

Supporting Statement
Final 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 final regulations (Final Rule) 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.”

The Omnibus Appropriations Act, as clarified by the Credit CARD Act, does not specify any particular types of provisions that the Commission should include or refrain from including in a rule addressing loan modification and foreclosure rescue services. Rather, it directs the Commission to issue rules that “relate to” unfairness or deception.¹ Accordingly, the Commission interprets the Omnibus Appropriations Act to allow it to issue rules that prohibit or restrict conduct that may not be unfair or deceptive itself, but that are reasonably related to the goal of preventing unfairness or deception.²

(1) Necessity for Collecting the Information

The Final Rule retains the same basic structure as, and many provisions from, the proposed rule, which was submitted for OMB review on March 9, 2010.³ It also incorporates a number of important changes to enhance the protections it affords to consumers. The most significant changes: (1) add additional examples to the list of the types of misrepresentations prohibited by the Rule; (2) add a requirement that core claims for MARS be substantiated; (3) add new disclosures and expand the types of communications in which disclosures must be made; (4) strengthen the advance fee ban; and (5) expand the scope of the attorney exemption.

¹ Credit CARD Act at § 511(a)(1)(B).

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

³ OMB filed comment on the proposed rule on May 6, 2010, requesting that the FTC consider public comments it received regarding its burden estimates and to provide a response and any necessary adjustments in the ensuing clearance submission for the final rule.

Disclosure requirements

In commercial communications for a general audience, the Final Rule requires MARS providers to make the following disclosure:

- (1) “(Name of company) is not associated with the government and our service is not approved by the government or your lender”; and
- (2) in some instances, that “[e]ven if you accept this offer and use our service, your lender may not agree to change your loan.”

In addition, the Final Rule requires MARS providers to disclose to consumers, in any subsequent commercial communication directed to a specific consumer, the following information:

- (1) that “You may stop doing business with us at any time. You may accept or reject the offer of mortgage assistance we obtain from your lender [or servicer]. If you reject the offer, you do not have to pay us. If you accept the offer, you will have to pay us (insert amount or method for calculating the amount) for our services”;
- (2) that “(Name of company) is not associated with the government and our service is not approved by the government or your lender”; and
- (3) in some instances, that “[e]ven if you accept this offer and use our service, your lender may not agree to change your loan.”

Furthermore, the Final Rule requires MARS providers to disclose to consumers in all communications in which the provider represents that the consumer should temporarily or permanently discontinue payments, in whole or in part, the following information:

“If you stop paying your mortgage, you could lose your home and damage your credit rating.”

Finally, after a provider has obtained an offer of mortgage assistance relief from the lender or servicer and presented the consumer with a written agreement incorporating the offer, the Final Rule requires that the MARS provider disclose the following:

- (1) “This is an offer of mortgage assistance relief service from your lender [or servicer]. You may accept or reject the offer. If you accept the offer, you will have to pay us [same amount as disclosed pursuant to § 322.4(b)(1)] for our services”; and
- (2) a description of all “material differences” between the terms, conditions, and limitations of the consumer’s current mortgage and those associated with the offer for mortgage relief, provided in a written notice from the consumer’s lender or servicer.

The Final 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 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 that the government, for-profit entities, and nonprofit entities assist financially distressed consumers with their mortgages, and allowing for the frequency of deceptive affiliation claims, the FTC believes that the requirement that MARS providers disclose their nonaffiliation with the government or with consumers' lenders or servicers is reasonably related to the goal of preventing deception.
- Risk of Nonpayment of Mortgage: The rulemaking record demonstrates that MARS providers frequently encourage consumers, often through deception, to stop paying their mortgages and instead pay providers. Consumers who rely on these deceptive statements frequently suffer grave financial harm. The FTC believes that requiring MARS providers who encourage consumers not to pay their mortgages to disclose the risks of following this advice is necessary to prevent deception.
- 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 reasonably related to the prevention of deception.

In addition, the Final Rule prohibits providers from collecting fees until the consumer has accepted the results obtained by the provider. The FTC concludes that to effectuate fully the advance fee ban, it also is necessary for the provider to inform consumers that they may withdraw from the service and may accept or reject the result delivered by the provider. This disclosure is reasonably related to preventing unfair and deceptive acts and practices by MARS providers.

- 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 reasonably related to the goal of preventing deception.

- Written Notice from Lender or Servicer: Based on the FTC's law enforcement experience and the rulemaking record, the Commission believes that providing the consumer with a notice from the consumer's lender or servicer describing all material differences between the consumer current mortgage loan and the offered mortgage relief is essential to consumers' ability to evaluate whether they should accept the offer. Requiring that the lender or servicer prepare the written disclosure also better ensures that the information provided is consistent with the terms of the offer, and mitigates against the risk that MARS providers would mislead consumers about the offer. The FTC concludes that this disclosure is reasonably related to the goal of protecting consumers from the deception.

Recordkeeping requirements

The Final 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.⁴

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

⁴ 5 C.F.R. § 1320.3(b)(2).

The information obtained from the rulemaking record establishes the need for 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 Final Rule and to identify injured consumers.

(2) Use of the Information

The required disclosures under the Final 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 Final 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 Final 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 Final Rule are format-neutral and do not limit MARS providers' use of available information technology that might reduce compliance burdens. Likewise, the Final Rule's recordkeeping provisions do not limit the use of available technology to maintain required records. Rather, the Final 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 Final 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 final 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 Final 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 Final Rule cannot be provided less frequently. As a threshold matter, it is important that consumers know before they begin dealing with the MARS providers: (1) that MARS providers are not associated with the government or with consumers' lenders; and (2) that regardless of the service or result the MARS providers represent the consumer will receive by using their services, the lender may not agree to change

the consumer's loan. Thus, it is necessary that these disclosures be made in all communications with consumers prior to consumers entering into an agreement to purchase MARS. In addition, these disclosures, along with the disclosure of total cost and the right to cancel the service at any time, are needed in each subsequent commercial communication with specific consumers to reinforce these intended protections and help prevent their oversight. Furthermore, the disclosure to the consumer regarding the risk of failing to pay his or her mortgage is necessary in all communications in which the triggering statement is made given the harm that could result from following such advice. These requirements will 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 Final Rule also is tailored to minimize the frequency of recordkeeping as much as possible. The final 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 Final 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 Final Rule is consistent with all applicable guidelines contained in 5 C.F.R. § 1320.5(d)(2).

(8) Consultation Outside the Agency

On June 1, 2009, the Commission published in the Federal Register an Advance Notice of Proposed Rulemaking (ANPR)⁵ and 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) prohibitions and restrictions on providers of these services that are needed to prevent harm to consumers addressing MARS practices. Further, on March 9, 2010, the Commission published in the Federal Register a Notice of Proposed Final Rulemaking (NPRM)⁶ and sought comment on a proposed rule.

In response to the ANPR and NPRM, the Commission received a total of 145 comments.⁷

⁵ 74 Fed. Reg. 26,130.

⁶ 75 Fed. Reg. 10,707.

⁷ The FTC received 46 comments in response to the the ANPR. The comments on the ANPR are available at <http://www.ftc.gov/os/comments/mars/index.shtml>. A total of 75 comments were

The comments were received from stakeholders, including for-profit MARS providers, state law enforcers, consumer and community groups, state bars and bars associations, and financial service providers. A majority of the comments expressed concern regarding pervasive 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, nonprofits, lenders, or loan servicers. In addition, many commenters, including 46 state attorneys general, consumer and community organizations, and financial service providers, state that the Rule should prohibit or restrict the collection of fees for mortgage relief services until the promised services have been completed.

The largest number of comments received in response to the NPRM – a total of 30 – were submitted either by attorneys who provide MARS⁸ or entities representing attorneys, including the American Bar Association and several state bars and bar associations.⁹ These comments focused on the scope of the proposed rule’s exemption for attorneys, asserting that the Commission should expand the exemption. Other commenters, including some consumer groups and a coalition of state bank examiners, also advocated that the proposed exemption for attorneys be broadened, although to a lesser extent than the attorneys and their representatives advocated.¹⁰ By contrast, comments from NAAG¹¹ and others¹² urged the Commission not to change the attorney exemption in the proposed rule. In addition, several commenters argued generally that the proposed recordkeeping requirements were burdensome, in particular for attorney providers. To address those concerns, attorneys who provide MARS to consumers are exempt from the Final Rule (other than the advance fee ban) if they meet certain requirements.

Apart from comments that focused on the coverage of attorneys, most comments supported the proposed rule and its specific provisions. Most significantly, these comments generally supported an advance fee ban,¹³ although a few non-attorney MARS providers opposed

received in response to the NPRM and those comments are available at <http://www.ftc.gov/os/comments/mars-nprm/index.shtm>.

⁸ See, e.g., James Robert Deal, Esq.; Leah Greenfield.

⁹ See, e.g., Am. Bar Ass’n (ABA); Oregon State Bar at 1; Wisconsin State Bar at 1; Georgia State Bar at 1; Florida State Bar at 1; Maine Bar Ass’n at 1-2.

¹⁰ See, e.g., National Consumer Law Center, et al. (“NCLC”) at 10-13; Conference of State Bank Supervisors (“CSBS”) at 4-5.

¹¹ See National Association of Attorneys General (“NAAG”) at 3-4.

¹² See, e.g., Consumers Union of United States, Inc. (“CUUS”) at 8-9.

¹³ See, e.g., Office of the Minnesota Attorney General at 3; Office of the Ohio Attorney General at 1; Mortgage Bankers Association at 2-3 (supporting “strict prohibition” of advance fees); NAAG at 2 (“The advance fee ban is the linchpin of effective deterrence of fraudulent practices

it.¹⁴ Several commenters argued generally that the proposed recordkeeping requirements were burdensome, in particular for attorney providers. To address those concerns, the Final Rule exempts attorney providers from the recordkeeping provision.

Furthermore, the Commission has consulted with the Federal Reserve Board and, as appropriate, other federal banking agencies. Since the Commission's publication of the NPRM, FTC staff has held meetings with a number of stakeholders about the proposed rule, including representatives of the American Bar Association, the National Association of Bar Counsel, National Association of Attorneys General, the Hope Now Alliance, and the National Association of Consumer Credit Administrators. Staff also has met with officials of Freddie Mac and several federal agencies, including the Federal Reserve Board, Office of Thrift Supervision, Department of Housing and Urban Development, Federal Deposit Insurance Corporation, Office of the Comptroller of the Currency, Federal Housing Administration, and the Department of the Treasury staff responsible for creating the BCFP.

(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.

(12) Estimated Annual Hours and Labor Cost Burden

Estimated annual hours burden: 65,000 hours

Estimated labor cost burden: \$2,915,600, rounded to the nearest thousand

The Final 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

by providers of mortgage relief services."); NCLC at 3 ("The single most important provision is section 322.5, which prohibits the collection of any fee before providing tangible results of real value to consumers."); American Financial Services Association at 5 ("Banning upfront fees is the best way for the FTC to ensure that MARS providers do really provide consumers with a beneficial service."); *see also* CSBS at 3; CUUS at 6; New York City Department of Consumer Affairs at 3.

¹⁴ *See, e.g.*, Metropolis Loans (Camerin Hawthorne); Rate Modifications, Inc. (David Deal); Ian Hirsch.

experiences and information in the rulemaking record, the FTC estimates that the Final Rule would affect 500 MARS providers.

The Final 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.¹⁵ Staff conservatively estimates, however, that the incremental burden to prepare these documents will be approximately 2 hours. Staff assumes that management personnel will implement the disclosure requirements, at an hourly rate of \$46.65.¹⁶ Based upon these estimates and assumptions, total labor cost for 500 MARS providers to prepare the required documents is \$46,650 (500 providers x 2 hours each x \$46.65 per hour).

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

Commission staff assumes that management personnel will prepare the required disclosures at an hourly rate of \$46.65.¹⁷ Based upon the above estimates and assumptions, the total labor cost to prepare the required documents to demonstrate compliance is \$2,915,625 (500 providers x 125 hours each x \$46.65 per hour). 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 \$13.63.¹⁸ Based upon the above estimates and assumptions, the total labor cost to retain and file documents is \$20,445 (500 providers x 3 hours each x \$13.63 per hour).

¹⁵ 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).

¹⁶ This estimate is based on an averaging of the mean hourly wages for sales and financial managers provided by the Bureau of Labor Statistics. BUR. OF LABOR STATISTICS, NATIONAL COMPENSATION SURVEY: OCCUPATIONAL EARNINGS IN THE UNITED STATES, 2009, tbl. 3, at 3-1 (2010), available at <http://www.bls.gov/ncs/ncswage2009.htm> (“OCCUPATIONAL EARNINGS SURVEY”).

¹⁷ *Id.*

¹⁸ This estimate is based on mean hourly wages for office file clerks found at OCCUPATIONAL EARNINGS SURVEY, *supra* note 14 tbl. 3, at 3-23.

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

The Final 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) Program Changes/Adjustments

This is a new rulemaking. The burden hour and capital cost estimates from the proposed to final rule remain unchanged. Labor costs have been revised to incorporate updated Bureau of Labor Statistics hourly wage inputs for the labor categories assigned to the analysis above.

(16) Plans for Tabulation and Publication

Not applicable.

(17) Failure to Display the OMB Expiration Date

Not applicable.

(18) Exceptions to Certification

Not applicable.