CALIFORNIA ASSOCIATION OF REALTORS®

March 23, 2011

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

2011 OFFICERS

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President

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Executive Vice President/ State Secretary

In Re: Mortgage Assistance Relief Services (MARS) rules at 16 CFR Part 322

Dear Mr. Secretary:

On behalf of the 172,000 members of the CALIFORNIA ASSOCIATION OF REALTORS® (C.A.R.), we are requesting modification of the above mentioned rule to explicitly exempt real estate agents providing services in short sale transactions, or alternatively, we seek clarification from the FTC that the rule does not pertain to real estate agents. Without modification or clarification, the rule and guidance will continue to cause great confusion and burden in the residential real estate industry, at a time the housing market needs to recover, not be dampened. The FTC states in its commentary that an exemption for real estate agents is not necessary, and yet, as written, the rule could be read as sweeping most short sale transactions involving agents into the regulation. An explicit exemption is called for when real estate agents, while acting under the strict supervision and regulations of their state licensing agencies, negotiate, obtain, and arrange short sales as an inherent part of their services in helping homeowners list and sell their properties.

The services real estate professionals provide should be exempted in the rule itself and in the commentary so that its lack of applicability is clear. Further, when states have enacted laws that prohibit advance fees, the MARS rule unnecessarily encumbers legitimate activity with recordkeeping, superfluous notices, and extensive customer service recordkeeping and policies that at best confuse rather than protect customers and at worst, discourage legitimate providers from staying in a very fragile market due to the burden and confusion caused.

<u>Agents Who Negotiate Short Sales Play a Vital Role in the Housing Recovery</u>
Real estate professionals are involved in the listing and selling of property that, in this market, are often in a short sale position. In short sale transactions, listing brokers cannot avoid becoming involved in lender interactions to ensure the successful closing of their transactions. In virtually every case, the real estate

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agent is not paid unless it closes. By further hindering these real estate professionals from advertising their skills and experience, the market is hurt, not helped at a time when the economy very much needs to end the distress of the housing market.

The Case for a California Exemption of All Short Sale Transactions
California law prohibits advance fees for loan modifications (Cal. Civ. Code § 2944.7, Cal. Bus. & Prof. Code § 10085.6), and prohibits advance fees for foreclosure-related consulting services under the foreclosure consultant law (Cal. Civ. Code § 2945 et seq.). For anything not prohibited by those laws, California law requires heavy regulatory oversight for real estate licensees charging upfront fees for services not yet performed (Cal. Bus. & Prof. Code § 10026). Among other things, no less than ten calendar days before collecting an advance fee, a real estate broker must submit to the California Department of Real Estate (DRE) the advance fee agreement and all other materials to be used for advertising, promoting, soliciting, or negotiating the advance fee (10 Cal. Code of Reg. § 2970). Even then the fees are subject to trust accounting required for real estate brokers (Cal. Bus. & Prof. Code § 10146).

<u>The Current Guidance and Rule Has Caused Massive Confusion.</u>
According to FTC's own MARS Compliance Guide for Business:

> Real Estate Agents. The Rule covers real estate agents who promote their services as a way to help consumers to avoid foreclosure, for example, by getting a lender's approval for a short sale. However, the Rule doesn't cover real estate agents who don't promote their services this way, and who only provide services to help people in buying or selling homes — like listing homes for sale, showing homes, or finding homes that meet buyers' needs.

The rule is contradictory to the express statement in footnote 126 (16 CFR Part 322, vol. 75 No. 230 Dec. 1, 2010 p. 75102) states:

As a general matter, the Final Rule is not intended to apply to the marketing of services to assist consumers in selling their properties to third parties. …Real estate agents customarily assist consumers in selling or buying homes and perform functions such as listing homes for sale, showing homes, and finding desirable homes for consumers. The Commission is aware that real estate agents may perform these functions

> when properties are ***bought or sold through a short sale transaction, but does not consider these services to be MARS***. (Emphasis added.)

Yet 322.2 (i)(6) explicitly contradicts this when it includes short sales in the definition:

> "Mortgage Assistance Relief Service" means any service, plan, or program, offered or provided to the consumer in exchange for consideration, that is represented, expressly or by implication, to assist or attempt to assist the consumer with any of the following: …(6) Negotiating, obtaining or arranging: (i) A short sale of a dwelling, (ii) A deed–in-lieu of foreclosure, or (iii) Any other disposition of a dwelling other than a sale to a third party who is not the dwelling loan holder.

It is hard to conceive of the rule not applying to "marketing of services to assist consumers in selling their properties to third parties," yet applying to "Negotiating, obtaining or arranging: (i) A short sale of a dwelling." It is equally as difficult to reconcile that "The Commission is aware that real estate agents may perform these functions when properties are bought or sold through a short sale transaction, **but does not consider these services to be MARS"** with 322.2(i)(6) that says they are MARS. Perhaps the intent was to only cover those functions if these are done by persons without a real estate license, which would be illegal in California and perhaps other states as well.

A specific change or clarification is needed to indicate that real estate licensees performing licensed activities in conjunction with a short sale are not MARS service providers as indicated in the footnote. This should be true whether or not the listing broker and selling broker (the one who works with the buyer) arranges for a separate licensed person who has knowledge of short sale transactions to assist in negotiating the short sale with the lender in exchange for compensation, usual paid as a portion of the listing or selling broker's compensation. Of course, this would only be if these licensees provided these services without advance fees.

<u>The Guidance and Rule are Over Inclusive.</u>
Not all short sales involve a homeowner avoiding foreclosure, or even necessarily are for properties in which a notice of default commencing the foreclosure process has been filed. Many homeowners make timely mortgage payments, are at no risk of foreclosure, and yet, want to do short sales. Perhaps they are relocating for employment, retirement, medical reasons, or to accommodate their need for a larger or smaller home. These short sales are desired due to a declining market,

not necessarily a delinquent homeowner facing foreclosure, but one who has insufficient cash to cover the lack of equity yet needs to sell for a variety of reasons.

Short Sale Transactions are Not Inherently Unfair or Deceptive Acts or Practices.

The underlying law relates to regulating "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."

Real estate agents who provide listing and selling services in a real estate transaction in which negotiation of the outstanding mortgage amount is required in order to close the transaction, is not "an unfair, deceptive act or practice involving loan modification or foreclosure rescue services." This is particularly true when no payment is made to the real estate professional unless the transaction successfully closes, which of course requires the seller's agreement to the amount of the loan payoff and other salient terms if any.

Existing regulations already prohibit false and misleading advertising. These factors suggest that there should be a full exemption, including short sales, from the regulation for real estate licensees. We believe it should be nationwide, but at the very least should be on par with the lawyer's exemption in states in which advance fees are effectively barred by the regulations of the licensees. Real estate agents in such states as California that require **advance** review of all advertising and contracts for such services, and ban such services for loan modification altogether, coupled with the rigorous trust accounting for any of the extremely few who do past regulatory muster, should be sufficient to achieve the actual objectives under the FTC's rule making authority. To go further creates regulatory burdens with no increase in protection to the consumer.

Proposed Revised Guideline or Rule:

An exemption in the rule would take care of these situations but if none is granted, we urge the FTC to issue guidance as follows to clarify the confusion:

> Real Estate Agents. Real estate agents who communicate with short sale lenders, or negotiate, obtain, or arrange short sales, are not covered under this Rule. Accurately advertising that one has experience in short sale transactions does not trigger the requirements under the Rule.

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We sincerely appreciate your consideration of this change in light of the massive confusion this has already caused and in light of the market realities and the adverse impact this regulation, if unaltered, will cause on the market.

Sincerely,

Beth L. Peerce

Beth Peerce
President