NATIONAL ASSOCIATION OF REALTORS®

The Voice For Real Estate®

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July 15, 2009 Submitted electronically via www.regulations.gov

Federal Trade Commission
Office of the Secretary
Room H-135 (Annex W)
600 Pennsylvania Avenue, NW
Washington, DC 20580

Re: Mortgage Assistance Relief Services Rulemaking, Rule No. R911003

Dear Mr. Secretary:

On behalf of the 1.1 million members of the National Association of REALTORS® (NAR), I am pleased to provide comments on the Federal Trade Commission's Advance Notice of Proposed Rulemaking; request for comment regarding mortgage assistance relief services.

The National Association of REALTORS® (NAR) is America's largest trade association, including NAR's five commercial real estate institutes and its societies and councils. REALTORS® are involved in all aspects of the residential and commercial real estate industries and belong to one or more of some 1,400 local associations or boards, and 54 state and territory associations of REALTORS®. In this comment letter, NAR will limit its comments to one of the FTC's specific questions raised in the FTC's Advanced Notice of Proposed Rulemaking: Mortgage Assistance Relief Services:[1]

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 restriction should be imposed and why?

NAR believes the Commission should impose fee restrictions in a proposed FTC rule that prohibits providers of loan modification and foreclosure rescue services from receiving referral fees and/or splits of fees or commissions from mortgage lenders, brokers, builders, or real estate sales agents or brokers. The Department of Housing and Urban Development (HUD) has previously addressed the issue of fee splitting with regard to housing counseling agencies[2].

[1] FR 74 26130 (6-1-09)

[2] 24 CFR Section 214.303(f) (72 FR 55652 (9-28-07) prohibits HUD-approved housing counseling agencies from making referrals or accepting of fees from mortgage lenders, brokers, builders, or real estate sales agents or brokers.

In the case of loan modification and foreclosure rescue services, NAR has received anecdotal evidence that some of these organizations have offered to pay referral fees to real estate agents in return for agents steering their clients to their foreclosure rescue services. In a reverse situation, at least one foreclosure rescue company has offered, under certain circumstances, to refer their clients to real estate agents in return for a split of the real estate agent's commission.

In a February 12, 2009 email, HUD warned HUD-approved housing counseling agencies not to split fees with real estate brokers or real estate agents for purposes of paying for a client's foreclosure counseling session in relation to short sales. HUD ordered all approved housing counseling agencies, their affiliates and branches to stop the practice immediately and warned that future fee-splitting may be grounds for termination from the HUD program. In the same email, HUD warned that such practices may also violate the Real Estate Settlement Procedures Act (RESPA) which prohibits referral fees and kickbacks, from any person for any settlement service.[3]

NAR believes that a similar prohibition against fee splitting for referrals should extend to all loan modification and foreclosure rescue services, and any compensation to other service providers should be limited to bone fide services actually provided. Such a prohibition would be consistent with HUD's current Housing Counseling Program rules[4] prohibiting referral fees and fee splitting as well as new guidance (referenced above) HUD has provided to its counseling agencies in short sale situations.

Other NAR Concerns

NAR has long been interested in promoting foreclosure prevention programs and has recently testified before Congress at a hearing on this subject [5] NAR's testimony is attached to this comment letter. We appreciate the opportunity to address issues of concern to NAR in this comment letter.

Sincerely,

Charles McMillan, CIPS, GRI
2009 President, National Association of REALTORS®

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[3] Depending on whether loan modification and foreclosure rescue services result in a refinancing or a new mortgage and other factors, foreclosure prevention and relief services may or may not be considered a "settlement service" and therefore subject to RESPA prohibitions against referral fees, kickbacks and splits of fees.

[4] 72 FR 55638 (9-28-07).

[5] Hearing before the United States House of Representatives Committee on Financial Services Subcommittee on Housing and Community Opportunity Entitled "Legislative Solutions for Preventing Loan Modification and Foreclosure Rescue Fraud." (May6, 2009).

HEARING BEFORE THE

UNITED STATE HOUSE OF REPRESENTATIVES

COMMITTEE ON FINANCIAL SERVICES

SUBCOMMITTEE ON HOUSING AND COMMUNITY OPPORTUNITY

ENTITLED

"LEGISLATIVE SOLUTIONS FOR PREVENTING LOAN MODIFICATION AND FORECLOSURE RESCUE FRAUD"

WRITTEN TESTIMONY OF

JOHN W. ANDERSON, ABR, CRB, CRS, GRI

ON BEHALF OF

THE NATIONAL ASSOCIATION OF REALTORS®

MAY 6, 2009

Introduction

Chairwoman Waters, Ranking Member Capito, and Members of the Subcommittee, thank you for the opportunity to testify before you. My name is John Anderson and I am a broker/owner of Twin Oaks Realty in Crystal, MN. I am the 2009 Vice Chair of the National Association of REALTORS® (NAR) Federal Housing Policy Committee, and a member of NAR's 2009 Public Advocacy Advisory Group.

I am here to testify on behalf of 1.2 million members of the National Association of REALTORS®. We thank you for the opportunity to present our views on the problems with foreclosure rescue scams and need for mortgage reform. NAR represents a wide variety of housing industry professionals committed to the development and preservation of the nation's housing stock and making it available to the widest range of potential homebuyers.

REALTORS® Want to Protect our Nation's Homeowners

Irresponsible and abusive lending practices are a major problem for our nation's communities. While responsible subprime lenders have played an important role in helping millions of consumers achieve homeownership, abusive lending occurs much too often in subprime markets. Unfortunately, some lenders have abused their role and taken advantage of vulnerable borrowers, by charging extremely high interest rates and loan fees unrelated to risk, using aggressive sales tactics to steer consumers into unnecessarily expensive or inappropriate loan products, advertising "teaser" interest rates (like the 2/28 or 3/27 adjustable rate mortgage) that steeply increase after the first few years of the loan and basing their lending on artificially high appraisals. Real estate professionals have a strong stake in preventing abusive lending because:

- Abusive lending erodes confidence in the Nation's housing system.
- Legislative and regulatory responses to lending abuses that go too far can inadvertently limit the availability of reasonable credit for prime as well as subprime borrowers in a credit-driven economy. When responses to abusive lending constrain the ability of the secondary mortgage market to provide liquidity for home finance, consumers will find it more difficult and expensive to buy a home.
- Citizens of communities, including real estate professionals, are harmed whenever abusive lending strips equity from homeowners. This is especially the case when irresponsible lenders concentrate their activities in certain neighborhoods and create a downward cycle of economic deterioration.

Foreclosures Devastate the Strength and Stability of Communities

The consequence of lending abuses is higher rates of foreclosures leading to the loss of families' homes and savings and increased vacancy rates which, in turn, can cause all homes in a neighborhood to lose value. In my own state of Minnesota, foreclosures continue to rise, although at a slower pace than in previous years. Foreclosure filings in 2007 almost doubled from 2006. In 2009, the rate increased by 29% to 26,268[6].

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[6] Foreclosures in Minnesota: A Report Based on County Sheriff's Sale Data, Housing Link, February 26, 2009.

I can tell you first hand that the impact of foreclosures is unmistakable. According to research conducted by the Woodstock Institute, a foreclosed home lowers the price of surrounding homes by about 1 percent.[7] The same research also found that each additional foreclosed home within an eighth of mile lowered the values by an additional percent. The Center for Responsible Lending (CRL) projects that more than 2 million American households with subprime loans will have lost their homes by the end of 2009, up from the original estimate of 1.1 million made in 2006. Additionally CRL estimates that 40.6 million homes in neighborhoods surrounding those foreclosures will suffer price declines averaging over $8,667 per home and resulting in a $352 billion total decline in property values.[8]

Someone once said that foreclosures are like mold — once it starts, it's difficult to rid a community of it. Families struggling to make mortgage payments and who live in a neighborhood where homes have already been lost to foreclosure will find it difficult to refinance or sell due to declines in area home values. Far too often the financially stressed family will end up losing their home and feeding the vicious proliferation of foreclosures.

<u>Foreclosure "Rescue" Scams</u>

The most pervasive foreclosure "rescue" scam is the "reconveyance" which may or may not involve equity stripping. Generally, the scam goes like this:

- A homeowner falls a few months behind on their mortgage payment and has just received a notice of pending foreclosure from the lender.
- The homeowner responds to an advertisement or a letter that typically says, "Want to avoid foreclosure and stay in your home? Call now. Time is of the essence. The foreclosure timeline has already started."
- The foreclosure "rescuer" or "counselor" makes promises of a fresh start and rebuilding credit by bringing the mortgage current. In exchange for paying the mortgage arrears, the homeowner is asked to sign a quitclaim deed and told he or she can remain in the house as a renter.
- The "rescuer" or "counselor" explains that every month, the homeowner makes a payment (i.e. rent) to his company, which will be lower than their current mortgage payment. The homeowner is also told that every payment will be credited to the principal of the original mortgage and will help them to repurchase the home in a few years.
- While the homeowner is making monthly payments to the "rescuer" or "counselor," the scammer is not making payments on the original mortgage. Instead the "rescuer" is keeping those payments (really, stealing) from the family and often using a home equity line of credit to suck out any remaining equity in the home.
- Soon, the homeowner learns they are further in arrears with the original lender and have the added financial burden of new liens for the scammer's new home equity loans. In almost every case where there is no legal intervention, the homeowner loses the home to foreclosure, loses all the money paid to the scammer as rent, and loses all the home equity that has built up over the years.

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[7] There Goes the Neighborhood: The Effect of Single-Family Mortgage Foreclosures on Property Values, Woodstock Institute (June 2005).

[8] Updated Projections of Subprime Foreclosures in the United States and Their Impact on Home Values and Communities, Center for Responsible Lending (August 2008)

Transfer of ownership generally does not relieve the homeowner of their mortgage debt obligation. Most conventional mortgages have a “due on sale” clause that prevents a transferee (in foreclosure “rescuer” scams, the transferee is the scammer) from assuming the mortgage obligation. Typically, the only way to be released from liability of mortgage debt is to pay off the property’s mortgage, either from proceeds of a sale or at the end of the term of the mortgage.

In addition, new scams related to mortgage modification are becoming a growing problem. These unscrupulous businesses claim to be affiliated with the government and ask homeowners to pay high up-front fees to qualify for government mortgage modification programs. Often these companies have names similar to government programs – including use of the Troubled Asset Relief Program (TARP) acronym or other federal programs.

We are pleased that the Administration is taking a firm stance on foreclosure rescue and loan modification scams. President Obama has convened a new coordinated effort across federal, state, and local governments, and the private sector to target mortgage loan modification fraud and foreclosure rescue scams that threaten to hurt American homeowners and prevent them from getting the help they need during these challenging times. Multiple agencies are involved and are helping protect consumers from these types of fraud. Currently the FBI is investigating more than 2,100 mortgage fraud cases, up almost 400 percent from five years ago.

In the last year, the Federal Trade Commission (FTC) has brought 11 cases against companies using deceptive tactics to market their mortgage modification and home foreclosure relief services. On the state level, more than 150 enforcement actions have been brought against mortgage rescue companies.

<u>Minnesota’s “Foreclosure Reconveyance” Statute</u>

In 2004, Minnesota took a significant step to protect its citizens from becoming victims of foreclosure “rescue” scams by enacting a law that sets forth a series of complex requirements applicable to persons who offer to help stop or postpone a foreclosure (“foreclosure consultant”).[9] The mortgage foreclosure law requires that if a transaction falls within the statutory definition of “foreclosure reconveyance,”[10] all details of the transaction must be in a written contract, including the exact nature of the foreclosure consultant’s services and the total amount and terms of compensation. The Minnesota statute requires that a notice be included in the contract and be printed in at least 14-point boldface type alerting consumers that foreclosure consultants cannot take money or ask for money prior to completing their work and they cannot ask the homeowner to sign any lien, mortgage or deed.[11] Probably the most important provision of the state mortgage foreclosure law is the additional right of the homeowner who engages the services of a “foreclosure consultant” to cancel the contract for services within three business days. The statue requires that a separate “Notice of Cancellation” be attached to each contract.[12]

[9] Minn. Stat. §325N (2004). See Minn. Stat. §325N.01(a) and (b) for complete definition of “foreclosure consultant.” Generally, NAR does not take positions on state statutes and does not have a position on Minn. Statute325N. The Minnesota Association of REALTORS® supported the final version of MN Statute 325N when it was enacted in 2004.

[10] Minn. Stat. §325N.01(c) (2004).

[11] Minn. Stat. §325N.03(b) (2004).

[12] 18 Minn. Stat. §325N.03(e) (2004).

The Minnesota statute also includes strong remedies for violations by foreclosure consultants including a private right of action and criminal penalties (including imprisonment). In the last year alone, Minnesota Attorney General Lori Swanson has brought 12 lawsuits against fraudulent foreclosure consultants operating in the state.

One important provision in the Minnesota legislation is that it exempts from the definition of "foreclosure consultant" real estate professionals who are acting in their capacity as trusted advisors to their clients. Especially in our current housing environment, REALTORS® often assist their clients with information on foreclosure processes, short sales, and loan modifications. Consumers rely on REALTORS® for their professional expertise, and trust their Code of Ethics. Exempting these professionals when they are engaged in their normal business practices, will allow REALTORS® to continue to offer these valuable services to their clients. Similar exemptions are provided in other federal laws, such as the SAFE Act and the mortgage reform bill being debated in the House, HR 1728, the "Mortgage Reform and Anti-Predatory Lending Act". We are pleased to see that H.R. 1231, the "Foreclosure Rescue Fraud Act of 2009", sponsored by Rep. Moore (D-WI) includes similar language.

H.R. 1231, the "Foreclosure Rescue Fraud Act of 2009"

NAR is happy to endorse, H.R. 1231, the "Foreclosure Rescue Fraud Act of 2009". This bill provides a federal definition of a "foreclosure consultant" and would prohibit these individuals or companies from receiving any compensation from a homeowner prior to completing services; holding power of attorney or interest in a home for a homeowner; or accepting a lien or other security on a home as payment for services.

The bill creates a fair balance between legitimate housing counselors and consultants that provide beneficial services to struggling homeowners and those predatory practices that take advantage of families who are facing foreclosure. The bill provides some federal minimum standards for legitimate businesses, while not preempting stronger state laws.

We support this legislation that will ensure that homeowners in need do not fall prey to unscrupulous foreclosure rescue consultants.

Homeowners Have Legitimate Options to Prevent Foreclosures

There are a number of other steps that we believe are in order to prevent the proliferation of more foreclosure scams. In order for a foreclosure "rescue" scam to be successful, the "counselor" must cut off the homeowner's access to all legitimate foreclosure prevention options. They do this by preying on the vulnerability of homeowner, often instructing them to not contact the lender or an attorney because it will preempt the "rescuers" negotiations to stay the foreclosure. For many Americans who are embarrassed and do not want to be a burden on family or friends, the foreclosure "rescue" seems like a great option and the "counselor" seems like they really want to help. But as detailed above, it is the worst option and, by some measures, even more terrible than a foreclosure where any remaining equity in the home is returned to the borrower when the mortgage debt is paid.

We think that lenders and servicers should be more aggressive in helping distressed homeowners. Too often, we hear reports from our members that borrowers seeking help from their servicer or lender are told nothing can be done until they are at least 90 days delinquent.

Too often, even when the loan is modified, the late payments are simply added to the end of the loan or the loan is modified in a way that actually increases the monthly payments. Borrowers often end up in an even more precarious financial situation and are even less likely to get back on their financial feet. As a last desperate gamble, they may turn to a mortgage "rescue" scammer. The Obama Administration's Making Home Affordable Loan Modification Program seeks to address these problems by providing incentives to investors and servicers that modify the loans of at risk borrowers who are not yet delinquent and by assuring a significant decrease in monthly payments, and we hope that loan modifications under the new program will succeed.

Similarly, some homeowners want or need to sell their home but owe more than their home is worth. This means they must obtain lender approval of a short sale. In a short sale, the lender or lenders agree to accept less than the outstanding principal on the loan and nevertheless release the lien. Lenders have a financial interest to do so because the alternative—foreclosure—almost always costs the lender more than accepting a reasonable short sale offer. But the reality is that getting a short sale approved is extremely difficult and time-consuming. NAR hears every day from members frustrated that servicers take many months to even consider a short sale and are unrealistic about the current value of the home. Potential buyers get frustrated and give up. Because the process for getting a short sale to closing is, we think, broken, homeowners become easier prey for scammers in this situation as well. NAR has been working with lenders, their representatives, Fannie Mae and Freddie Mac, and government agencies on ways to improve the short sale process. Unfortunately, little progress has been made.

It is critical that foreclosure prevention options be widely advertised and available, especially in areas where we know rescue scammers like to operate. The general nature of a homeowner who is behind on their mortgage payment is to avoid contact with the lender. We are hopeful that these attitudes and behaviors will change now that there is widespread messaging from our federal government that help is a phone call away at 1 888 -995-HOPE for free foreclosure counseling assistance.

NAR supports the efforts of the Making Home Affordable initiative, which is a broad-based collaboration between credit and homeownership counselors, lenders, investors, mortgage market participants, and trade associations and endorsed by the Department of the Treasury and the Department of Housing and Urban Development (HUD). Since May 2007, NAR has actively promoted the 1-888-995-HOPE hotline number in numerous publications and on the highly visited REALTOR.org website.

NAR strongly believes the private sector has an obligation to help educate homebuyers about today's mortgage products. Starting in 2005, NAR worked with the Center for Responsible Lending (CRL) to produce a series of brochures that describe the pros and cons of conventional loans and nontraditional mortgages, and give consumers tips on how to avoid predatory loans. In May of 2007, NAR partnered with CRL and NeighborWorks, on a brochure that focuses on helping financially stressed homeowners understand their options and offers tips on how to avoid foreclosure. Shortly after the brochure was released, NAR's President sent an e-mail to over 1.3 million REALTORS® informing them of the foreclosure prevention brochure and encouraging REALTORS® to put the brochure into the hands of every consumer they help to become a homeowner. These consumer education brochures are readily available on NAR's website. Anyone may download them for free, and we also provide thousands to our consumer partners for distribution. And the glossy version is also available for purchase at a reasonable cost.

NAR also supports increased funding for programs that provide financial assistance, counseling, and consumer education to borrowers to help them avoid foreclosure or minimize its impact. In fact, NAR in March of this year launched a $3 million Foreclosure Prevention and Response initiative to provide funding to all state and local Realtor® associations to assist them in devising and implementing plans to respond to the current foreclosure crisis. These plans will be fully in accord with locally identified needs and are aimed primarily at educating and training Realtors® to help consumers through counseling and the proper handling of troublesome transactions such as short sales. This funding will also help Realtors® team up with local governments and other community organizations to address the adverse impacts of foreclosures.

Need for Mortgage Reform

Finally, REALTORS® across the nation believe anti-predatory lending reforms are required to restore consumer confidence in the mortgage industry. Historically low mortgage interest rates and a significant tax credit for first-time homebuyers have begun to entice consumers to get back into the housing market; however, wholesale reform of the mortgage lending sector to give consumers the protections they need, will, we believe, remove the last impediment preventing a housing recovery.

Congress' efforts to reform mortgage lending are paramount not only to the housing recovery, but to the recovery of the national economy. As I, and many of my REALTOR® colleagues, have mentioned in prior testimony to this and other Congressional committees, housing has always led our economy out of downturns, and it will again -- once the appropriate measures are put in place to prevent recurrence of the past irresponsible and abusive lending practices, which are largely responsible for causing the problems we are experiencing today.

As Congress moves towards putting these protections in place, REALTORS® respectfully remind you that an appropriate balance must be struck between safeguarding the consumer and making sure consumers have access to mortgages at a reasonable cost. Undue regulation of the mortgage market that makes the sector unattractive for business participants will be as harmful to the consumer as the lack of regulation that allowed for the level of irresponsibility and abuse we have just experienced.

REALTORS® have a strong stake in preventing abusive lending, and have adopted a set of "Responsible Lending Principles" that form the basis for NAR's advocacy efforts in Congress. We are pleased that H.R. 1728 embodies the REALTORS® "Responsible Lending Principles"; therefore, REALTORS® offer strong support for H.R. 1728, "the Mortgage Reform and Anti-predatory Lending Act of 2009" because it strikes an appropriate balance between safeguarding the consumer and making sure consumers have access to mortgages at a reasonable cost.

Conclusion

Rarely do foreclosure "rescue" scams turn out with a happy ending. Rather, the "rescue" scenario that is played out over and over in communities across this country is in reality the theft of a family's wealth, the taking of a homeowner's dignity and stolen homeownership. For Americans who rely on their home as the foundation of their net worth, a foreclosure is emotionally and financially crippling.

REALTORS® help families achieve the dream of homeownership. The National Association of REALTORS® supports increased consumer protections to ensure that the "dream" our members help fulfill does not turn into a family's worst nightmare. NAR stands ready to work with Congress on the important issue of foreclosure "rescue" scams.

Thank you