[1] 2009 Omnibus Appropriations Act, Pub. L. 111-8, 123 Stat. 524.

[2] *Id.* § 626(a).

www.chapa.org/pdf/ForeclosureUpdateCreditSuisse.pdf); *see also* NAAG at 2 ("An estimated 8.1 million mortgages are anticipated to be in foreclosure within the next four years.").

[25] *See* Appendix B (list of FTC actions against MARS providers).

[26] Section II.C of the ANPR described the ongoing federal, state, and local efforts to educate consumers, to assist consumers in working with

$5,600. . . .”); NCLR at 1 (observing fees as high as $8,000); NCLC at 6 (estimating fees to be between $2,000 and $4,000).

[41] *See, e.g., 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).

[42] *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. TRO at 5 (S.D. Fla. filed Nov. 24, 2009).

[43] *See, e.g.*, NAAG at 5; *see also, e.g., FTC v. Debt Advocacy Ctr., LLC*, No. 1:09CV2712 (N.D. Ohio filed Nov. 19, 2009).

[44] *See, e.g., FTC v. Fed. Housing Modification Dep't*, No. 09-CV-01753 (D.D.C. filed Sept. 15, 2009); *FTC v. LucasLawCenter "Inc.,"* No. 09-CV-770 (C.D. Cal. filed July 7, 2009).

[45] *See, e.g.*, NCLC 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.”).

[46] *See, e.g., 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, e.g., Cincinnati Bar Assoc. v. Mullaney*, 119 Ohio St. 3d 412 (2008) (disciplining attorneys involved in mortgage assistance relief services); Press Release, North Carolina Dep't of Justice, *AG Cooper Targets California Schemes that Prey on NC Homeowners* (July 15, 2009),

[55] *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).

[56] *See, e.g.*, *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 websites 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* OH AG at 4 ("Our office has seen many companies that have names or advertisement that make it sound like they are government sponsored."); NCLC 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.").

[77] In some states, mortgagors have the right to "redeem," *i.e.*, regain possession of, a property for a period of time following foreclosure.

[78] *See supra* note 35; *see also* NAAG at 2.

[79] *See supra* note 76. For example, some laws mandate that before doing 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).

[80] *See* NAAG 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 that originally promised. The trend of mortgage brokers providing services is likely to

[86] As defined in the proposed Rule, "commercial communication" is intended to include any written or verbal statement, illustration, or other depiction used to induce the purchase of goods or services. *See* Proposed § 322.2(a).

[87] Where possible, in formulating the requirements of the proposed Rule, the Commission has drawn from comparable FTC rules requiring clear and prominent disclosures. *See* Disclosure Requirements and Prohibitions Concerning Franchising, 16 CFR 436.6 (2007) (Franchise Rule); Disclosure Requirements and Prohibitions Concerning Business Opportunities, 16 CFR 437.1 (2007) (Business Opportunity Rule); Regulations Under Section 4 of the Fair Packaging and Labeling Act, 16 CFR 500.4 (1994) (Fair Packaging and Labeling Act Regulations); Trade Regulation Pursuant to the Telephone Disclosure and Dispute Resolution Act of 1992, 16 CFR 308.2 (1993) (900 Rule); Rule Concerning Cooling-Off Period for Sales Made at Home or at Certain Other Locations, 16 CFR 429.1 (1988) (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*).

[88] *See* 900 Rule, 16 CFR 308.3(a)(5); Franchise Rule, 16 CFR 436.9(a); Business Opportunity Rule, 16 CFR 437.1(a)(21) (prohibits making any oral, visual, or written representation that contradicts the information required to be disclosed by the Rule).

[89] *See, e.g., Tender Corp.*, Docket No. C-4261, File No. 082-3188 (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"); *Budget Rent-A-Car-System, Inc.*, Docket No.C-4212, File No. 062-3042 (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

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

[98] *See, e.g.*, Tom Espiner, *Web Users Ignoring Security Certificate Warnings*Juely28,t

_ 3-12097264-83.html

[113] *In re Cliffdale Assocs., Inc.*, 103 F.T.C. 110, 164-66, 175-76 (1984). Information is "material" if it is "likely to affect a consumer's choice of or conduct regarding a product."

[120] *Supra* notes 18-21.

[121] 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, Committee on Commerce, Science and Transportation, United

in May 2009 [which] showed that only 12% reduced the interest rate or wrote-off fees or principal").

[130] *Id.*; *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").

[131] *See supra* notes 62-64.

[132] TNLMA 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."). Relatedly, one commenter expressed concern that consumers could "game" a back-end fee model by rejecting the loan modification secured by the provider (in exchange for the fee) and then simply approaching the lender directly to obtain the very same modification for free. *Id.*

[133] *See, e.g.,* Gutner 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

of mortgage assistance services are never able to recover the amount of the advance payment they made to a MARS provider who neither performed promised services nor delivered promised results.[140]

Having paid in advance and not received a refund, the only remaining recourse consumers would have for a nonperforming MARS provider is to file a lawsuit for breach of contract, hardly a viable option for financially-distressed consumers who might be facing imminent foreclosure.[141] Many consumers who are in financial distress are not sophisticated in legal matters and may not be aware that filing an action against the MARS provider for breach of contract is available as an alternative. More significantly, the cost of litigating makes it impossible or impractical for many consumers to seek legal recourse. Thus, the possibility of taking legal action does not sufficiently mitigate the harm to consumers from paying an advance fee.

Based on the forgoing analysis, the Commission believes that charging an advance fee for mortgage assistance relief services is an unfair practice. The Commission reached the same conclusion in its TSR with respect to the charging of an advance fee for credit repair services, money recovery services, and guaranteed loans or other extensions of credit.[142] As is true in this proceeding, the Commission found in the TSR proceeding that companies selling those products or services routinely misrepresented the services they would perform or the results they would achieve, and that consumers paying advance fees would incur all of the risk of nonperformance. The TSR therefore prohibits telemarketers of such products or services from charging an advance fee.[143]

d. 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. There are strong public policies against charging advance fees for MARS as shown by the 20 or more state laws that prohibit this practice because of its adverse effect on consumers.[144] Consistent with these statutes and their law enforcement experience, 46 states filed comments strongly advocating that the Commission issue a rule that prohibit the charging of advance fees for MARS.[145] The Commission believes that these state laws provide further support for its finding that this practice is unfair.

2. The Advance Fee Ban to Help Prevent Deception

As a second basis for imposing an advance fee ban, the Commission believes that such a ban is reasonably related to the goal of protecting consumers from widespread deception

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[140] *See, e.g., Door-to-Door Sales Rule Statement of Basis and Purpose*, 40 FR at 53523 ("Consumers are clearly injured by a system which forces them to bear the full risk and burden of sales related abuses. There can be little commercial justification for such a system.").

[141] *In re Orkin Exterminating Co.*, 108 F.T.C. 263 at 374-75 (Oliver, Chmn., concurring) (suing for breach of contract is not a reasonable means for consumers to avoid injury).

[142] *See Telemarketing Sales Rule Statement of Basis and Purpose*, 68 FR 4580, 4614 (Jan. 29, 2003) *(TSR Statement of Basis and Purpose).*

[143] *See* 16 CFR 310.4(a). Note that, although the TSR declares the charging of advance fees in this context to be "abusive" – the term used in the Telemarketing Act – the Commission used the unfairness analysis set forth in Section 5(n) of the FTC Act to support this declaration. *See TSR: Notice of Proposed Rulemaking*, 67 FR 4492, 4511 (Jan. 30, 2002).

[144] *See supra* note 76.

[145] *See* NAAG at 9; MN AG at 4; MA AG at 2; OH AG at 3.

[146] The Commission exercises similar discretion in crafting orders to resolve law violations. *Cf. FTC v. National 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."); *FTC v. Ruberoid*, 343 U.S. 470, 473 (1952) ("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.").

[147] *See supra* notes 123-26.

[148] *See, e.g.*, NAAG at 10 ("The risk of not receiving payment provides the strongest possible incentive for mortgage consultants to promptly and adequately provide all promised services. Plus, if the consultant provides good services and the consumer obtains an affordable loan modification, the consumer should be in a better position financially to pay the consultant."); *id.* at 11 ("The incentives created for fraudulent companies to enter into this industry by allowing payment of advance fees cannot be mitigated through disclosures. The only way to ensure that companies are actually working for consumers is to require them to produce results before the consumers make payment."); NCLC at 5, 8 ("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."); MN AG at 4 ("A prohibition on up-front fees also provides the strongest incentive for loan modification and foreclosure rescue companies to provide adequate services. . . .").

[149] Although the proposed Rule prohibits deceptive representations and mandates certain disclosures, there is no assurance that these remedies would be effective in every case, or that all providers will abide by them. An advance fee ban thus also may be needed to prevent deception. The Commission in the TSR prohibited the collection of advance fees from credit repair services, money recovery services, and guaranteed loans or other extensions of credit even though the Rule also banned deceptive claims and required disclosures in marketing those products and services. *See* TSR, 16 CFR 310.1, *et seq.*; *TSR Statement of Basis and Purpose*, 68 FR 4580.

or respond to particular requests from the lender or borrower on behalf of the consumer. *See, e.g.*, NAAG 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.").

[161] The MARS provider cannot evade this prohibition by refraining from making any explicit claim about the result it will achieve (such as a loan modification) and instead offering to provide specific mortgage relief-related services, such as a review of consumers' loan documents. Such offers are likely to convey to reasonable consumers that they will receive the ultimate result that is the purpose for which they are entering into the transaction. Thus, proposed § 322.5(b) requires MARS providers to obtain the loan modification or other remedy before requesting or collecting any fee.

[162] For example, Maine's statute regarding MARS providers limits them to a $75 up-front fee. *See* ME. REV. STAT. ANN. tit. 32, § 6174-A.

[163] *See, e.g.*, NAAG at 10 ("By fees, we mean any transfer of money whatsoever from consumers to consultants. This includes monies placed in escrow, holds placed on credit cards, and checks that are post-dated."); Na2rds, andcw(The MARSes placed in)Ttaewdcw(The MARSes98-165.3(Prop3f tha91 T99 1r)Tj0 -

[170] *See, e.g.*, *FTC v. Loss Mitigation Servs., Inc.*, No. SACV09-800 DOC (ANX), Pls. Opp. Mot. Decl. Relief at 5 (C.D. Cal. filed Nov. 20, 2009) (alleging that payment processor for defendant loan modification company had "actual knowledge that the credit card charges [it] processed for [the defendant] were for advance fees in violation of relevant consumer protection laws"). In other industries, the FTC has sued payment processors for charging consumers for products or services despite indications that those products or services were illusory. *See, e.g.*, *FTC v. InterBill, Ltd.*, No. 06-cv-01644-JCM-PAL (D. Nev. Jan. 8, 2007); *FTC v. Your Money Access, LLC*, No. 07-5174 (E.D. Pa. filed Dec. 11, 2007).

[171] *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).

[172] *See supra* notes 170-71.

[173] Additionally, advertising affiliate network companies may serve as intermediaries between individual advertisers and lead generator websites.

[174] *See, e.g.*, *FTC v. Kirkland Young, LLC*, No. 09-

any direct role, in helping consumers obtain actual loan modifications"); MN AG at 5 ("The Office is aware of several loan modification and foreclosure rescue companies that have affiliated with licensed

[212] NCLC notes that HUD's criteria for approving housing counselors under the HUD Housing Counseling Program include strong recordkeeping provisions. NCLC at 7. These recordkeeping provisions include the retention of client files. *See* Mortgage and Loan Insurance Programs Under the National Housing Act and Other Authorities, 24 CFR 214.315(b) (2007). As HUD explained in its regulation: "The system must permit HUD to easily access all information needed for a performance review." *Id.* at 214.315(a). The recordkeeping requirements proposed by the Commission – focusing largely on documents pertaining to transactions between the provider and client – are similar and will enable the Commission effngdent y

[222] *See* 16 CFR 310.4(a)(6)(i)(C) (requiring telemarketers to make and maintain an audio recording of telemarketing transactions involving pre-acquired account information).

[223] *See* 16 CFR 308.7. Specifically, the 900 Rule requires billers of pay-per-call services to respond to consumer notices of billing errors, including: (1) sending a written acknowledgment to the consumer of receipt of the billing error notice; (2) correcting the billing error and crediting the consumer's

protect consumers from these practices? What would be the costs and benefits of including these types of services in the proposed Rule?

(b) The Commission intends the proposed Rule to apply to sale-leaseback and similar transactions *only* to the extent that such transactions are marketed as a means to avoid foreclosure. What are the costs and benefits of this approach? Should these services generally be exempted from coverage? Alternatively, should these services be subject to additional restrictions and limitations in the proposed Rule? What is the experience of the states in regulating these types of transactions? Does the proposed Rule conflict with state laws regulating sale-leaseback and similar transactions and, if so, how should the conflict be resolved?

(c) Are there reasons to broaden the definition of MARS to include the word "product?"

of not paying their mortgages (such as the loss of their home and damage to their credit ratings)? Why or why not? If the proposed ban on advance fees is enacted, would it be beneficial for MARS providers to disclose to consumers that fees are not owed unless promised results are delivered? Why or why not? Should MARS providers be required to disclose the minimum specific benefit the consumer will receive, *e.g.*, the minimum reduction in the monthly payment amount, for the amount of fees to be paid? Would such a disclosure be beneficial to consumers or competition? Why or why not?

(5) Should the FTC require MARS providers to disclose their historical performance? If so, how should historical performance be measured and disclosed? Could historical performance information mislead some consumers about the likelihood that they will achieve the promised results? How do the potential benefits of such a disclosure compare to the potential costs? If the FTC requires this disclosure, what if any disclosure should be required of new entrants?

4. Section 322.5: Prohibition on Collection of Advance Payments

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

(a) In particular, the Notice of Proposed Rulemaking to amend the Telemarketing Sales Rule to address the sale of debt relief services, 74 FR 41988 (Aug. 19, 2009) prohibits:

> Requesting or receiving payment of any fee or consideration from a person for any debt relief service until the seller has provided the customer with documentation in the form of a settlement agreement, debt management plan, or other such valid contractual agreement, that the particular debt has, in fact, been renegotiated, settled, reduced, or otherwise altered.

Should the standard be the same as or different than the standard articulated for debt relief services in the proposed amendments to the TSR?

(b) Would it be appropriate for the Commission to consider allowing providers to collect a limited initial fee or set-up fee at the beginning of MARS being provided? Would this provide sufficient protection for consumers? Why or why not? Do providers currently use this payment model in the MARS industry and, if so, how much do they collect upfront from consumers and in total? For what purposes do providers use such fees? What has been the experience of states that have limited the amount of the initial fee or set-up fee providers may charge consumers? If providers were permitted to collect an initial or set-up fee, what fees should be limited and what amount should be permitted?

(c) Should MARS providers who promise that consumers will obtain a specific end result (*e.g.*, a successful loan modification) be allowed to charge partial or piecemeal fees for intermediate results (*e.g.*, helping the consumer fill out required forms to apply for the loan modification)? Why or why not? Would allowing providers to charge fees for intermediate services provide an opportunity for fraudulent providers to charge consumers without ever obtaining the result consumers expect, such as a loan modification, and thus evade the advance fee ban?

(d) Should MARS providers be allowed to charge fees for individual services (*e.g.*, helping consumers fill out required forms) so long as they do *not* promise that consumers will obtain a specific end result (*e.g.*, a successful loan modification)? Why or why not? If MARS providers are allowed to collect such fees in this situation, should they be required to disclose that they are not promising to deliver a specific, or any, end result? Would such a disclosure be sufficient to avoid consumer deception?

(e) What are the costs and benefits of providers charging fees based on the level of the benefit provided? For example, what is the effect if MARS providers charge fees that are proportional to the size of the loan modification ultimately obtained for the consumer? If MARS providers charge such fees for loan modifications, should a minimum level of benefit be required? If a minimum level of benefit is required, should the minimum level be a substantial and permanent reduction in the amount of the scheduled mortgage payments, or something else? Should providers be required to charge fees based on the level of the benefit provided? Why or why not?

(2) In certain cases, proposed § 322.5 specifies that a MARS provider cannot request or receive payment until after it delivers a "mortgage loan modification" to the consumer. Mortgage loan modification is defined as a "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." Under the proposed Rule, such change must be "permanent for a period of five years or more;" or "will become permanent for a period of five years or more once the consumer successfully completes a trial period of three months or less." Is this the appropriate standard to ensure that providers confer on consumers the benefit they expect? Why or why not? Are there alternative standards that should be applied? If so, describe the suggested standard and explain the relative costs and benefits of the standard.

(a) Does the definition of "mortgage loan modification" define the conditions for payment clearly enough? Why or why not? In particular, does the term "substantially" need to be defined and, if so, what would constitute a substantial reduction for the consumer? Similarly, should the term "permanent" be modified to ensure that consumers receive a benefit consistent with reasonable expectations? If so, describe the suggested modifications and discuss the relative costs and benefits of each modification.

(3) What benefits do consumers paying fees in advance of performance provide to consumers or competition? What evidence is there that consumers who purchase MARS fail to pay the fees if fees are not collected in advance? What evidence is there that without collecting fees in advance providers could not fund their operations? Will it no longer be economically feasible for covered entities to provide particular types of services if this fee restriction is imposed? Which services will it be no longer economically feasible to provide and why?

(4) Would it be appropriate to allow providers to use escrow accounts to collect their fees upfront? What are the costs and benefits of using escrow accounts?

(a) To what extent do providers of MARS currently use escrow accounts? If so, how are these escrows structured, for example, what conditions must be met before providers are entitled to withdraw money from the escrows? Have providers abused escrow accounts, for example, by making unauthorized withdrawals or refusing to return money to consumers when services are not performed? What has been the

alternative monitoring provisions? What would be the costs and benefits of such alternatives?

(3) Proposed § 322.9(b)(4) mandates that MARS providers maintain documentation of their compliance with §§ 322.9(b)(1)-(3) of the Rule. Should the retention period for these documents be a 24-month period or an alternative period of time? For example, would a time period commensurate with the five-year statute of limitations for an FTC action for civil penalties be more appropriate? For each suggested time period, discuss why you believe it would be appropriate.

(4) Proposed § 322.9(c) permits MARS providers to retain documents in any form and in the same manner, format, or place as they keep such records in the ordinary course of business. Is this flexibility warranted in the context of MARS? Should the Commission specify how documents should be retained? If so, explain what you believe to be the appropriate standard for retaining documents.

Interested parties are invited to submit written comments electronically or in paper form. Comments should refer to "Mortgage Assistance Relief Services Rulemaking, Rule No. R911003" to facilitate the organization of comments. Please note that your comment – including your name and your state – will be placed on the public record of this proceeding, including on the publicly accessible FTC website, at (*http://www.ftc.gov/os/publiccomments.shtm*).

Because comments will be made public, they should not include any sensitive personal information, such as any individual's Social Security number; date of birth; driver's license number or other state identification number, or foreign country equivalent; passport number; financial account number; or credit or debit card number. Comments also should not include any sensitive health information, such as medical records or other individually identifiable health information. In addition, comments should not include any "[t]rade secret or any commercial or financial information which is obtained from any person and which is privileged or confidential. . . . ," as provided in Section 6(f) of the FTC Act, 15 U.S.C. 46(f), and Commission Rule 4.10(a)(2), 16 CFR 4.10(a)(2). Comments containing material for which confidential treatment is requested must be filed in paper form, must be clearly labeled "Confidential," and must comply with FTC Rule 4.9(c), 16 CFR 4.9(c).[226] Co 1 Tfa 3485 -1 ...Tc0 TD-jT*(at t nddried d.0029 mments will b 16 CFRons fdenTjj617.002delay duation is appl

[226] The comment must be accompanied by an explicit request for confidential treatment, including the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. The request will be granted or denied by the Commission's General Counsel, consistent with applicable law and the public interest. *See* 16 CFR 4.9(c).

[227] *See* 16 CFR 1.26(b)(5).

[228] 5 U.S.C. 601-612.

[229] 5 U.S.C. 603-605. Covered entities under the proposed Rule will be classified as small businesses if they satisfy the Small Business Administrator's relevant size standards, as determined by the Small Business Size Standards component of the North American Industry Classification System (NAICS). Because a wide range of individuals and companies may provide mortgage assistance relief services to homeowners, no one classification is applicable to this rulemaking. The closest NAICS size standards relevant to this rulemaking is $7-8.5 million maximum in annual receipts. That is the range in size standard for comparable professional and support services, such as those for lawyers ($7 million), tax preparation services ($7 million), certified public accountants ($8.5 million), human resources consulting services ($7 million), and marketing consulting services ($7 million).

proposed Rule will 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 proposed 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 proposed Rule would provide attorneys with a limited exemption from the advance fee ban, as well as with a broad exemption from its prohibition against directing consumers not to contact their lender or servicer.

As detailed below, the Commission believes that the proposed Rule is likely to cover several hundred MARS providers. Although the Commission does not know the precise number of such providers, its conservative estimate is that the Rule will cover approximately 500 providers. It is not known, however, how many of those 500 providers, if any, are small entities. The Commission nonetheless believes that the number of providers that are small entities is not likely to be substantial and, therefore, the proposed Rule is not likely to have a significant economic impact on a substantial number of small entities. Accordingly, this document serves as notice to the Small Business Administration of the Commission's certification of no economic impact. Nonetheless, the FTC has determined to prepare the following analysis:

A. Description of the Reasons That Action by the Agency is Being Considered

The Commission proposes, and seeks comment on, a rule to implement Section 626 of the Omnibus Appropriations Act, as amended by the Credit CARD Act, which mandates that the Commission initiate a rulemaking with respect to mortgage loans. Section 511 of the Credit CARD Act clarified that the Commission's rulemaking should relate to unfair or deceptive acts or practices, and stated that the FTC's implementing rules should address "loan modification and foreclosure rescue services." In addition, the proposed Rule will cover those entities over which the FTC has jurisdiction under the FTC Act – entities other than banks, thrifts, federal credit unions, and nonprofits that engage in the conduct the rule would cover. Through this document, the Commission proposes, and seeks comment on, prohibitions, disclosures, affirmative compliance requirements, and recordkeeping provisions aimed at for-profit MARS providers to prevent deceptive and unfair practices that harm borrowers, consistent with the goals of the Act.

B. Statement of the Objectives of, and Legal Basis for, the Proposed Rule

The proposed Rule is intended to implement Section 626 of the Omnibus Appropriations Act, as amended by the Credit CARD Act, which directs the Commission to initiate a rulemaking with respect to mortgage loans. As noted above, the Omnibus Act, as amended, directs the Commission to initiate a rulemaking related to unfair or deceptive acts or practices with respect to mortgage loans. Through the rulemaking, the Commission seeks to prevent deceptive and unfair acts and practices in the mortgage assistance relief services industry, which has been the subject of numerous individual law enforcement actions under Section 5 of the FTC Act.

C. Small Entities to Which the Proposed Rule Will Apply

The proposed Rule will apply to mortgage assistance relief service 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 ANPR suggest that the number of MARS providers purporting to assist distressed homeowners is growing in response to the crisis in the home mortgage industry,[230] but do not offer empirical data on the number of such entities.[231] 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 comment, the National Community Reinvestment Coalition reported testing of 100 MARS providers. NAAG stated that its members have investigated 450 companies and brought suits against 130 under state law.[232] Accordingly, Commission staff has taken a conservative approach and estimates that there are approximately 500 mortgage assistance relief service providers. Nonetheless, staff cannot readily estimate the number of such providers, if any, that are small entities. Accordingly, the Commission specifically requests additional comment on: (1) the number of individuals or entities that provide mortgage assistance relief services; and (2) the number of such providers, if any, that are small entities.

D. Projected Reporting, Recordkeeping, and Other Compliance Requirements

The proposed 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 proposed recordkeeping requirements would ensure covered entities can demonstrate compliance with specific proposed Rule provisions, which are discussed below.

The proposed 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.[233] The professional or other skills necessary for compliance with the proposed Rule are discussed in the Paperwork Reduction Act analysis elsewhere in this document.[234]

E. Duplicative, Overlapping, or Conflicting Federal Rules

The Commission has not identified any other federal statutes, rules, or policies that would duplicate, overlap, or conflict with the proposed Rule. The Commission invites comment on this issue.

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[230] *See, e.g.*, MA AG at 1-2; NAAG at 3-4; OH AG at 1.

[231] For example, NAAG explained that it is difficult to obtain empirical data on providers "due to the prominence of internet-based companies and their ephemeral nature. The difficulty of gathering information is increased due to the fact many of these companies operate primarily over the internet and do not maintain a physical presence in the states in which they do business." NAAG at 3.

[232] NAAG at 4.

[233] *See supra* § VI.C.

[234] *See infra* § VII.

F. Significant Alternatives to the Proposed Rule Amendments

As previously noted, the proposed Rule is intended to prevent deceptive and unfair acts and practices in the mortgage assistance relief services industry, as mandated by the Act. The proposed Rule is intended to achieve that goal without creating unnecessary compliance costs. To achieve that goal, the Commission proposes a definition of "mortgage assistance relief service provider" that focuses on for-fee third-party providers. The term does not include the mortgage loan holder or servicer of a mortgage, or any agent of either, provided that the agent does not receive any money or other valuable consideration from the borrower for the agent's own benefit.[235] Further, as discussed in Section III.I above, providers generally must keep only consumer files and consumer transactional records that are retained in the ordinary course of business. In addition, proposed § 322.9(c) states that providers may keep the records in any form and in the same manner, format, or place as they keep records in the ordinary course of business.

The proposed Rule also limits the type of information that must be retained to a minimum. For example, providers must maintain records relating to actual transactions with customers; they are not required to keep records if consumers do not sign contracts or otherwise agree to an offer of mortgage assistance relief services. In addition, providers must retain only materially different versions of advertising and related materials.[236] Finally, the proposed Rule calls for a 24-month record retention period. The Commission believes this is the minimum amount of time necessary for consumers to report violations of the Rule and for the Commission to complete investigations of noncompliance and to identify victims.

Furthermore, the recordkeeping and disclosure requirements are format-neutral; they would not preclude the use of electronic methods that might reduce compliance burdens. In addition, the Commission is not aware of any feasible or appropriate exemptions for small entities because the proposed Rule attempts to minimize compliance burdens for all entities.

Nonetheless, the Commission seeks additional comment regarding: (1) the existence of small entities for which the proposed Rule would have a significant

[235] *See* ABA at 8; AFSA at 1, 3; Chase at 1; CMC at 1; MBA at 3-4 (urging the Commission not to cover mortgage servicers or third parties retained by mortgage servicers to assist homeowners on a not-for-profit basis).

[236] *See TSR Statement of Basis and Purpose*, 60 FR at 43858 (recognizing the burden imposed by requiring the retention of each and every script, advertisement, and promotional piece, "much of which may be worthless or redundant from a law enforcement standpoint.").

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

[238] Proposed § 322.4 sets forth the format and content of the notice, which varies depending upon the medium used.

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

[240] 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).

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Appendix B – List of FTC MARS Law Enforcement Actions

MARS Proposed Rule

FTC v. First Universal Lending, LLC, No. 09-CV-82322 (S.D. Fla. filed Nov. 24, 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-DV-61846 (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)

[245] Pub. L. No. 111-8, § 626, 123 Stat. 524, as amended by Pub. L. No. 111-24, § 511, 123 Stat. 1734.

(4) In communications made through interactive media, such as the Internet,

manner, in every commercial communication for any mortgage assistance relief service:

> "(Name of company) is a for-profit business not associated with the government. This offer has not been approved by the government or your lender."

(2) In textual communications except for communications not covered by paragraph (b) of this section, the required disclosure also must be preceded by the statement "IMPORTANT NOTICE"

regarding transactions in which all employees and independent contractors are involved;

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

(3) Take corrective action with respect to any employee or independent contractor whom the mortgage assistance relief service provider determines is not complying with this rule, which may include training, disciplining, or terminating such person; and

(4) Maintain documentation of its compliance with paragraphs (b)(1)-(3) of this section.

(c) A mortgage assistance relief provider may keep the records required by § 322.9 (a) and (b) in any form, and in the same manner, format, or place as they keep such records in the ordinary course of business. Failure to keep all records required under § 322.9 (a) and (b) shall be a violation of this Part.

§ 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, Pub. L. 111-8, § 626, 123 Stat. 524 (Mar. 11, 2009), as amended by Pub. L. 111-24, § 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.

[FR Doc. 2010–4651 Filed 3–8–10; 8:45 am]

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DEPARTMENT OF LABOR

Occupational Safety and Health Administration

29 CFR Part 1904

[Docket No. OSHA–2009–0044]

RIN 1218–AC45

Occupational Injury and Illness Recording and Reporting Requirements

AGENCY: Occupational Safety and Health Administration (OSHA), Labor.

ACTION: Extension of comment period.

SUMMARY: OSHA is extending the comment period on the proposed rule on Occupational Injury and Illness Recording and Reporting Requirements to March 30, 2010. The proposal would restore a column to the OSHA 300 Log that employers would use to record work-related musculoskeletal disorders (MSDs).

DATES: The comment period for the proposed rule published January 29, 2010, at 75 FR 4728, is extended. Comments must be submitted (postmarked, sent or received) by March 30, 2010.

ADDRESSES: You may submit comments, identified by Docket No. OSHA–2009–0044, by any one of the following methods:

Electronically: You may submit comments and attachments electronically at *http://*