; CSBS at 1; CUUS at 9; LOLLAF at 1; Lawyer's Committee at 11; LFSV at 1.

[491] CUUS at 9.

[492] OPLC at 3–4; NYC DCA at 9–10; CUUS at 9; LFSV at 4.

[493] OPLC at 3–4 (provide documents in a timely manner upon written request); LFSV at 4 (provide documents within 10 days of a consumer's requests).

[494] NYC DCA at 9.

[495] *Id.* at 9–10.

[496] CUUS at 9.

[497] *Id.*

[498] *See* LFSV at 4; CUUS at 9 (recommending a retention period of five years, the statute of limitations for FTC civil penalty actions).

[499] *See* ABA at 4, 8 ; MO Bar at 1; OR Bar at 1; IL BA at 1; IRELA at 2; MI Bar at 1; FL Bar at 1; ME BA at 1; GA Bar at 1; WI Bar at 1; Shaw at 1; GLS at 1.

[500] The recordkeeping requirements in the Final Rule are similar to those imposed in the TSR, 16 CFR part 310; The Franchise Rule, 16 CFR part 436;

compliance [501] requirements are similar to those imposed in other FTC consumer protection rules. In addition, MARS providers would likely retain these records in the ordinary course of business even in the absence of the Rule. The Commission adopts these recordkeeping and compliance requirements to promote effective and efficient enforcement of the Rule, thereby deterring and preventing deception and unfairness.

The Commission has decided to make one substantive modification to the compliance requirements in the proposed rule. The proposed rule required all MARS providers to conduct random blind recording of their sales and customer service calls. Some MARS providers who do not telemarket their services, including many attorneys, argued that it would be unduly costly for them to record such calls.

To foster compliance with the Rule without imposing undue burdens, the Commission has decided to modify the telephone call recording requirement so that it applies to MARS providers only if they telemarket their services.[502] Specifically, § 332.9(b)(1)(i) of the Final Rule states:

> If the mortgage assistance relief service provider is engaged in the telemarketing of mortgage assistance relief services, [it must perform] random, blind recording and testing of the oral representations made by individuals engaged in sales or other customer service functions

Further, in order to effectuate this provision, the Final Rule defines "telemarketing" as "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." [503] This is similar to the definition of this term used in the TSR.[504]

The Commission declines to make the other changes in the recordkeeping and compliance requirements advocated in the comments. With respect to suggestions that the Rule require the retention of additional records, the FTC concludes that the records specified in § 322.9(a) are sufficient for the Commission to make an initial determination about whether a provider's practices merit further investigation. If its practices do, the Commission has substantial authority under the FTC Act [505] to compel MARS providers and others to produce additional information and records. With regard to comments suggesting that the recordkeeping retention period be extended, the Commission concludes,[506] based on its law enforcement experience, that a two-year retention period is sufficient to investigate violations of the Rule. Extending the retention period beyond two years also might impose additional costs on MARS providers.

Finally, comments suggested that the Final Rule should include provisions intended to make it easier for consumers to obtain information about the conduct of the MARS providers with whom they contract. In particular, comments recommended that the Commission require that MARS providers create and maintain electronically searchable records [507] and give consumers copies of any documents related to the services they provided or promised to provide.[508] Although having such information or having access to it may make the conduct of MARS providers more transparent to their customers, it is not clear to what extent these requirements prevent unfairness or deception, or are reasonably related to the prevention of such conduct. In addition, there is no information in the rulemaking record assessing possible benefits to consumers that might result from such requirements, nor is there anything addressing the costs to MARS providers of creating, maintaining, and providing access to information in their files and databases. The Commission therefore declines to impose these suggested recordkeeping and compliance requirements.[509]

J. Section 322.10: Actions by States

The Omnibus Appropriations Act, as clarified by the Credit CARD Act, permits states to enforce the Rules issued in connection with the MARS rulemaking.[510] States may enforce the Rules, subject to the notice requirements of the Omnibus Appropriations Act, by bringing civil actions in federal district court or another court of competent jurisdiction. Section 322.10 tracks the statute, stating that states have the authority to file actions against those who violate the Rule.[511]

K. Section 322.11: Severability

Section 322.11 states that the provisions of the Rule are separate and severable from one another. This provision, which is modeled after a similar provision in the TSR,[512] also states that if a court stays or invalidates any provisions in the proposed rule, the Commission intends the remaining provisions to continue in effect. This provision was included in the proposed rule and no comments were received addressing it. The Commission has determined to adopt the proposed provision as the Final Rule.

L. Effective Dates

The Final Rule, with the exception of the advance fee ban in § 322.5, becomes effective on December 29, 2010. Given the widespread deceptive and unfair conduct of MARS providers, and the urgency of protecting consumers of these services, the Commission concludes that this effective date is appropriate.

The advance fee ban provision, § 322.5 of the Final Rule, takes effect on January 31, 2011.[513] The Commission is providing MARS providers an additional month after the effective date of the other provisions of the Rule because compliance with the advance

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and the Funeral Industry Practices Rule, 16 CFR part 453.

[501] The compliance requirements in the Final Rule are similar to those imposed in the Standards for Safeguarding Customer Information, 16 CFR part 314; the TSR, 16 CFR part 310; and the Trade Regulation Pursuant to the Telephone Disclosure and Dispute Resolution Act of 1992 (*900 Number Rule*), 16 CFR part 308.

[502] The Commission notes, however, that MARS providers who do not telemarket their services remain subject to the other recordkeeping and compliance requirements in the Final Rule.

[503] Section 322.2(m). This definition was not included in the proposed rule.

The Final Rule also clarifies, in § 322.9(b)(4), that providers must "maintain any information and material necessary to demonstrate [their] compliance"—as opposed, merely, to "maintain[ing] documentation" of compliance—as the proposal required. This modification makes it clear that the information providers must maintain to demonstrate compliance is not limited to paper documents, but instead includes other media such as audio or computer files.

[504] Unlike the TSR, the definition of telemarketing in the MARS Rule does not cover the purchase of goods or a charitable contribution.

[505] *See* 15 U.S.C. 46, 49, 57b–1; 19 CFR 2.7.

[506] *See* LFSV at 4; CUUS at 9 (recommending a retention period of five years because it is similar to the FTC statute of limitation for civil penalties).

[507] NYC DCA at 9.

[508] OPLC at 3–4 (provide documents in a timely manner upon written request); LFSV at 4 (provide documents within 10 days of a consumer's requests).

[509] Another comment suggested that the Commission mandate that MARS providers respond to consumer complaints within 14 days of receipt and resolve complaints within 30 days of receipt. LFSV at 4. Prompt resolution of consumer complaints certainly is good business practice, but in the absence of information as to the costs and the benefits of such requirements, as well as information as to whether they prevent unfairness or deception or are reasonably related to the prevention of such conduct, the Commission declines to specify such requirements in the Final Rule.

[510] Credit CARD Act § 511(b).

[511] NAAG stated that the Rule "would work harmoniously with existing state laws." NAAG at 5.

[512] *See* 16 CFR 310.9.

[513] The Final Rule does not apply retroactively; thus, the advance fee ban does not apply to contracts with consumers executed prior to the effective date.

fee ban may entail substantial adjustments to many providers' operations.

IV. Paperwork Reduction Act

The Commission is submitting this Final Rule and a Supplemental Supporting Statement to the Office of Management and Budget for review under the Paperwork Reduction Act (PRA), 44 U.S.C. 3501–21. The disclosure and recordkeeping requirements of the Rule constitute "collection[s] of information" for purposes of the PRA.[514] The associated PRA burden analysis follows.

A. Disclosure Requirements

As discussed above, the Rule requires several disclosures that MARS providers must place in commercial communications for MARS and must state to specific consumers who seek such services. Generally, commenters strongly supported the disclosures.[515]

In each general commercial communication and consumer-specific communication, providers must state that: (1) "(Name of company) is not associated with the government, and our service is not approved by the government or your lender;" and (2) "Even if you accept this offer and use our service, your lender may not agree to change your loan." In consumer-specific communications, providers also must disclose the total cost of MARS.

Based on the rulemaking record,[516] the Final Rule adds two new disclosures to consumers seeking MARS, and it modifies one existing disclosure substantially. First, if MARS providers advise consumers, expressly or by implication, to stop making mortgage payments, they must warn consumers in all communications that: "If you stop paying your mortgage, you could lose your home and damage your credit rating."[517] Second, at the time providers furnish the consumer with a written agreement from the lender or servicer memorializing the result the providers have obtained, they must disclose: "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." At the same time, providers also must provide consumer's with a notice from the consumer's loan holder or servicer that describes material differences between the terms, conditions, and limitations associated with the consumer's current mortgage and the terms, conditions, and limitations associated with the consumer's mortgage if he or she accepts the loan holder's or servicer's offer.

The Final Rule also expands the proposed disclosure of total cost in § 322.4(b)(1), such that the provider must now disclose: "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." The Rule also broadens when the required disclosures must be made in commercial communications, such that all of the disclosures—with the exception of the disclosures regarding total cost and the obligation to pay fees—must be made in every general and consumer-specific commercial communication.

B. Recordkeeping Requirements

The Rule also imposes several recordkeeping requirements. Several commenters argued generally that the proposed recordkeeping requirements were burdensome, in particular for attorney providers.[518] To address those concerns, the Final Rule exempts attorney providers from the recordkeeping provision. Most record retention requirements, however, pertain to records customarily kept in the ordinary course of business. This includes copies of contracts and consumer files containing the name and address of the borrower, telephone correspondence and written communications, and materially different versions of sales scripts and related promotional materials. As such, their retention does not constitute a "collection of information," as defined by OMB's regulations that implement the PRA.[519]

In other instances, the Rule requires MARS providers to create as well as retain documents demonstrating their compliance with specific Rule requirements. These include the requirement that providers document the following activities: (1) The mortgage relief obtained by the provider from the lender or servicer before seeking payment from a consumer; (2) monitoring of sales presentations by recording and testing of oral representations if they engage in the telemarketing of their services; (3) establishing a procedure for receiving and responding to consumer complaints; (4) ascertaining, in some instances, the number and nature of consumer complaints; and (5) taking corrective action if sales persons fail to comply with the Rule, including training and disciplining sales persons. To lessen the burden of providers who do not telemarket their services, the Commission streamlined the compliance requirements by limiting the need to record communications to providers who telemarket their services.

C. Estimated Hours Burden and Associated Labor Costs

Commission staff believes that the above noted disclosure and recordkeeping requirements will impact approximately 500 MARS providers. No comments specifically addressed and refuted this estimate nor staff's associated PRA burden assumptions and calculations. Apart from more recent available data to update staff's labor cost estimates, the FTC retains its previously published estimates without modification. The related PRA burden assumptions and calculations follow.

(1) Disclosure Requirements

The Final Rule calls for the disclosure of specific items of information to consumers and adds two additional disclosures for MARS providers. Largely, the content of the disclosures is prescribed. Thus, the PRA burden on providers is greatly reduced.[520] Staff conservatively estimates, however, that the incremental burden to prepare these documents will be approximately 2 hours. Staff assumes that management personnel will implement the disclosure requirements, at an hourly rate of $46.65.[521] Based upon these estimates and assumptions, total labor cost for 500 MARS providers to prepare the required documents is $46,650 (500 providers × 2 hours each × $46.65 per hour).

[514] *See* 44 U.S.C. 3502(3)(A).

[515] *See, e.g.,* NAAG at 4; MA AG at 3; CUUS at 4–5; LOLLAF at 3; CSBS at 2–3; AFSA at 4–5.

[516] *See supra* § III.D.2.

[517] Section 322.4 sets forth the format and content of the notice, which varies depending upon the medium used.

[518] *See supra* § III.H.2 and accompanying text and § III.G.

[519] *See* 5 CFR 1320.3(b)(2).

[520] According to OMB, the public disclosure of information originally supplied by the Federal government to a recipient for the purpose of disclosure to the public is excluded from the definition of a "collection of information." *See* 5 CFR 1320.3(c)(2).

[521] This estimate is based on an averaging of the mean hourly wages for sales and financial managers provided by the Bureau of Labor Statistics. Bur. of Labor Statistics, National Compensation Survey: Occupational Earnings in the United States, 2009, tbl. 3, at 3–1 (2010), *available at http://www.bls.gov/ncs/ncswage2009.htm* ("Occupational Earnings Survey").

(2) Recordkeeping Requirements

As noted above, the Rule contemplates that MARS providers will create and retain records demonstrating their compliance with several obligations set forth in the Rule. Staff estimates that each of the estimated 500 providers will spend approximately 25 hours to institute procedures to monitor sales presentations. Although Commission staff cannot estimate with precision the time required to document compliance with the Rule provisions, it is reasonable to assume that providers will each spend approximately 100 hours to do so. This includes preparing records demonstrating steps taken to seek payment for services performed, handling consumer complaints, and conducting training. Additionally, staff estimates that retention and filing of these records will require approximately 3 hours per year per provider.

Commission staff assumes that management personnel will prepare the required disclosures at an hourly rate of $46.65.[522] Based upon the above estimates and assumptions, the total labor cost to prepare the required documents to demonstrate compliance is $2,915,625 (500 providers × 125 hours each × $46.65 per hour).

Commission staff further assumes that office support file clerks will handle the Rule's record retention requirements at an hourly rate of $13.63.[523] Based upon the above estimates and assumptions, the total labor cost to retain and file documents is $20,445 (500 providers × 3 hours each × $13.63 per hour).

D. Estimated Capital/Other Non-Labor Cost Burden

The Rule should impose no more than minimal non-labor costs. Staff assumes that each of the estimated 500 MARS providers will make required disclosures in writing to approximately 1,000 consumers annually.[524] Under these assumptions, non-labor costs will be limited mostly to printing and distribution costs. At an estimated $1 per disclosure, total non-labor costs would be $1,000 per provider or, cumulatively for all providers, $500,000.

V. Regulatory Analysis and Regulatory Flexibility Act Requirements

The Regulatory Flexibility Act of 1980 ("RFA") [525] requires a description and analysis of proposed and Final Rule that will have a significant economic impact on a substantial number of small entities.[526] The RFA requires an agency to provide an Initial Regulatory Flexibility Analysis ("IRFA") [527] with the proposed rule and a Final Regulatory Flexibility Analysis ("FRFA") [528] with the Final Rule, if any. The Commission is not required to make such analyses if a Rule would not have such an economic effect.[529]

As of the date of the NPRM, the Commission did not have sufficient empirical data regarding the MARS industry to determine whether the Rule would impact a substantial number of small entities as defined in the RFA. It was also unclear whether the Rule would have a significant economic impact on small entities. Thus, to obtain more information about the impact of the proposed rule on small entities, the Commission decided to publish an IRFA pursuant to the RFA and to request public comment on the impact on small businesses of its proposed amended Rule. In response to questions in the NPRM, the Commission did not receive any comprehensive empirical data regarding the revenues of MARS providers or the impact on small businesses of the Rule.

A. Need for and Objectives of the Rule

The objective of the proposed rule is to curb deceptive and unfair practices occurring in the MARS industry. As described in Sections II and III, above, the Rule is intended to address consumer protection concerns regarding MARS and is based on evidence in the record that deceptive and unfair acts are common in the provision of MARS to consumers.

B. Significant Issues Raised by Public Comment, Summary of the Agency's Assessment of These Issues, and Changes, If Any, Made in Response to Such Comments

As discussed in Section III above, commenters raised concerns about the burden of the proposed rule. One consumer advocacy group stated that the Rule would "not eliminate competition; it will simply get rid of bad actors who take consumers money while failing to deliver results. MARS providers who are engaged in legitimate practices should have no added burden." [530] In contrast, another consumer advocacy group stated that complying with the disclosure and compliance requirements would be "prohibitively expensive" for consumer protection attorneys with small practices and impossible for sole practicioners.[531] However, commenters raised more significant concerns about the potential costs and burdens of the advance fee ban, as discussed in Sections III.E.1.b. Several small firms and sole practitioners owned by attorneys asserted that they would go out of business if the Commission imposed an advance fee ban.[532] Many of the commenters did not focus specifically on the costs faced by small businesses relative to those that would be borne by other firms. Rather, they argued that the costs to be borne by all firms—including small firms—would be excessive.

The Commission concludes that the Final Rule's modifications to the recordkeeping and compliance requirements and the advance fee ban reduce the economic impact of compliance on all MARS providers, including small businesses. For example, attorney providers who meet certain conditions are exempt from the recordkeeping and compliance requirements and only providers who engage in telemarketing must comply with the telephone call taping requirement. Moreover, the Final Rule permits attorney providers who are exempt to receive payments from a client trust account, provided certain conditions are met.

As noted above, the Rule will prevent unfair and deceptive conduct by MARS providers through a combination of conduct prohibitions, disclosures, affirmative compliance obligations, and recordkeeping provisions. As discussed in detail in the NPRM, the Rule's reach is limited. First, the Rule will only cover entities that are within the FTC's jurisdiction under the FTC Act. The FTC Act specifically excludes banks, thrifts, and federal credit unions from the agency's jurisdiction. Further, the definition of "mortgage assistance relief service provider" is limited to third parties offering for-fee services and does not extend to free services provided by lenders or mortgage servicers and their agents. In addition, the Rule would give attorney providers who meet certain conditions with a limited exemption from the advance fee ban, as well as

[522] *Id.*

[523] This estimate is based on mean hourly wages for office file clerks found at Occupational Earnings Survey, *supra* note 521, tbl. 3, at 3–23.

[524] Associated costs would be reduced if the disclosures are made electronically.

[525] 5 U.S.C. 601–612.

[526] The RFA definition of "small entity" refers to the definition provided in the Small Business Act, which defines a "small-business concern" as a business that is "independently owned and operated and which is not dominant in its field of operation." 15 U.S.C. 632(a)(1).

[527] 5 U.S.C. 603.

[528] 5 U.S.C. 604.

[529] 5 U.S.C. 605.

[530] CUUS at 9–10.

[531] NCLC at 4. The commenter does not indicate how many attorney MARS providers are small business or solo practitioners.

[532] *See, e.g.,* SJMA at 2; Rogers at 1; GLS at 1; LCL at 8; Holler at 1.

with an exemption from the conduct prohibitions, disclosures, substantial assistance or support prohibition, and recordkeeping and compliance provisions of the Rule.

C. Description and Estimate of the Number of Small Entities Subject to the Final Rule or Explanation Why No Estimate Is Available

The Rule will apply to MARS providers. Based upon its knowledge of the industry, the Commission believes that a variety of individuals and companies provide or purport to provide such services, including telemarketers, mortgage brokers, lead generators, payment processors, contractors that provide back-room services, and attorneys.

Comments in response to the NPRM suggest that the number of MARS providers purporting to assist distressed homeowners is growing in response to the crisis in the home mortgage industry, but do not offer empirical data on the number of such entities.[533] The available data suggest that there are a few hundred such providers. For example, FTC staff sent warning letters to 71 MARS providers in the course of its investigation of the industry. In its comments to the ANPR, NAAG stated that its members have investigated 450 companies and brought suits against 130 under state law.[534] Accordingly, Commission staff has taken a conservative approach and estimates that there are approximately 500 MARS providers. Determining a precise estimate of how many of these are small entities, or describing those entities further, is not readily feasible because the staff is not aware of published data that reports annual revenue figures for MARS providers.[535] Further, the Commission's requests for information about the number and size of MARS providers yielded virtually no information. Based on the absence of available data, the Commission believes that a precise estimate of the number of small entities that fall under the Rule is not currently feasible.

D. Description of the Projected Reporting, Recordkeeping and Other Compliance Requirements of the Proposed Rule, Including an Estimate of the Classes of Small Entities Which Will Be Subject to the Rule and the Type of Professional Skills That Will Be Necessary to Comply

The Final Rule sets forth specific recordkeeping requirements to ensure efficient and effective law enforcement, to identify individual wrongdoers, and to identify potential injured consumers. In large measure, the recordkeeping provisions require MARS providers to retain documents—consumer files and documentation of consumer transactions—that are kept in the ordinary course of business. Other recordkeeping requirements would ensure covered entities can demonstrate compliance with specific Rule provisions, which are discussed below.

The Rule has three other kinds of compliance requirements: (1) Prohibited acts and practices that are deceptive or unfair; (2) disclosures to ensure that consumers receive the truthful and accurate information they need to make an informed decision whether to purchase MARS; and (3) compliance obligations to monitor sales promotions and consumer complaints. As discussed above, these requirements are necessary to prevent unfair or deceptive acts and practices, to ensure compliance with the Rule, and to achieve effective law enforcement.

The classes of small entities, if any, covered by the rule have been discussed in the preceding section of this analysis.[536] The professional or other skills necessary for compliance with the Rule are discussed in the Paperwork Reduction Act analysis elsewhere in this document.[537]

E. Steps the Agency Has Taken To Minimize Any Significant Economic Impact on Small Entities, Consistent With the Stated Objectives of the Applicable Statutes

As previously noted, the Final Rule is intended to prevent deceptive and unfair acts and practices in the MARS industry. In drafting the Rule, the Commission has made every effort to avoid unduly burdensome requirements for entities. The Commission believes that the Rule—including the conduct prohibitions, disclosures, advance fee ban, affirmative compliance obligations and recordkeeping provisions—are necessary in order to protect consumers considering the purchase of MARS. For each of these provisions, the Commission has attempted to tailor the provision to the concerns evidenced by the record to date. For example, to reduce the burden on business, including small entities, the Commission limited the compliance requirement to record telephone calls to MARS providers who telemarket. On balance, the Commission believes that the benefits to consumers of each of the Rule's requirements outweighs the costs to industry of implementation.

The Commission considered, but decided against, providing an exemption for small entities in the Rule. The protections afforded to consumers are equally important regardless of the size of the MARS provider with whom they transact. Indeed, small MARS providers have no unique attributes that would warrant exempting them from provisions, such as the required disclosures or conduct prohibitions. The information provided in the disclosures is material to the consumer regardless of the size of the entity offering the services. Similarly, the protections afforded to consumers by the advance fee ban are equally necessary regardless of the size of the entity providing the services. Thus, the Commission believes that creating an exemption for small businesses from compliance with the Rule would be contrary to the goals of the Rule because it would arbitrarily limit its reach to the detriment of consumers.

Nonetheless, the Commission has taken care in developing the Rule to set performance standards, which establish the objective results that must be achieved by regulated entities, but do not establish a particular technology that must be employed in achieving those objectives. For example, the Commission does not specify the form in which records required by the Rule must be kept. Moreover, the Rule's disclosure requirements are format-neutral; they would not preclude the use of electronic methods that might reduce compliance burdens. In sum, the agency has worked to minimize any significant economic impact on small entities.

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[533] *See, e.g.,* MN AG at 1; CRL at 2–3; CUUS at 2.

[534] NAAG (ANPR) at 4.

[535] Covered entities under the proposed rule are classified as small businesses under the Small Business Size Standards component of the North American Industry Classification System ("NAICS") as follows: All Other Professional, Scientific and Technical Services (NAICS code 541990) with no more than $7.0 million dollars in average annual receipts (no employee size limit is listed). *See* SBA, Table of Small Business Size Standards Matched to North American Industry Classification System codes (Aug. 22, 2008), *available at http://www.sba.gov/idc/groups/public/documents/sba_homepage/serv_sstd_tablepdf.pdf.*

[536] *See supra* § V.C.

[537] *See supra* § IV.

LIST OF COMMENTERS AND SHORT-NAMES/ACRONYMS

Short-name/Acronym	Commenter
1st ALC	1st American Law Center, Inc.
ABA	American Bar Association
Am. Bankers Assoc.	American Bankers Association
AFSA	American Financial Services Association
ALMSC	American Loss Mitigation Solutions Corp.
ARS	ARS Financial Group (Rob Peters)
Baker	David Baker, Esq.
Baughman	Derek Baughman
Carr	Christopher C. Carr, Esq.
Casey	Catherine Casey
CRC	California Reinvestment Coalition, et al.
CRL	Center for Responsible Lending
CMC	Consumer Mortgage Coalition
CUUS	Consumers Union of United States, Inc.
CSBS	Conference of State Bank Supervisors
CUNA	Credit Union National Association
Chase	Chase Home Finance, LLC
Chucales	Nick Chucales
CJI	Civil Justice, Inc. (Phillip Robinson)
Dargon	Dargon Law Firm PLLC
Davidson	[Unidentified] Davidson
E. Davidson	EDLAW (Edward Davidson)
Deal	James Robert Deal, Esq.
Dix	Chris Dix
FL Bar	The Florida Bar
Francis	Crystal Francis
Franzen	Terry Franzen and Michael Pierce
GLS	Gabel Legal Services, L.L.C. (John Gabel)
Giles	Geoffrey Lynn Giles
GA	Bar Georgia State Bar
Goldberg	[Unidentified] Goldberg
Greenfield	Julia Leah Greenfield, Esq.
Gutner	John Gutner
HPC	Housing Policy Counsel
Hirsch	Ian Hirsch
Holler	George Holler
Hunter	Josiah Hunter
IL AG	Illinois Office of the Attorney General
IL RELA	Illinois Real Estate Lawyers Association
IL BA	Illinois State Bar Association
Lawson	Carol Lawson
Lawyer's Committee	The Lawyers Committee for Civil Rights Under Law
LAF	The Legal Assistance Foundation of Metropolitan Chicago
Legalprise	Legalprise, Inc.
LCL	Liberty Credit Law (H. Bruce Bronson, Jr.)
LOLLAF	Land of Lincoln Legal Assistance Foundation, Inc.
LFSV	Law Foundation of Silicon Valley
ME BA	Maine State Bar Association
MA AG	Massachusetts Office of the Attorney General
Matejcek	Karen Matejcek
McLaughlin	Heidi McLaughlin
Metropolis	Metropolis Loans (Camerin Hawthorne)
MBA	Mortgage Bankers Association
MI Bar	Michigan State Bar
MN AG	Office of the Minnesota Attorney General
MO Bar	The Missouri Bar
NAAG	National Association of Attorneys General
NAR	National Association of Relators
NCRC	National Community Reinvestment Coalition
NCLC	National Consumer Law Center, et al.
NCLR	National Council of La Raza
NV DML	Nevada Division of Mortgage Lending
NYC DCA	New York City Department of Consumer Affairs
OTS	Office of Thrift Supervision
OH AG	Ohio Attorney General
OPLC	Ohio Poverty Law Center
OR Bar	Oregon State Bar
Parkey	Aaron Parkey
Peters	Michele Peters
RMI	Rate Modifications, Inc. (David Deal)
Rodriguez	Jesse Rodriguez
Rogers	The Rogers Law Group (Rick Rogers)

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.