

types of loans? What are the costs and benefits of mandating its disclosure?

iii. What would be the effect on competition and consumers if the Commission were to require non-bank financial companies to make these disclosures, but banks, thrifts, and federal credit unions were not similarly required to do so?

18. Should the FTC consider prohibiting or restricting as unfair or deceptive certain acts and practices related to mortgage servicing fees or related charges, such as:

a. charging fees not authorized under the mortgage contract;

b. charging fees not authorized by state law;

c. charging for "estimated" attorney fees or other fees for services not rendered;

d. charging late fees that are not permitted under the service agreement or that are otherwise improper (other than "fee pyramiding," which is already prohibited under the Board's Regulation Z amendments¹¹⁴);

e. failing to disclose and itemize adequately fees in billing statements or other relevant communications with borrowers; or

f. forcing consumers to buy insurance on their homes when the servicer knows or should know that insurance is already in place?

Identify any such act or practice, and for each, please answer the following questions:

i. Why is it unfair or deceptive under Section 5 of the FTC Act?

ii. Should it be prohibited or restricted? If so, how? For all loans or only certain types of loans? What are the costs and benefits of such prohibitions or restrictions?

iii. What would be the effect on competition and consumers if the Commission were to prohibit or restrict non-bank financial companies with respect to the act or practice, but banks, thrifts, and federal credit unions were not similarly prohibited or restricted?

19. Should the FTC consider prohibiting or restricting as unfair or deceptive certain acts and practices related to how mortgage servicers handle payments, amounts owed, or consumer disputes, such as:

a. failing to post payments in a timely and proper manner (beyond the new prohibition under the Board's Regulation Z amendments);

b. mishandling of partial payments or suspense accounts;

c. misrepresentation of amounts owed or other account terms or the status of the account;

d. making claims to borrowers about their loan accounts without a reasonable basis (*i.e.*, lack of substantiation);

e. failing to have a adequate procedures to ensure accuracy of information used to service loans; or

f. failing to maintain and provide adequate customer service to handle disputes?

Identify any such act or practice, and for each, please answer the following questions:

i. Why is it unfair or deceptive under Section 5 of the FTC Act?

ii. Should it be prohibited or restricted? If so, how? For all loans or only certain types of loans? What are the costs and benefits of such prohibitions or restrictions?

iii. What would be the effect on competition and consumers if the Commission were to prohibit or restrict non-bank financial companies with respect to the act or practice, but banks, thrifts, and federal credit unions were not similarly prohibited or restricted?

20. Should the FTC consider prohibiting or restricting as unfair or deceptive certain acts and practices related to how mortgage servicers handle loan performance and loss mitigation issues, such as:

a. taking foreclosure action without first verifying loan information and investigating any disputes;

b. taking foreclosure action without first giving the consumer an opportunity to attend foreclosure counseling or mediation;

c. requiring consumers to release all claims (or other requirements, such as requiring binding arbitration agreements) in connection with loan modifications or other workout agreements/repayment plans; or

d. making loan modifications or other workout agreements/repayment plans without regard to the consumer's ability to repay?

Identify any such act or practice, and for each, please answer the following questions:

i. Why is it unfair or deceptive under Section 5 of the FTC Act?

ii. Should it be prohibited or restricted? If so, how? For all loans or only certain types of loans? What are the costs and benefits of such prohibitions or restrictions?

iii. What would be the effect on competition and consumers if the Commission were to prohibit or restrict non-bank financial companies with respect to the act or practice, but banks, thrifts, and federal credit unions were not similarly prohibited or restricted?

21. Should the FTC consider prohibiting or restricting as unfair or deceptive certain acts and practices

related to servicing of mortgage loans in connection with bankruptcy proceedings, such as:

a. failing to disclose fees incurred during a Chapter 13 bankruptcy case and then seeking to collect them from the consumer after discharge/dismissal?

b. filing of proofs of claim or other bankruptcy filings without a reasonable basis (*i.e.*, impose a substantiation requirement beyond Rule 11 of the Federal Rules of Civil Procedure);

c. failing to apply properly payments in bankruptcy to pre-petition/post-petition categories of the consumer's debts; or

d. charging of specific unnecessary or excessive fees in bankruptcy cases (*e.g.*, duplicative attorneys' fees)?

Identify any such act or practice, and for each, please answer the following questions:

i. Why is it unfair or deceptive under Section 5 of the FTC Act?

ii. Should it be prohibited or restricted? If so, how? For all loans or only certain types of loans? What are the costs and benefits of such prohibitions or restrictions?

iii. What would be the effect on competition and consumers if the Commission were to prohibit or restrict non-bank financial companies with respect to the act or practice, but banks, thrifts, and federal credit unions were not similarly prohibited or restricted?

22. Do any recent reports, studies, or research provide data relevant to mortgage servicing rulemaking? If so, please provide or identify such reports, studies, or research.

By direction of the Commission.

Donald S. Clark

Secretary

[FR Doc. E9-12595 Filed 5-29-09; 8:45 am]

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FEDERAL TRADE COMMISSION

16 CFR Parts 321 and 322

[RIN 3084-AB18]

Advance Notice of Proposed Rulemaking: Mortgage Assistance Relief Services

AGENCY: Federal Trade Commission (FTC or Commission)

ACTION: Advance Notice of Proposed Rulemaking; request for comment

SUMMARY: President Obama signed the 2009 Omnibus Appropriations Act on March 11, 2009. Section 626 of the Act directed the Commission to initiate, within 90 days of the date of enactment, a rulemaking proceeding with respect to

¹¹⁴ See note 102, *supra*.

mortgage loans. To implement the Act, the Commission has commenced a rulemaking proceeding in two parts. This Advance Notice of Proposed Rulemaking (ANPR), the Mortgage Assistance Relief Services Rulemaking, addresses the practices of entities (other than mortgage servicers) who offer assistance to consumers in dealing with owners or servicers of their loans to modify them or avoid foreclosure. Another ANPR, the Mortgage Acts and Practices Rulemaking, will address more generally activities that occur throughout the life-cycle of a mortgage loan, i.e., practices with regard to mortgage loan advertising and marketing, origination, appraisals, and servicing. The Commission is seeking public comment with regard to the unfair and deceptive acts and practices that should be prohibited or restricted pursuant to any rules adopted in these proceedings. Any rules adopted will apply to entities, other than banks, thrifts, federal credit unions, and non-profits, that are engaged in such unfair and deceptive acts and practices.

DATES: Comments must be received by July 15, 2009.

ADDRESSES: 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 comments will be placed on the public record of this proceeding—including on the publicly accessible FTC website, at (<http://www.ftc.gov/os/publiccomments.shtml>)—and therefore should not include any sensitive or confidential information. In particular, comments should not include any sensitive personal information, such as an 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 secrets and commercial or financial information obtained from a person and 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).¹

Because paper mail addressed to the FTC is subject to delay due to heightened security screening, please consider submitting your comments in electronic form. Comments filed in electronic form should be submitted by using the following weblink: (<https://secure.commentworks.com/ftc-mortgage-assistancereliefservices>) (and following the instructions on the web-based form). To ensure that the Commission considers an electronic comment, you must file it on the web-based form at the weblink (<https://secure.commentworks.com/ftc-mortgage-assistancereliefservices>). If this Notice appears at (<http://www.regulations.gov/search/index.jsp>), you may also file an electronic comment through that website. The Commission will consider all comments forwarded to it by regulations.gov. You may also visit the FTC website at <http://www.ftc.gov> to read the Notice and the news release describing it.

A comment filed in paper form should include the reference "Mortgage Assistance Relief Services Rulemaking, Rule No. R911003" both in the text of the comment and on the envelope, and should be mailed or delivered to the following address: Federal Trade Commission, Office of the Secretary, Room H-135 (Annex W), 600 Pennsylvania Avenue, NW., Washington, DC 20580. The FTC requests that any comment filed in paper form be sent by courier or overnight service, if possible, because U.S. postal mail in the Washington area and at the Commission is subject to delay due to heightened security precautions.

The FTC Act and other laws administered by the Commission permit the collection of public comments to consider and use in this proceeding as appropriate. The Commission will consider all timely and responsive public comments received, whether filed in paper or electronic form. Comments received will be available to the public on the FTC website, to the extent practicable, at (<http://www.ftc.gov/os/publiccomments.shtml>). As a matter of discretion, the Commission makes every effort to remove home contact information from

¹ 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 FTC Rule 4.9(c), 16 CFR 4.9(c).

comments filed by individuals before placing those comments on the FTC website. More information, including routine uses permitted by the Privacy Act, may be found in the FTC's privacy policy, at (<http://www.ftc.gov/ftc/privacy.shtml>).

FOR FURTHER INFORMATION CONTACT:

Evan Zullo or Stephen Shin, Attorneys, (202) 326-3224, Division of Financial Practices, Federal Trade Commission, 600 Pennsylvania Avenue, NW, Washington, DC 20580.

SUPPLEMENTARY INFORMATION:

I. Background

A. FTC Rulemaking Authority Pursuant to the Omnibus Appropriations Act of 2009

Section 626 of the Omnibus Appropriations Act of 2009² requires that, within 90 days of enactment, the FTC initiate a rulemaking proceeding with respect to mortgage loans. Pursuant to the Act, the rulemaking proceeding will be conducted in accordance with the requirements of Section 553 of the Administrative Procedure Act.³ To implement the Omnibus Appropriations Act of 2009, the Commission has commenced a rulemaking proceeding in two parts.

This ANPR, the Mortgage Assistance Relief Services (MARS) Rulemaking, addresses the practices of entities (other than mortgage servicers) who offer assistance to consumers in dealing with owners or servicers of their loans to modify them or avoid foreclosure. Another ANPR, the Mortgage Acts and Practices (MAP) Rulemaking, addresses more generally activities that occur throughout the life-cycle of a mortgage loan, i.e., practices with regard to mortgage loan advertising and marketing, origination, appraisals, and servicing. Although the Omnibus Appropriations Act of 2009 specifies neither the type of conduct nor the types of entities any proposed rules should address, the Commission has used its organic statute, the FTC Act, in establishing the parameters for this rulemaking.⁴ In particular, the types of

² Omnibus Appropriations Act of 2009, Pub. L. No. 111-8, § 626, 123 Stat. 524 (Mar. 11, 2009).

³ 5 U.S.C. 553. Section 626 of the Omnibus Appropriations Act of 2009 authorizes use of these procedures in lieu of the procedures set forth in Section 18 of the FTC Act, 15 U.S.C. 57a. Note that, because this rulemaking is not undertaken pursuant to Section 18, 15 U.S.C. 57a(f), federal banking agencies are not required to promulgate substantially similar regulations for entities within their jurisdiction. Nonetheless, the Commission plans to consult with the federal banking agencies in this proceeding.

⁴ The available legislative history is consistent with the Commission's determination as to the

conduct that the FTC proposes to cover include acts and practices that meet the FTC's standards for unfairness or deception under Section 5 of the FTC Act.⁵ In addition, the entities that the FTC intends to cover are those over which the FTC has jurisdiction under the FTC Act—specifically, entities other than banks, thrifts, federal credit unions,⁶ and non-profits⁷ that engage in the conduct the rules would cover.

The Commission is seeking comments on a series of questions related to loan modification and foreclosure rescue. The FTC is seeking comments to determine whether certain acts and practices of loan modification and foreclosure rescue entities are unfair or deceptive under Section 5 of the FTC Act and should be incorporated into a proposed rule. These acts and practices include conduct that the FTC currently could challenge in a law enforcement action as violating Section 5 of the FTC Act. However, the Commission is not seeking comments on statutes that have been enacted and rules that have been issued on these topics.

Pursuant to Section 626 of the Omnibus Appropriations Act of 2009, any violation of a rule adopted under that section will be treated as a violation of a rule promulgated pursuant to Section 18 of the FTC Act.⁸ Therefore, pursuant to Section 5(m)(1)(A) of the FTC Act,⁹ the Commission may seek civil penalties as a remedy for such rule violations. In addition, pursuant to Section 626(b) of the Omnibus Appropriations Act of 2009, a state may bring a civil action, in either state or federal court, to enforce the FTC mortgage loan rules and obtain civil penalties and other relief for violations. Before initiating an enforcement action, the state must notify the FTC, at least 60 days in advance, and the Commission may intervene in the action.

scope of the FTC's rulemaking. See 155 Cong. Rec. S2816-S2817 (2009).

⁵ 15 U.S.C. 45(a)(1). For a comprehensive description of the FTC's application of its unfairness and deception authority in the context of financial services, see Letter from the FTC staff to John E. Bowman, Chief Counsel of the Office of Thrift Supervision (Dec. 12, 2007), available at (<http://www.ftc.gov/os/2007/12/P084800anpr.pdf>).

⁶ 15 U.S.C. 45(a)(2).

⁷ 15 U.S.C. 44. Bona fide non-profit entities are exempt from the jurisdiction of the FTC Act. Sections 4 and 5 of the FTC Act confer on the Commission jurisdiction only over persons, partnerships, or corporations organized to carry on business for their profit or that of their members. See 15 U.S.C. 44, 45(a)(2).

⁸ 15 U.S.C. 57a.

⁹ 15 U.S.C. 45(m)(1)(A).

B. FTC Authority Over Mortgage Loans and Other Financial Services

The Commission has law enforcement authority over a wide range of acts and practices throughout the consumer credit life-cycle. The agency enforces Section 5 of the Federal Trade Commission Act, which prohibits "unfair or deceptive acts or practices in or affecting commerce."¹⁰ The Commission also enforces other consumer protection statutes that govern financial services providers. These include the Truth in Lending Act (TILA),¹¹ the Home Ownership and Equity Protection Act,¹² the Consumer Leasing Act,¹³ the Fair Debt Collection Practices Act,¹⁴ the Fair Credit Reporting Act (FCRA),¹⁵ the Equal Credit Opportunity Act,¹⁶ the Credit Repair Organizations Act,¹⁷ the Electronic Funds Transfer Act,¹⁸ the Telemarketing and Consumer Fraud and Abuse Prevention Act,¹⁹ and the privacy provisions of the Gramm-Leach-Bliley (GLB) Act.²⁰

Notwithstanding the Commission's broad authority over acts and practices related to financial services, the FTC does not have jurisdiction over all providers of these services. The FTC Act specifically excludes banks, thrifts, and federal credit unions from the agency's

jurisdiction.²¹ However, non-bank affiliates of banks, such as parent companies or subsidiaries, are subject to the Commission's jurisdiction.²² Likewise, the FTC has jurisdiction over entities that have contracted with banks to perform certain services on behalf of banks, such as credit card marketing and other services, but which are not themselves banks.²³ As a result, non-bank entities that provide financial services to consumers are subject to Commission jurisdiction, even if they are affiliated with, or are contracted to perform services for, banking entities.

The Commission also does not have jurisdiction under the FTC Act over non-profit organizations.²⁴ However, the FTC does have jurisdiction over for-profit entities that provide mortgage-related services as a result of a contractual relationship with a non-profit organization.²⁵

As discussed above, the Commission intends that any rules that it issues in this proceeding would apply only to the same types of entities over which the Commission has jurisdiction under the FTC Act.

²¹ 15 U.S.C. 45(a)(2). The FTC Act defines "banks" by reference to a listing of certain distinct types of legal entities. See 15 U.S.C. 44, 57a(f)(2). That list includes: national banks, federal branches of foreign banks, member banks of the Federal Reserve System, branches and agencies of foreign banks, commercial lending companies owned or controlled by foreign banks, banks insured by the Federal Deposit Insurance Corporation, and insured state branches of foreign banks.

²² Congress clarified FTC jurisdiction when it enacted the GLB Act. Section 133(a) of the GLB Act states that an entity that is affiliated with a bank, but which is not itself a bank, is not a bank for purposes of the FTC Act. Section 133(a) of the GLB Act specifically provides:

CLARIFICATION OF FEDERAL TRADE COMMISSION JURISDICTION. Any person that directly or indirectly controls, is controlled directly or indirectly by, or is directly or indirectly under common control with, any bank or savings association . . . and is not itself a bank or savings association shall not be deemed to be a bank or savings association for purposes of any provisions applied by the Federal Trade Commission under the Federal Trade Commission Act.

Pub. L. No. 106-102, § 133(a), 113 Stat. 1383; 15 U.S.C. 41 note (a). This section has been interpreted to apply to subsidiaries of banks that are not themselves banks. *Minnesota v. Fleet Mortgage Corp.*, 181 F. Supp. 2d 995 (D. Minn. 2001).

²³ See, e.g., *FTC v. CompuCredit Corp.*, Civil Action No. 1:08-CV-01976-BBM-RGV (N.D. Ga. 2008) (approving stipulated final order involving FTC action against entity that contracted to perform credit card marketing services for a bank); *FTC v. Am. Standard Credit Sys.*, 874 F. Supp. 1080, 1086 (C.D. Cal. 1994) (dismissing argument that entity that contracted to perform credit card marketing and other services for a bank is not subject to FTC Act).

²⁴ See 15 U.S.C. 44.

²⁵ See *Nat'l Fed'n of the Blind v. FTC*, 420 F.3d 331, 334-35 (4th Cir. 2005). In addition, the Commission asserts jurisdiction over "sham charities" that operate as for-profit entities in practice. See, e.g., *FTC v. Ameridebt, Inc.*, 343 F. Supp. 2d 451 (D. Md. 2004).

¹⁰ 15 U.S.C. 45(a)(1).

¹¹ 15 U.S.C. 1601-1666j (mandates disclosures and other requirements in connection with consumer credit transactions).

¹² 15 U.S.C. 1639 (provides protections for consumers entering into certain high-cost mortgage refinance loans).

¹³ 15 U.S.C. 1667-1667f (requires disclosures, limits balloon payments, and regulates advertising in connection with consumer lease transactions).

¹⁴ 15 U.S.C. 1692-1692p (prohibits abusive, deceptive, and unfair debt collection practices by third-party debt collectors).

¹⁵ 15 U.S.C. 1681-1681x (imposes standards for consumer reporting agencies and information furnishers; places restrictions on the use of consumer report information). The Fair and Accurate Credit Transactions Act of 2003 amended the FCRA. Pub. L. No. 108-159, 117 Stat. 1952 (2003).

¹⁶ 15 U.S.C. 1691-1691f (prohibits creditor practices that discriminate on the basis of race, religion, national origin, sex, marital status, age, receipt of public assistance, or the exercise of certain legal rights).

¹⁷ 15 U.S.C. 1679-1679j (mandates disclosures and other requirements in connection with credit repair organizations, including a prohibition against charging fees until services are completed).

¹⁸ 15 U.S.C. 1693-1693r (establishes rights and responsibilities of institutions and consumers in connection with electronic fund transfer services).

¹⁹ 15 U.S.C. 6101-6108 (provides consumer protection from telemarketing deception and abuse and requires the Commission to promulgate implementing rules).

²⁰ 15 U.S.C. 6801-6809 (requires financial institutions to provide annual privacy notices; provides consumers the means to opt out from having certain information shared with non-affiliated third parties; and safeguards customers' personally identifiable information).

C. Deceptive and Unfair Acts and Practices

1. Deceptive Acts and Practices

Section 5 of the FTC Act broadly proscribes deceptive or unfair acts or practices in or affecting commerce. An act or practice is deceptive if there is a representation, omission of information, or practice that is likely to mislead consumers, who are acting reasonably under the circumstances, and the representation, omission, or practice is one that is material.²⁶ Injury is likely if the misleading or omitted information is material to consumers, *i.e.*, likely to affect a decision to purchase or use a product or service.

To determine that an act or practice is deceptive, the Commission first must conclude that there is a representation, omission of information, or a practice that is likely to mislead consumers. A claim about a product or service may be either express or implied. An express claim generally is established by the representation itself. An implied claim, on the other hand, is an indirect representation, which must be examined within the context of other information that is either presented or omitted. Deception may occur based on what is stated or because of the omission of information that would be important to the consumer. In determining that an advertisement is deceptive, for example, the Commission considers whether the overall net impression of the ad (including language and graphics) is likely to mislead consumers.²⁷

Second, the Commission considers the act or practice from the perspective of a consumer acting reasonably under the circumstances.²⁸ Reasonableness is evaluated based on the sophistication and understanding of consumers in the group to whom the representation or sales practice is directed. If a specific audience is targeted, the Commission will consider the effect on a reasonable member of that target group. A representation may be susceptible to

more than one reasonable interpretation, and if one such interpretation is misleading, the advertisement is deceptive, even if other non-deceptive interpretations are possible.²⁹

Third, to conclude that deception has occurred, the Commission must determine that the representation, omission, or practice is material, *i.e.*, one that is likely to affect a consumer's decision to purchase or use a product or service. A deceptive representation, omission, or practice that is material is likely to cause consumer injury—that is, but for the deception, the consumer may have made a different choice.³⁰ Express claims about a product or service, such as statements about cost, are presumed to be material. Claims about purpose and efficacy of a product or service are also presumed to be material.³¹

2. Unfair Acts and Practices

Section 5(n) of the FTC Act also sets forth a three-part test to determine whether an act or practice is unfair.³² First, the practice must be one that causes or is likely to cause substantial injury to consumers. Second, the injury must not be outweighed by countervailing benefits to consumers or to competition. Third, the injury must be one that consumers could not reasonably have avoided.

In analyzing whether injury is substantial, the Commission is not concerned with trivial, speculative, or more subjective types of harm. The substantial injury test may be met by small harm to a large number of consumers. In most cases, substantial injury involves monetary harm. Once it determines that there is substantial consumer injury, the Commission considers whether the harm is offset by any countervailing benefits to consumers or to competition. Thus, the Commission considers both the costs of imposing a remedy and any benefits that consumers enjoy as a result of the practice at issue. Finally, the injury must be one that consumers cannot reasonably avoid. If consumers reasonably could have made a different choice that would have avoided the injury, but did not do so, the practice is not deemed to be unfair under the FTC Act.

In applying its unfairness standard, the Commission takes the approach that

well-informed consumers are capable of making choices for themselves. The agency therefore may prohibit or restrict acts and practices if they unreasonably create, or take advantage of, an obstacle to the ability of consumers to make informed choices, thus causing, or being likely to cause, consumer injury.³³

II. Loan Modification and Foreclosure Rescue Services

With the recent economic downturn, more consumers have become delinquent on their mortgages or at risk of foreclosure. Others, even if not yet delinquent, are struggling to pay their mortgage debt. To respond to these problems, many consumers have sought to modify their loans or purchase services to assist them in avoiding foreclosure. However, the acts and practices of some companies that provide or advertise loan modification and foreclosure rescue services have raised substantial consumer protection concerns. To date, the Commission has addressed these concerns primarily through law enforcement under Section 5 of the FTC Act. Through this ANPR, the FTC seeks comment on whether it should also issue rules to address the conduct of those who provide or advertise loan modification and foreclosure rescue services.

A. Mortgage Loan Servicing

In the past, mortgage lenders usually made loans to consumers and then held the loans until consumers paid off their mortgages or sold their homes. In more recent years, however, more mortgage lenders have regularly sold their loans to others. Thus, the owner of a mortgage loan may be either the originating lender or an investor who has purchased the loan.

Owners of loans often contract with others to service their loans. A mortgage servicer is the agent responsible for handling the day-to-day aspects of a loan on behalf of the loan's owner. A mortgage servicer's responsibilities

²⁶ Federal Trade Commission Policy Statement on Deception, *appended to In re Cliffdale Assocs.*, 103 F.T.C. 110, 174-84 (1984) (Deception Policy Statement).

²⁷ Disclaimers or qualifying statements are important to consider for deception analysis. Such disclaimers must be sufficiently clear, prominent, and understandable to convey the qualifying information effectively to consumers. The Commission recognizes that often "reasonable consumers do not read the entirety of an ad or are directed away from the importance of the qualifying phrase by the acts or statements of the seller." Deception Policy Statement at 181. Thus, fine print disclosures at the bottom of a print ad or television screen are unlikely to cure an otherwise deceptive representation.

²⁸ Deception Policy Statement at 177-81.

²⁹ *Id.* at 178.

³⁰ *Id.* at 182-83.

³¹ *Novartis Corp. v. FTC*, 223 F.3d 783, 786-87 (D.C. Cir. 2000).

³² 15 U.S.C. 45(n). Section 5(n) of the FTC Act also provides that "[i]n determining whether an act or practice is unfair, the Commission may consider established public policies as evidence to be considered with all other evidence."

³³ See Letter from the FTC to Hon. Wendell Ford and Hon. John Danforth, Committee on Commerce, Science and Transportation, United States Senate, Commission Statement of Policy on the Scope of Consumer Unfairness Jurisdiction (December 17, 1980), reprinted in *In re Int'l Harvester Co.*, 104 F.T.C. 949, 1070, 1073 (1984) (Unfairness Policy Statement); see also Trade Regulation Rule Concerning Cooling-Off Period for Sales Made at Homes or at Certain Other Locations, 16 CFR 429 (making it an unfair and deceptive practice for anyone engaged in "door-to-door" sales of consumer goods or services with a purchase price of \$25 or more to fail to provide buyer with certain oral and written disclosures regarding buyer's right to cancel within three business days); *FTC v. Holland Furnace*, 295 F.2d 302 (7th Cir. 1961) (seller's servicemen dismantled home furnaces then refused to reassemble them until consumers agreed to buy services or replacement parts).

include collecting monthly mortgage payments and crediting borrowers' accounts. A servicer may also maintain an escrow account which covers charges such as property taxes and homeowners insurance. If a borrower falls behind on monthly payments and becomes delinquent on the loan, the mortgage servicer also conducts activities associated with a defaulted loan, such as attempting to collect overdue payments, negotiating loss mitigation options, and, if necessary, overseeing foreclosure proceedings.

Generally, financially distressed homeowners having difficulty making mortgage payments can contact their mortgage servicers directly and seek assistance. Pursuant to guidelines or agreements with the owners of loans, many servicers provide loss mitigation options for distressed homeowners. Owners of loans often have an incentive to consider such options because of the cost associated with foreclosure proceedings.

Mortgage servicers may provide various loss mitigation options to help distressed homeowners avoid foreclosure, including a repayment plan, forbearance agreement, short sale, deed-in-lieu of foreclosure, or loan modification.³⁴ A repayment plan gives a borrower a fixed amount of time to repay the overdue amount by adding a portion of what is past due to the regular payment. A forbearance agreement reduces or suspends payments for a period of time, at the end of which the borrower resumes regular payments as well as a lump sum payment or additional partial payments. A short sale is an agreement to sell the house before foreclosure and to have the servicer forgive any shortfall between the sales price and the mortgage balance. A deed-in-lieu of foreclosure allows a borrower to transfer voluntarily the property title to the servicer, in exchange for cancellation of the remainder of the debt. A loan modification is an agreement to change permanently one or more of the terms of the mortgage loan to make the

borrower's monthly payments more affordable.³⁵

A loan modification, in particular, benefits distressed homeowners because borrowers can avoid foreclosure and are more likely to be able stay in their homes with more affordable payments. In addition, if loans are in default, once they have been modified, servicers will reinstate the loans and treat borrowers as being current on their mortgages. The specific loan modification policies used vary by mortgage servicer.

B. Mortgage Foreclosure

Foreclosure is the legal means an owner of a mortgage loan can use to take possession of a home when a borrower defaults on the loan. In general, a borrower is in default thirty days after the first missed mortgage payment. Typically, a mortgage servicer may attempt various loss mitigation options prior to initiating foreclosure proceedings, which generally occur three to six months after the first missed mortgage payment.³⁶

Foreclosure processes differ by state and depend on the details of state foreclosure laws. Differences among states include the requirements of notification and the types of foreclosure proceedings available. Generally, there are three types of foreclosures processes: judicial foreclosure, power of sale foreclosure, and strict foreclosure. Judicial foreclosure involves the owner of the loan filing suit in court and the home being sold under the court's supervision. All states allow judicial foreclosure, and in some states it is the only foreclosure option available. Power of sale foreclosure, also known as "statutory foreclosure," involves the sale of the home at public auction by the servicer if the mortgage contains a "power of sale" clause or if a deed of trust was used instead of a mortgage. Many states permit power of sale foreclosure, which is often more expedient than judicial foreclosure. In a power of sale foreclosure, the owner of the loan sends notices demanding payment to borrowers who have defaulted. Once the required waiting period has passed, the mortgage servicer can sell the home at public auction, subject to judicial review. Strict foreclosure is available in a limited number of states and permits the owner

of the loan to file lawsuits against borrowers who have defaulted. If the borrower cannot pay the mortgage debt within the period of time set by court order, the property title goes directly to the owner of the loan.

C. Developments in the Mortgage Marketplace

As a result of the recent downturn in the economy and housing market, many American homeowners are in financial distress. The rate of mortgage loan delinquency and foreclosure has risen to the highest level in three decades.³⁷ The recent economic downturn has also given rise to a new and broader range of third-party providers who offer to assist homeowners—for free or for a fee—in obtaining a loan modification or preventing foreclosure.

The FTC and other agencies like the U.S. Department of Housing and Urban Development (HUD) have generally advised consumers who are behind on their mortgage payments to contact their mortgage servicer about the possibility of loan modification or other options.³⁸ The Commission has initiated a stepped-up consumer outreach initiative on foreclosure rescue and loan modification fraud. The Commission has issued consumer education publications warning homeowners against foreclosure rescue and loan modification scams. Most recently, the Commission issued a new consumer education publication on this topic, which several servicers have provided directly to consumers, including during loan counseling sessions, in monthly statements, in correspondence to delinquent borrowers, and on their websites.³⁹

In addition, government agencies have instituted new programs to help homeowners in financial distress. For

³⁴ Servicers consider loss mitigation options if a delinquent borrower does not have adequate equity to sell the house and pay off the mortgage in full or to refinance into a more affordable loan. A delinquent borrower can also file Chapter 13 personal bankruptcy to prevent foreclosure, often as a debt management option of last resort. If a borrower has regular income, Chapter 13 may allow the borrower to keep property, such as a mortgaged house or car. In Chapter 13, the court may approve a repayment plan that allows the use of future income toward payment of debts during a three-to-five year period, rather than requiring surrender of property.

³⁵ For example, the servicer may lower the monthly payment, alter the payment schedule, fix or lower the interest rate, apply fees and arrearage to the principal, or even reduce the unpaid principal balance.

³⁶ See U.S. Department of Housing and Urban Development, *Foreclosure Process*, available at (<http://www.hud.gov/foreclosure/foreclosureprocess.cfm>).

³⁷ See Mortgage Bankers Association, *Delinquencies Continue to Climb in Latest MBA National Delinquency Survey* (Mar. 5, 2009), available at (<http://www.mbaa.org/NewsandMedia/PressCenter/68008.htm>). According to the Mortgage Bankers Association's (MBA) National Delinquency Survey, the delinquency rate for mortgage loans on one-to-four unit residential properties rose to a seasonally adjusted rate of 7.88% of all loans, as of the end of the fourth quarter of 2008, which is the highest rate ever based on data dating back to 1972. Over 11% of loans are either in foreclosure or delinquent by at least one payment, which is the highest rate ever recorded in the MBA national delinquency survey.

³⁸ See FTC Publication, *Mortgage Payments Sending You Reeling? Here's What to Do*, available at (<http://www.ftc.gov/bcp/edu/pubs/consumer/homes/rea04.shtm>).

³⁹ See FTC Publication, *A Note to Homeowners*, available at (<http://www.ftc.gov/bcp/edu/pubs/consumer/homes/rea16.pdf>); see also FTC Publication, *Foreclosure Rescue Scams: Another Potential Stress for Homeowners in Distress*, available at (<http://www.ftc.gov/bcp/edu/pubs/consumer/credit/cre42.shtm>).

example, on March 4, 2009, the U.S. Department of the Treasury introduced the Making Home Affordable Program to assist eligible homeowners to refinance or modify their mortgage loans to an affordable payment. Under the program, mortgage servicers who adopt certain loan modification guidelines and provide eligible homeowners with loan modifications can qualify to receive substantial government incentives.⁴⁰

In addition to federal efforts, state and local agencies and non-profit organizations also offer similar foreclosure prevention assistance and other housing-related services. Non-profit organizations and housing counseling agencies continue to provide a wide array of free services to homeowners who are in financial distress. HUD has certified numerous non-profit housing counseling agencies. These agencies provide homeowners with assistance, such as offering consumer education, assisting with debt management, negotiating directly with servicers to make mortgage payments more affordable—thereby providing foreclosure relief and helping consumers stay in their homes.

The private sector also has developed and offered programs at no cost to help distressed homeowners. HUD-approved counseling agents, mortgage companies, investors, and other mortgage market participants created the HOPE NOW Alliance (Hope Now) to provide homeowners with free foreclosure prevention assistance. Consumers can visit Hope Now's website, www.hopenow.com, or call the Homeowner's HOPE Hotline, 1-888-995-HOPE, to find housing counselors from HUD-certified agencies who can help guide them through various foreclosure prevention options, including loan modification.

At the same time that governmental and private sector entities (both for-profit and non-profit) are increasing their efforts to assist distressed homeowners, there has been an increase in individuals and entities offering to assist consumers in securing loan modifications and foreclosure rescue services in exchange for a fee. Foreclosure rescue and loan modification entities frequently market their services via direct mail, email, radio, television, and Internet advertisements.⁴¹ They sometimes send

targeted written solicitations to consumers facing mortgage rate resets⁴² or foreclosure.⁴³ Specifically, foreclosure rescue and loan modification entities often identify such consumers by reviewing notices of default and other publicly-available records.

Foreclosure rescue and loan modification entities, sometimes also referred to as "foreclosure consultants," generally offer to negotiate with a consumer's servicer to secure a reduction in mortgage payments or otherwise obtain a favorable modification of loan terms on behalf of a consumer. Foreclosure rescue and loan modification entities charge a fee for their services, and this fee is almost always charged up-front. In many instances, these entities claim that they have knowledge of and experience with the mortgage industry and lending because they are attorneys or mortgage brokers. In some cases, instead of simply offering to negotiate on behalf of a consumer, foreclosure rescue operations require consumers to enter a new loan with them or to transfer title to the property (for example, to remain in the home as a renter with the option to repurchase or otherwise maintain the opportunity to reacquire title).

Consumers may choose to pay a fee for the services of providers of foreclosure rescue and loan modification services rather than use free services for a variety of reasons. Some distressed homeowners may be drawn to, or targeted for, aggressive advertisements by fee for service providers and may be unaware of the

free services available to them. They also may be unwilling or unable to work directly with their mortgage servicer or with a non-profit organization. For example, consumers may be wary of or unsatisfied with a mortgage servicer's loss mitigation offer, or frustrated with their inability to contact the appropriate person at their servicer.

III. FTC Law Enforcement

A. Application of the FTC Act and Consumer Protection Concerns

The FTC has taken a number of law enforcement actions to protect consumers from unfair and deceptive loan modification and foreclosure rescue practices. The Commission has recently filed numerous lawsuits against defendants for allegedly engaging in deceptive practices.⁴⁴ Most recently, the FTC—along with other federal and state regulators—announced law enforcement actions as part of a broader crackdown on loan modification and foreclosure rescue entities.⁴⁵ In connection with this effort, the Commission also sent warning letters to 71 companies for marketing potentially deceptive mortgage loan modification and foreclosure assistance programs.⁴⁶

In the FTC's law enforcement actions against those who offer loan modification and foreclosure rescue services, the Commission has alleged that a number of acts and practices were deceptive under Section 5 of the FTC Act:

First, many defendants promised a high likelihood of success but failed to fulfill their promise to modify

⁴² Mortgage loans are sometimes categorized as having either a "fixed" or "adjustable" rate. A fixed rate mortgage loan maintains the same interest rate throughout its term. An adjustable mortgage, by contrast, has an interest rate which is subject to change (or "reset") after a certain introductory period; and that reset can result in an increased interest rate.

⁴³ See, e.g., Testimony of Prentiss Cox, before the U.S. Senate Committee on Commerce Science & Technology (Feb. 26, 2009) at 2 (noting that "families are often desperate to save their homes," and that "[a]s soon as a house enters the foreclosure process, the homeowner in foreclosure typically is subject to an avalanche of mail, phone calls and personal visits from people promising to help the homeowner"); see also Steve Tripoli & Elizabeth Renuart, National Consumer Law Center, *Dreams Foreclosed: The Rampant Theft of Americans' Home Through Foreclosure "Rescue" Scams* (2005), at 9 ("The 'rescuer' identifies distressed homeowners through public foreclosure notices in newspapers or at government offices.... The 'rescuer' then contacts the homeowner by phone, personal visit, card or flyer left at the door... or advertising. Initial contact typically revolves around a simple message such as 'Stop foreclosure with just one phone call,' 'I'd like to \$ buy \$ your house,' 'You have options,' or 'Do you need instant debt relief and CASH?'"), available at (<http://www.consumerlaw.org/news/content/ForeclosureReportFinal.pdf>).

⁴⁴ See, e.g., *FTC v. New Hope Property LLC*, Case No. 1:09-cv-01203-JBS-JS (D.N.J. filed Mar. 17, 2009); *FTC v. Hope Now Modifications, LLC*, Case No. 1:09-cv-01204-JBS-JS (D.N.J. filed Mar. 17, 2009); *FTC v. National Foreclosure Relief, Inc.*, Case No. SACV09-117 DOC (MLGx) (C.D. Cal. filed Feb. 2, 2009); *FTC v. United Home Savers, LLP*, Case 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.*, Case No. 8:08-cv-388-T-23EAJ (M.D. Fla. filed Feb. 26, 2008); *FTC v. National Homestead Solutions, Inc.*, Case No. 4:08-cv-067 (E.D. Tex. filed Feb. 26, 2008).

⁴⁵ See *FTC v. Federal Loan Modification Law Center, LLP*, Case No. SACV09-401 CJC (MLGx) (C.D. Cal. filed Apr. 3, 2009); *FTC v. Thomas Ryan, Civil No. 1:09-00535 (HHK)* (D.D.C. filed March 25, 2009); *FTC v. Home Assure, LLC*, Case No. 8:09-CV-00547-T-23T-SM (M.D. Fla. filed Mar. 24, 2009); see also, Press Release, *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>); Press Release, *Federal, State Partners Announce Multi-Agency Crackdown Targeting Foreclosure Rescue Scams, Loan Modification Fraud* (Apr. 6, 2009), available at (<http://www.ftc.gov/opa/2009/04/loanfraud.shtm>).

⁴⁶ An example of these letters is available at (<http://www.ftc.gov/os/2009/04/090406warningletter.pdf>).

⁴⁰ See Home Affordable Modification Program Guidelines (Mar. 4, 2009), available at (<http://www.financialstability.gov/roadtostability/homeowner.html>).

⁴¹ See, e.g., *FTC v. National Foreclosure Relief, Inc.*, Case No. SACV09-117 DOC (MLGx) (C.D. Cal. filed Feb. 2, 2009) (alleging that defendants targeted consumer in arrears with mailer advertisements).

consumers' existing loans or to stop foreclosure.⁴⁷ For example, some defendants assured consumers that they could stop foreclosure or obtain a loan modification with claims such as a "97% success rate."⁴⁸ However, many defendants allegedly did little or nothing to negotiate with the mortgage servicer or to stop foreclosure. Second, many defendants promised to fully or partially refund consumers' payments in the event that negotiation efforts to obtain a loan modification or to prevent foreclosure were unsuccessful.⁴⁹ Often, defendants allegedly did not provide the promised refunds. Third, some defendants represented that they were affiliated with governmental or free non-profit programs,⁵⁰ when in fact they were not.⁵¹

⁴⁷ For example, in one case the Commission charged a foreclosure rescue operation for promising consumers that it could stop "any foreclosure," but then failing to stop foreclosure or taking minimal steps to do so. See *FTC v. National Homestead Solutions, LLC*, Case No. 4:08-cv-067 (E.D. Tex. filed Feb. 26, 2008).

⁴⁸ See, e.g., *FTC v. Federal Loan Modification Law Center, LLP*, Case No. SACV09-401 CJC (MLGx) (C.D. Cal. filed Apr. 3, 2009); *FTC v. National Foreclosure Relief, Inc.*, Case No. SACV09-117 DOC (MLGx) (C.D. Cal. filed Feb. 2, 2009); *FTC v. Foreclosure Solutions, LLC*, No. 1:08-cv-01075 (N.D. Ohio filed Apr. 28, 2008); *FTC v. Mortgage Foreclosure Solutions, Inc.*, Case No. 8:08-cv-388-T-23EAJ (M.D. Fla. filed Feb. 26, 2008). Additionally, some entities claim to be associated with or to have good relationships with the consumer's mortgage servicer. *FTC v. Home Assure, LLC*, Case No. 8:09-CV-00547-T-23T-SM (M.D. Fla. filed Mar. 24, 2009).

⁴⁹ See, e.g., *FTC v. Home Assure, LLC*, Case No. 8:09-CV-00547-T-23T-SM (M.D. Fla. filed Mar. 24, 2009) (alleging that defendant promised "100% SATISFACTION GUARANTEE OR YOUR MONEY BACK"); *FTC v. United Home Savers, LLP*, Case No. 8:08-cv-01735-VMC-TBM (M.D. Fla. filed Sept. 3, 2008); *FTC v. National Homestead Solutions, LLC*, Case No. 4:08-cv-067 (E.D. Tex. filed Feb. 26, 2008).

⁵⁰ The Federal Reserve Board recently promulgated amendments to Regulation Z of TILA, generally effective October 1, 2009, which would ban various mortgage entities from a number of relevant practices, including banning mortgage advertisers from: misrepresenting an advertised loan as being part of a "government loan program" or otherwise endorsed or sponsored by a government entity; making misleading claims of debt elimination; and using the term "counselor" to refer to for-profit mortgage creditors or brokers. See 73 FR 44589-90, 44602. To the extent that loan modification or foreclosure rescue entities are offering loans to consumers, they may fall within the ambit of these rules.

⁵¹ For example, in two cases the Commission charged defendants for falsely advertising themselves to be associated with the HOPE NOW Alliance, and then breaking promises to secure loan modifications or alternatively, to refund the money of consumers whose loans could not be modified. See *FTC v. New Hope Property LLC*, Case No. 1:09-cv-01203-JBS-JS (D.N.J. filed Mar. 2009); *FTC v. Hope Now Modifications, LLC*, Case No. 1:09-cv-01204-JBS-JS (D.N.J. filed Mar. 2009). In another case, a defendant marketing purported loan modification services allegedly represented, via his website, that he was the "House and Urban Department," displaying a government-like seal; and using a web address ("bailout-hud.gov.us" or "bailout.dohgov.us") and other features to create

Moreover, most defendants charged substantial, up-front fees, which appears to be a prevalent practice in the for-profit foreclosure rescue and loan modification industry. When defendants use deception to secure advance payment and then fail to fulfill their promise to stop a foreclosure or obtain a loan modification, consumers are unlikely to receive a refund or recover their money.⁵² Payment of up-front fees, which are sometimes thousands of dollars, exacerbates the consumer injury from deception, and imposes a significant burden on consumers already in financial distress.

In addition, some defendants advise consumers, including those who are still current on their loans, to stop making mortgage payments and to cease communication with their mortgage servicer while the foreclosure rescue or loan modification operator purportedly negotiates on their behalf.⁵³ If the operator fails to take adequate steps to obtain a loan modification or to prevent foreclosure, the operator may actually increase the likelihood of foreclosure, because consumers fail to take advantage of other options available to them that might help save their homes.⁵⁴

B. State Law Enforcement

Many states have engaged in legislative and law enforcement efforts to address conduct in the loan modification and foreclosure rescue industry. First, several states have filed lawsuits against loan modification or foreclosure rescue entities for violating state consumer protection laws prohibiting unfair and deceptive practices.⁵⁵ Second, some states have

the impression his business was associated with the U.S. government. *FTC v. Thomas Ryan*, Civil No. 1:09-00535 (HHK) (D.D.C. filed Mar. 25, 2009); see also *FTC v. Federal Loan Modification Law Center, LLP*, Case 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).

⁵² Note that, even if providers do fulfill their promises to provide refunds, this action does not cure the deception employed in enrolling the consumer in the program. See, e.g., *FTC v. Think Achievement Corp.*, 312 F.3d 259, 262 (7th Cir. 2002) ("[A] money-back guaranty does not sanitize a fraud.")

⁵³ See, e.g., *FTC v. Home Assure, LLC*, Case No. 8:09-CV-00547-T-23T-SM (M.D. Fla. filed Mar. 24, 2009); *FTC v. National Homestead Solutions, LLC*, Case No. 4:08-cv-067 (E.D. Tex. filed Feb. 26, 2008).

⁵⁴ The FTC has warned consumers about for-profit loan modification and foreclosure rescue operations which charge hefty fees for services which consumers can undertake themselves by contacting their mortgage servicer directly or obtain for free through organizations like Hope Now. See FTC Publication, *A note to Homeowners*, available at (<http://www.ftc.gov/bcp/edu/pubs/consumer/homes/rea16.pdf>).

⁵⁵ See, e.g., *State Foreclosure Rescue Enforcement Actions - Sampling of Actions: March 31, 2009*,

applied existing statutes specifically regulating the debt settlement, debt management, or credit counseling industries to cover foreclosure rescue and loan modification practices.⁵⁶ Third, numerous states and the District of Columbia have recently enacted statutes that specifically restrict or ban "foreclosure consultants" from engaging in some of the foreclosure rescue and loan modification practices detailed above.⁵⁷ State law enforcement agencies have filed numerous suits against individuals and entities for violations of these statutes.⁵⁸

available at (<http://www.ftc.gov/os/2009/04/090406foreclosurerescue.pdf>); see also Press Release, *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>); Press Release, *Federal, State Partners Announce Multi-Agency Crackdown Targeting Foreclosure Rescue Scams, Loan Modification Fraud* (Apr. 6, 2009), available at (<http://www.ftc.gov/opa/2009/04/loanfraud.shtm>).

⁵⁶ See, e.g., Ohio Attorney General, Press Release, *Attorney General Dann Files 6 Suits Against Companies For Foreclosure Rescue Scams* (Aug. 8, 2007) (including count under state "debt adjustment" statute).

⁵⁷ See, e.g., Cal. Civ. Code § 2945, *et seq.*; Colo. Rev. Stat. § 6-1-1101, *et seq.*; 6 Del C. § 2400B, *et seq.*; D.C. Code Ann. § 42-2431, *et seq.*; Fla. Stat. Ann. § 501.1377; GA. Code Ann. § 10-1-393; Hawaii Rev. Stat. Ann. § 480E-1, *et seq.*; IL Comp. Stat., Ann., Ch. 765 § 940/1, *et seq.*; Ind. Code Ann. § 24-5.5-1-1, *et seq.*; Iowa Code § 714E.1, *et seq.*; ME Rev. Stat. Ann. tit 32 § 6191, *et seq.*; MD Real Property Code Ann. § 7-301, *et seq.*; Code Mass. Reg., 940 CMR § 25.01, *et seq.*; Minn. Stat. Ann. § 325N.01, *et seq.*; MO Ann. Stat. § 407.935, *et seq.*; Neb. Rev. Stat. Ann. § 76-2701, *et seq.*; NH Rev. Stat. § 479-B:1, *et seq.*; NY CLS Real Prop. § 265-b; RI Gen. Laws § 5-79-1, *et seq.*

⁵⁸ See, e.g., Press Release, Massachusetts Attorney General, *Attorney General Martha Coakley Obtains Temporary Restraining Order against Perpetrators of Loan Modification Scam; Warns Public About Scams Targeting Homeowners* (Apr. 7, 2009) (alleging defendant loan modification service violated state law prohibiting advance fees), available at (http://www.mass.gov/?pageID=cagopressrelease&L=1&L0=Home&sid=Cago&b=pressrelease&f=2009_04_07_fox_loan_mods&c=sd=Cago); Press Release, Illinois Attorney General, *MADIGAN FILES TWO MORTGAGE RESCUE FRAUD LAWSUITS, SEEKS IMMEDIATE BAN ON COMPANIES' OPERATIONS* (Apr. 6, 2009) (alleging defendant loan modification entity violated Illinois Mortgage Rescue Fraud Act for, inter alia, charging up-front fee), available at (http://www.ag.state.il.us/pressroom/2009_04/20090406.html); Press Release, Florida Attorney General, *Court Grants Request to Temporarily Stop Loan Modification Company's Up-Front Fees* (Feb. 23, 2009) (noting that Florida statute "governs companies providing foreclosure-related rescue services including loan modification"), available at (<http://www.myfloridalegal.com/newsrel.nsf/pv/FF973C8A0EEE167B85257566006916E8>); Press Release, Minnesota Attorney General, *Attorney General Lori Swanson Expands Litigation Against Fraudulent Foreclosure Consultants And Issues Warning To Minnesota Homeowners In Mortgage Trouble To Seek Reputable Help And Steer Clear Of Scam Artists* (Jan. 29, 2009), available at (<http://www.ag.state.mn.us/consumer/pressrelease/090129foreclosurerescueconsultants.asp>); Press Release, Illinois Attorney General's Office, *Madigan Sues*

In 1979, California enacted the first statute that specifically restricts the practices of entities offering foreclosure rescue or similar services.⁵⁹ More recently, in 2004, Minnesota enacted a statute, based on the California law, but adding several additional key restrictions on foreclosure reconveyance transactions.⁶⁰ Since then, over twenty states have passed their own foreclosure consultant statutes, which are modeled after the California and Minnesota laws. These state foreclosure consultant statutes 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.

Some statutes also impose additional requirements on foreclosure rescue operations that require consumers to transfer title to their homes, and purport to offer reconveyance at a later date. These statutes often include the requirement that foreclosure rescue operations must verify before doing a reconveyance that the consumer has a reasonable ability to pay for the subsequent conveyance of the home back to the consumer.⁶¹ Other states have decided to ban outright certain practices, like title reconveyances.⁶² Some states also have enacted criminal statutes covering foreclosure rescue operations.⁶³

Almost all state foreclosure consultant laws exempt state-licensed attorneys. Some for-profit loan modification and foreclosure rescue operations have partnered with attorneys,⁶⁴ which some operations may use to avoid state statutory prohibitions against the collection of advance fees. Some state bar associations have responded by issuing warnings to attorneys that many

relationships between licensed attorneys and foreclosure consultants violate state ethics rules for attorneys.⁶⁵

Some of the consumer protections that state statutes provide to homeowners in financial distress do not commence until the owner or servicer of a mortgage has served a notice of default on the borrower. However, some loan modification and foreclosure rescue services apparently provide services before a notice of default has been served, thereby limiting the protection accorded under state law to some homeowners in financial distress.

IV. Request for Comment

The Commission seeks written comments on a series of questions related to loan modification and foreclosure rescue. The FTC is seeking comments to determine whether certain acts and practices of loan modification and foreclosure rescue entities are unfair or deceptive under Section 5 of the FTC Act and should be incorporated into a proposed rule. These acts and practices include conduct that the FTC currently could challenge in a law enforcement action as violating Section 5 of the FTC Act. However, the Commission is not otherwise seeking comments on statutes that have been enacted and rules that have been issued.

The Commission invites interested persons to submit written comments on any issue of fact, law, or policy that may bear upon these issues. After examining the comments, the Commission will determine whether and how to incorporate them into any proposed rule.

The Commission encourages commenters to respond to the specific questions. However, commenters do not need to respond to all questions. Please provide explanations for your answers and detailed, factual supporting evidence.

Without limiting the scope of issues on which it seeks comment, the Commission is particularly interested in receiving comments on the following questions:

1. The Loan Modification and Foreclosure Rescue Industry

A. What empirical data are available concerning the nature, extent, and

impact of the loan modification and foreclosure rescue industry? Please identify any such data sources.

B. What business models are used to provide loan modification and foreclosure rescue services? Please identify and describe any such business models and their impact on consumers and competition.

C. What are the distinctions between different models of providing loan modification and foreclosure rescue services (e.g., free versus fee-for-service, loan negotiation versus title transfer, etc.)?

D. What are the costs and benefits of various loan modification and foreclosure rescue services?

E. What roles do mortgage servicers play in the loan modification and foreclosure rescue industry? What are the costs and benefits of their conduct in the context of loan modification and foreclosure rescue services? Do the practices of mortgage servicers present consumer protection concerns? If so, how are these concerns the same as or different from those raised by third-party loan modification and foreclosure rescue entities?

F. What empirical data are available concerning the performance of loan modification and foreclosure rescue entities in obtaining promised results? Please identify any such data (broken down by business model, if possible) used to provide loan modification and foreclosure rescue services, including but not limited to data addressing the following:

1. The percentage or proportion of consumers enrolled in loan modification or foreclosure rescue services who successfully obtain a loan modification or foreclosure relief.

2. For the consumers described in (F)(1), the percentage who, after successfully obtaining the modification or foreclosure relief, remain current on their mortgage payments for a substantial period of time (e.g., six months, one year, or two years).

2. Need for FTC Rule

A. Given that many states have enacted and enforced laws concerning loan modification and foreclosure services and that the FTC has brought law enforcement actions against providers of these types of services under Section 5 of the FTC Act, should the FTC promulgate a rule to address these services? Why or why not?

3. Scope of Covered Practices

A. Should conduct by loan modification and foreclosure rescue service providers or advertisers that the FTC has challenged as unfair or

Seven Companies For Mortgage Rescue Fraud (Nov. 18, 2008), available at (http://www.illinoisattorneygeneral.gov/pressroom/2008_11/20081118.html).

⁵⁹ Cal. Civ. Code § 2945, *et seq.*

⁶⁰ Minn. Stat. Ann. § 325N.01, *et seq.*

⁶¹ See, e.g., Minn. Stat. Ann. § 325N.17. The Minnesota statute also requires, among other things, that the foreclosure rescue operator reconvey the foreclosed property to the homeowner or pay the homeowner such that the total consideration is at least 82% of the fair market value of the property.

⁶² See, e.g., D.C. Code Ann. § 42-2431, *et seq.*; Code Mass. Reg., 940 CMR § 25.01, *et seq.*

⁶³ See, e.g., Iowa Code § 714E.1, *et seq.*

⁶⁴ See, e.g., *FTC v. Federal Loan Modification Law Center, LLP*, Case No. SACV09-401 CJC (MLGx) (C.D. Cal. filed Apr. 3, 2009) (alleging violations of FTC Act against professional law corporation and an attorney).

⁶⁵ See, e.g., *Ethics Alert: Legal Services to Distressed Homeowners and Foreclosure Consultants on Loan Modifications* (Committee on Professional Responsibility and Conduct, The State Bar of California, San Francisco, CA) Feb. 2, 2009 at 1, available at <http://www.calbar.ca.gov/calbar/pdfs/ethics/Ethics-Alert-Foreclosure.pdf>; *Ethics Alert: Providing Legal Services to Distressed Homeowners* (The Florida Bar) Mar. 15, 2009, available at (<http://www.floridabar.org/tfb/TFBETOpin.nsf/EthicsIndex?OpenForm>).

deceptive in violation of Section 5 of the FTC Act in its law enforcement actions be incorporated into a proposed FTC rule? If so, what conduct should be included, how should it be addressed, and why?

B. Should conduct by loan modification and foreclosure rescue service providers or advertisers that states have declared unlawful by statute or regulation or have challenged in law enforcement actions be incorporated into a proposed FTC rule? Why or why not? If so, what prohibitions and restrictions should be incorporated in a proposed FTC rule?

1. Some states require providers to create written contracts and include key disclosures in these contracts. Should the Commission impose the same or similar disclosure requirements in a proposed FTC rule? If so, what disclosures should be included and why?

2. Some states require providers to give consumers who enroll the right to rescind or cancel their agreements with the providers. Should the Commission include the same or similar rights of rescission or cancellation in a proposed rule? If so, what rescission and cancellation rights should be included and why?

3. Some states have restricted the type, amount, and timing of the fees charged and refunds given by providers of loan modification and foreclosure rescue services. In particular, some states ban advance fees until all services promised or contracted for are completed.

(i) Should the Commission address in a proposed FTC rule any fee or refunds practices of providers of loan modification and foreclosure rescue services? If so, what practices should be addressed, how they should be addressed, and why?

(ii) Should the Commission ban the payment of advance fees for loan modification and foreclosure rescue services in a proposed FTC rule? If so, why or why not? What effect, if any, would an advance fee ban have on the willingness or ability of loan modification and foreclosure rescue services providers to do business?

(iii) Should the Commission impose fee restrictions in a proposed FTC rule other than a ban on the advance fees that providers of loan modification and foreclosure rescue services receive? If so, what restrictions should be imposed and why? Would these restrictions prevent or mitigate the potential harm caused by payment of these fees? For example, to what extent might the possible harm from advance fees be prevented or mitigated by requiring

providers to make specific disclosures regarding the timing, amount, or allocation of fees? Additionally, to what extent might such harm be prevented or mitigated by requiring providers to make more general disclosures regarding the nature and material restrictions of their services (e.g., the disclosures regarding the likelihood of success, timing of services or negotiations with mortgage servicers, refund restrictions, or any potentially negative ramifications of using the service)?

4. Some states have foreclosure rescue laws which, in whole or in part, only apply once a consumer has received a notice of default. At what stage or stages of the process should a proposed FTC rule protect consumers? Should it take effect before consumers receive a notice of default, after the notice of default is received, or once foreclosure proceedings have begun? Why?

5. Please identify any other state restrictions or challenged conduct which should (or should not) be addressed in a proposed FTC rule, and explain why.

C. Are there any unfair or deceptive acts and practices by providers or advertisers of loan modification and foreclosure rescue services that neither the FTC nor the states have addressed that a proposed FTC rule should address? If so, how should these acts and practices be addressed and why?

4. Scope of Covered Entities

A. As described in the text, an FTC proposed rule would not cover banks, thrifts, federal credit unions, and non-profits. To what extent do these types of entities provide or advertise loan modification and foreclosure rescue services? To what extent do these entities compete with entities that an FTC proposed rule would cover and what effect would an FTC proposed rule have on such competition?

B. As described in the text, many states have exempted attorneys from laws (e.g., foreclosure consultant laws) which regulate the conduct of providers and advertisers of loan modification and foreclosure rescue services. What are the costs and benefits of exempting attorneys from these laws? What has been the effect of such exemptions on competition between attorneys and non-attorneys in providing or advertising loan modification and foreclosure rescue services? Should an FTC proposed rule include an exemption for attorneys or any other class of persons or entities? Why or why not?

By direction of the Commission.

Donald S. Clark

Secretary

[FR Doc. E9-12596 Filed 5-29-09; 8:45 am]

BILLING CODE 6750-01-S

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Parts 100 and 165

[USCG-2009-0127]

RIN 1625-AA00

Safety Zones: Annual Events Requiring Safety Zones in the Captain of the Port Duluth Zone

AGENCY: Coast Guard, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Coast Guard proposes establishment of safety zones for annual events in the Captain of the Port Duluth Zone. This rule proposes removal of a safety zone currently located in part 100, and the addition of it to part 165. Further, this rule proposes new safety zones to be added to part 165. These safety zones are necessary to protect spectators, participants, and vessels from the hazards associated with fireworks displays.

DATES: Comments and related materials must reach the Coast Guard on or before July 1, 2009.

ADDRESSES: You may submit comments identified by Coast Guard docket number USCG-2009-0127 to the Docket Management Facility at the U.S. Department of Transportation. To avoid duplication, please use only one of the following methods:

(1) *Online:* <http://www.regulations.gov>.

(2) *Mail:* Docket Management Facility (M-30), U.S. Department of Transportation, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue, SE., Washington, DC 20590-0001.

(3) *Hand Delivery:* Room W12-140 on the ground floor of the West Building, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The telephone number is 202-366-9329.

(4) *Fax:* 202-493-2251.

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