

Supporting Statement
Proposed Mortgage Assistance Relief Services Rule
16 C.F.R. Part 322
OMB Control No. 3084-XXXX

The Federal Trade Commission (FTC or Commission) requests clearance from the Office of Management and Budget (OMB) for disclosure and recordkeeping requirements in the proposed regulations for Mortgage Assistance Relief Services (MARS) pursuant to section 626 of the 2009 Omnibus Appropriations Act, Pub. L. No. 111-8, as clarified by section 511 of the Credit Card Accountability and Responsibility and Disclosure Act of 2009, Pub. L. No. 111-24 (Credit CARD Act). Section 511(a)(1)(B) of the Credit CARD Act specifies that the rulemaking “shall relate to unfair or deceptive acts or practices regarding mortgage loans, which may include unfair or deceptive acts or practices involving loan modification and foreclosure rescue services.”

(1) Necessity for Collecting the Information

Disclosure requirements

In commercial communications for a general audience, the proposed Rule would require MARS providers to make the following disclosure:

IMPORTANT NOTICE: (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.

In addition, the proposed Rule would require MARS providers to disclose to consumers, in any subsequent commercial communication directed at a specific consumer, the following information:

- (1) that “You will have to pay (insert amount) for this service”;
- (2) that “(Name of company) is a for-profit business not associated with the government. The offer has not been approved by the government or your lender”; and
- (3) in some instances, that “[e]ven if you buy our service, your lender may not agree to change your loan.”

The proposed Rule also sets forth requirements on making the disclosures clear and prominent that are specific to the media used.

The necessity for these disclosures are as follows:

- Non-affiliation with the government, non-profits, or lenders: The FTC and state law enforcement officials have brought numerous law enforcement actions against MARS providers who have misrepresented their affiliation with

government agencies or programs, lenders, or servicers, in connection with offering MARS. These providers have used a variety of techniques to create such misimpressions, including advertising under trade names that resemble the names of legitimate government programs. Given the number of entities that provide such services and the prevalence of these deceptive claims, the FTC believes that the requirement that MARS providers disclose their for-profit status and nonaffiliation with government or other programs or with consumers' lenders or servicers is necessary to combat deception.

- Total amount a consumer must pay: The total cost of mortgage assistance relief services is perhaps most material to consumers in making well-informed decisions on whether to purchase those services. Requiring the clear and prominent disclosure of total cost information in every communication directed at a specific consumer before the consumer enters into an agreement would decrease the likelihood that MARS providers will deceive prospective customers with incomplete, inaccurate, or confusing cost information. The FTC therefore believes that requiring MARS providers to disclose total cost information clearly and prominently is also necessary to combat deception.
- No guarantee: The record reveals that MARS providers often misrepresent their likelihood of success in obtaining a significant loan modification for consumers. These deceptive success claims lead consumers to overestimate MARS providers' abilities to obtain substantial loan modifications or other mortgage relief from MARS providers. Therefore, the FTC believes that requiring MARS providers to inform consumers that lenders might not agree to change consumers' loans, even if those consumers purchase the services that the MARS provider offers, is necessary for preventing deception.

Recordkeeping requirements

The proposed Rule also imposes several recordkeeping requirements. In some instances, these requirements pertain to records that are customarily kept in the ordinary course of business, such as copies of contracts and consumer files containing the name and address of the borrower and materially different versions of sales scripts and related promotional materials. Thus, the retention of these documents does not constitute a "collection of information," as defined by OMB's regulations that implement the PRA.¹

In other instances, the proposed Rule requires MARS providers to create and retain documents demonstrating their compliance with specific Rule requirements. These include the requirement that providers document the following activities:

- (1) performing and delivering of promised services before seeking payment from a

¹ 5 C.F.R. § 1320.3(b)(2).

borrower;

- (2) monitoring sales presentations by tape recording and testing oral representations;
- (3) establishing a procedure for receiving and responding to consumer complaints;
- (4) ascertaining, in some instances, the number and nature of consumer complaints; and
- (5) taking corrective action if sales persons fail to comply with the proposed Rule, including training and disciplining sales persons.

The information obtained from the rulemaking record to date establishes the need to propose these recordkeeping requirements. There appears to be widespread deception and unfair practices in the MARS industry, targeting financially vulnerable consumers. Accordingly, the FTC believes that strong recordkeeping requirements are needed to ensure effective and efficient enforcement of the proposed Rule and to identify injured consumers.

(2) Use of the Information

The required disclosures under the proposed Rule would enable prospective purchasers of MARS to make well-informed decisions and to avoid deceptive and unfair acts and practices.

The information that must be kept under the proposed Rule's recordkeeping requirements is used by the Commission, or by persons authorized by the Commission, for enforcement purposes and to ensure compliance by MARS providers with the proposed Rule. The information is requested only on a case-by-case basis.

(3) Consideration to Use Improved Information Technology to Reduce Burden

The disclosures required by the proposed Rule are format-neutral and do not limit MARS providers' use of available information technology that might reduce compliance burdens. Likewise, the proposed Rule's recordkeeping provisions do not limit the use of available technology to maintain required records. Rather, the proposed Rule specifically allows providers to keep the records in any form and in the same manner, format, or place as they keep records in the ordinary course of business. Thus, the proposed Rule would be consistent with the aims of the Government Paperwork Elimination Act, 44 U.S.C. § 3504 note.

(4) Efforts to Identify Duplication

The proposed disclosure and recordkeeping provisions do not duplicate any other federal information collection requirements. The FTC is unaware of any duplicative state requirements.

(5) Efforts to Minimize Burden on Small Organizations

The FTC believes that there are no feasible or appropriate exemptions for small entities. Inasmuch as the population of affected providers likely consists largely of such entities, exemptions based on size would undermine the protective aims of this rulemaking. In any event, the proposed Rule attempts to minimize compliance burdens for all entities.

(6) Consequences of Conducting the Collection Less Frequently

The FTC believes that the disclosures required by the proposed Rule cannot be provided less frequently. As a threshold matter, it is important that consumers know that MARS providers are for-profit entities, not associated with the government or with consumers' lenders, before the consumers begin dealing with the MARS providers. Thus, it is necessary that all advertising include this disclosure. In addition, this disclosure, along with the disclosures containing the MARS costs and limitations, are needed in each subsequent promotional communication with consumers. This requirement would prevent MARS providers from disclaiming, qualifying, or contradicting disclosures in subsequent statements to consumers during telemarketing calls or e-mail communications. The FTC's enforcement experience indicates that this practice of contradictory statements by MARS providers is common.

The proposed Rule also is tailored to minimize the frequency of recordkeeping as much as possible. The proposed provisions would require that MARS providers maintain records relating to actual transactions with customers; they are not required to keep records when consumers do not sign contracts or do not agree to an offer. In addition, providers would only be required to retain materially different versions of advertising and related materials. Further, the record supports the conclusion that the two-year retention requirement is the minimum amount of time necessary for consumers to report violations of the proposed Rule and for the FTC to complete investigations and to identify victims.

(7) Circumstances Requiring Collection Inconsistent With Guidelines

The collection of information in the proposed Rule is consistent with all applicable guidelines contained in 5 C.F.R. § 1320.5(d)(2).

(8) Consultation Outside the Agency

Pursuant to PRA implementing regulations under 5 C.F.R. Part 1320, the FTC is providing an opportunity for public comment on its burden analysis, contemporaneous with this submission. In addition, on June 1, 2009, the Commission published in the Federal Register an Advance Notice of Proposed Rulemaking (ANPR) addressing MARS practices.² The MARS ANPR sought public comment on: (1) the mortgage assistance relief services industry; (2) unfair or deceptive acts or practices in which providers of these types of services are engaged; and (3)

² 74 Fed. Reg. 26,130 (June 1, 2009).

prohibitions and restrictions on providers of these services that are needed to prevent harm to consumers.

In response to the ANPR, the Commission received a total of 46 comments.³ Forty-six state attorneys general, federal banking agencies, consumer advocacy groups, non-profit MARS providers, and mortgage lenders and brokers filed individual or group comments. In addition, the comments also included one from a trade association⁴ on behalf of for-profit MARS providers and separately from three individual MARS providers.⁵ The institutional comments the FTC received overwhelmingly supported the issuance of a rule governing the activities of MARS providers. A majority of these comments expressed concern regarding the prevalence of deception and abuse observed in the marketing of MARS, including the failure of MARS providers to perform promised services and their misrepresentation of affiliation with the government, non-profits, lenders, or loan servicers. In addition, many commenters, including 46 state attorneys general, consumer and community organizations, and financial service providers, stated that the Rule should prohibit or restrict the collection of fees for mortgage relief services until the promised services have been completed.

In the instant rulemaking, the Commission has consulted with and will continue to consult with the Federal Reserve Board and, as appropriate, other federal banking agencies.

(9) Payments and Gifts to Respondents

Not applicable.

(10) & (11) Assurances of Confidentiality/Matters of a Sensitive Nature

Not applicable. To the extent that information covered by a recordkeeping requirement is collected by the FTC for law enforcement purposes, the confidentiality provisions of Section 21 of the FTC Act, 15 U.S.C. § 57b-2, would apply. Furthermore, much of the information to be disclosed is of a routine business nature.

³ The comments are available at <http://www.ftc.gov/os/comments/mars/index.shtm>.

⁴ The National Loss Mitigation Association (“TNLMA”). The Commission has alleged that TNLMA is controlled by a named defendant in an ongoing FTC law enforcement action. *See FTC v. Loss Mitigation Servs., Inc.*, No. SACV09-800 DOC(ANX) (C.D. Cal. filed July 13, 2009).

⁵ Neither the comments from the TNLMA nor the individual MARS providers raised objections specific to the information collection provisions (recordkeeping and disclosure requirements) now proposed. One individual MARS provider, however, acknowledged problems in the loss mitigation industry and affirmatively endorsed the imposition of disclosure requirements on MARS providers. *See Greenway Capital Management (Ray Williams)*, Comment No. 542309-00018 (July 2, 2009).

(12) **Estimated Annual Hours and Labor Cost Burden**

Estimated annual hours burden: 65,000 hours

Estimated labor cost burden: \$2,891,000, rounded to the nearest thousand

The proposed Rule's requirements include disclosures to consumers by MARS providers. The potential entities providing MARS services are varied, and there are no ways to formally track them and no records documenting their existence. Nonetheless, based on law enforcement experiences and information in the rulemaking record, the FTC estimates that the proposed Rule would affect 500 MARS providers.

The proposed Rule calls for the disclosure of specific items of information to consumers. Largely, the content of the disclosures is prescribed. Thus, the PRA burden on providers is greatly reduced.⁶ The FTC conservatively estimates, however, that the incremental burden to prepare these documents will be approximately 2 hours. As noted above, the proposed Rule contemplates that MARS providers would create and retain records demonstrating their compliance with several obligations set forth in the Rule. The FTC estimates that each of the estimated 500 providers will spend approximately 25 hours to institute procedures to monitor sales presentations. Although the FTC cannot estimate with precision the time required to document compliance with the proposed Rule provisions, it is reasonable to assume that providers will each spend approximately 100 hours to do this. This includes preparing records demonstrating steps taken to seek payment for services performed, handling consumer complaints, and conducting training. For each of these tasks, the FTC assumes that management personnel will implement the requirements at an hourly rate of \$45.22.⁷ Accordingly, associated managerial labor costs would be \$2,871,470 (500 providers x 127 hours each x \$45.22).

Additionally, the FTC estimates that retention and filing of these records will require approximately 3 hours per year per provider, and that will be performed by office support file clerks at an hourly rate of \$13.24;⁸ cumulatively, \$19,860.

⁶ 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 C.F.R. § 1320.3(c)(2).

⁷ This estimate is based on an averaging of the mean hourly wages for sales and financial managers provided by the Bureau of Labor Statistics. BUR. OF LABOR STATISTICS, NATIONAL COMPENSATION SURVEY: OCCUPATIONAL EARNINGS IN THE UNITED STATES, 2008, tbl. 3, at 3-1 (2009), <http://www.bls.gov/ncs/ncswage2008.pdf> ("OCCUPATIONAL EARNINGS SURVEY").

⁸ This estimate is based on mean hourly wages for office file clerks found at OCCUPATIONAL EARNINGS SURVEY, *supra* note 5, tbl. 3, at 3-22.

(13) Estimate of Capital or Other Non-Labor Costs

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

(14) Estimate of Cost to Federal Government

Annualized for a prospective 3-year PRA clearance, estimated fiscal year cost to enforce the Rule will be approximately \$1,168,000. This estimate is based on the assumption that ten full attorney work years will be expended in that effort. Clerical and other support services are also included in this estimate.

(15) Adjustments

Not applicable; this is a new rulemaking.

(16) Plans for Tabulation and Publication

Not applicable.

(17) Failure to Display the OMB Expiration Date

Not applicable.

(18) Exceptions to Certification

Not applicable.