



New Federal Rule Outlaws Advance Fees and False Claims, and Requires Clear Disclosures, Regarding Mortgage Assistance Relief (including Loan Modification, Short Sale, and Deed-in-Lieu of Foreclosure) Services

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The Federal Trade Commission (FTC) has issued a far-reaching rule with nationwide effect that bans providers of “mortgage assistance relief services”, which includes residential mortgage foreclosure rescue, loan modification, short sale, and deed-in-lieu of foreclosure services, from requesting or collecting fees or any other consideration from a homeowner until the consumer has executed a written agreement with the loan holder or servicer which incorporates the offer of mortgage relief the provider obtained from the loan holder or servicer.

The complete text of the new FTC rule, which is more restrictive than California law in a number of respects, can be found at 16 Code of Federal Regulations, Part 322, or at <http://www.ftc.gov/opa/2010/11/mars.shtm>. Real estate licensees should review the rule in its entirety.

In addition to the restriction discussed above, the rule also mandates that such mortgage assistance relief providers disclose to consumers what the total cost of the services will be, that they have no connection to any government program or agency, and that homeowners are free to reject any offer from their lender or servicer with no requirement to pay a fee to the relief provider. Moreover, it bars the mortgage relief operators from providing false and misleading information, and from destructively advising consumers to stop communicating with their home loan lenders or servicers. The disclosure rules went into effect on December 29, 2010.

In a news release regarding the rule, the FTC stated that the rule was issued “to protect distressed homeowners from mortgage relief scams that have sprung up during the mortgage crisis. Bogus operations falsely claim that, for a fee, they will negotiate with the consumer's mortgage lender or servicer to obtain a loan modification, a short sale, or other relief from foreclosure. Many of these



operations pretend to be affiliated with the government and government housing assistance programs”.

The broad and significant advance fee ban, which became effective on January 31, 2011, includes a narrow and qualified carve out for attorneys. If lawyers meet the following four conditions, they are generally exempt from the rule:

1. They are engaged in the practice of law, and mortgage assistance relief is part of their practice.
2. They are licensed in the State where the consumer or the dwelling is located.
3. They are complying with State laws and regulations governing the “same type of conduct the [FTC] rule requires”.
4. They place any advance fees they collect in a client trust account and comply with State laws and regulations covering such accounts. This requires that client funds be kept separate from the lawyers' personal and/or business funds until such time as the funds have been earned.

It is important to note that the carve out for lawyers discussed above only applies to the FTC rule.

In California, since the passage of Senate Bill 94, which became effective on October 11, 2009, State law has prohibited any person, including real estate licensees and attorneys, from demanding, claiming, charging, collecting or receiving an upfront fee from a borrower in connection with a promise to modify the borrower’s residential loan or to do some other form of mortgage loan forbearance. The California Department of Real Estate has information about Senate Bill 94 and its broad advance fee ban, and that information can be accessed at http://dre.ca.gov/cons_adv_fees_alert.html.

Thus, the more comprehensive advance fee ban applicable to lawyers with respect to loan modifications and other forms of home loan forbearance under Senate Bill 94 is still in effect, and the FTC rule's limited attorney exception does not provide a safe harbor under California law.

Stated otherwise, the FTC rule does not supplant the greater protections of California law with respect to the services covered by Senate Bill 94. Rather, it adds another (Federal) layer of enforcement, and goes a step farther than current State law in covering short sales and deed-in-lieu of foreclosure services.



The FTC has promised robust enforcement of the new rule, and the FTC, federal prosecutors, and some State Attorney Generals will be able to enforce the rule by issuing injunctions, obtaining harsh civil penalties, and by seeking damages on behalf of injured consumers.

If you have questions regarding the FTC rule, you should contact the Federal Trade Commission.