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New FTC Mortgage Assistance Rule Targets Lead Generators and Affiliate Marketers

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On November 19, 2010, at the White House, with Vice President Biden at the podium, the Federal Trade Commission (the "FTC") announced its long-expected Mortgage Assistance Relief Services ("MARS") Rule (the "MARS Rule"). Under the MARS Rule, the FTC will subject those offering mortgage assistance relief services, such as third-party loan modification companies, foreclosure consultants, and many attorneys, to new substantive requirements. All provisions of the rule except the advance-fee ban will become effective on December 29, 2010. The advance-fee ban provisions will become effective on January 31, 2011.

Importance to Lead Generators and Affiliate Marketers

While the entire MARS Rule will be of interest to any lead generator and affiliate marketer that is advertising and marketing mortgage assistance to consumers, of greatest interest will be that:

- the MARS Rule applies to entities that provide substantial assistance or support to MARS providers (*i.e.*, more than casual or incidental) when that entity knows or consciously avoids knowing that the provider is engaged in any act or practice that violates the MARS Rule. According to the FTC, substantial assistance "could include such critical support functions as lead generation, telemarketing and other marketing support, payment processing, back-end handling of consumer files, and customer referrals."
- lead generators and affiliate marketers themselves also may qualify as MARS providers, and thus could be liable for primary violations of the MARS Rule, if they "arrang[e] for others to provide" mortgage assistance relief services, which many may implicitly do as part of their advertising and marketing services.
- the advance-fee ban prohibits the collection of any fees until MARS providers have provided consumers with a written offer from their lender or servicer that the consumer decides is acceptable and a written document from the lender or servicer describing the key changes to the mortgage that would result if the consumer accepts the offer.

Overview of the MARS Rule

Among other requirements and restrictions in the MARS Rule, included provisions will:

(1) adopt a broad definition of MARS;

(2) prohibit MARS providers from making false or misleading claims;

(3) mandate that providers disclose certain information about these services;

(4) bar the collection of advance fees for these services;

(5) prohibit anyone from providing substantial assistance or support to another they know or consciously avoid knowing is engaged in a violation of the MARS Rule;

(6) impose the requirements under the MARS Rule on attorneys, with certain limited exceptions; and

(7) impose recordkeeping and compliance requirements.

Enforcement and the New Consumer Financial Protection Bureau

Over the last two years, the FTC has brought more than 30 cases related to mortgage assistance and loan modification operations, and state and other federal law enforcement agencies have brought hundreds more. These cases have included telemarketers, mortgage brokers, lead generators, payment processors, contractors that provide back-office services, and attorneys.

The FTC can use its powers under the FTC Act to investigate and enforce the Rule, and the FTC can seek civil penalties under the FTC Act against those who violate it. As of July 21, 2011, the new Consumer Financial Protection Bureau ("CFPB") will have jurisdiction to enforce the Rule over persons to the extent they offer consumer financial products or services and to the extent they are subject to certain enumerated consumer laws or authorities transferred to the agency, including the MARS Rule, although the FTC also will retain the ability to also enforce the Rule. In addition, states can enforce the Rule by bringing civil actions in federal district court, subject to notice requirements to the FTC or the "primary federal regulator" (CFPB).

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The FTC and state Attorneys General are focused on advertising that approaches fraud or threatens injury to consumers, and that has led to stepped-up enforcement and new rules. Lead generators and affiliate marketers face an increasingly aggressive FTC and state Attorneys General, who will continue to be vigilant in their oversight of MARS and aggressive in the remedies they seek through enforcement actions. The new MARS Rule gives the FTC, state Attorneys General and, soon, the CFPB, a powerful tool to fight mortgage rescue abuses.

Lead generators and affiliate marketers that focus only on internal compliance, instead of carefully selecting their clients, are those that may end up on the wrong end of a governmental investigation or enforcement action. Simply achieving compliance with consumer facing advertising and marketing will not be enough to insulate a lead generator or affiliate marketer from an enforcement action in the event of a violation of the law by a lead purchaser.

Advertisers and marketers of mortgage assistance that want to survive in the new regulatory environment should study the new rule closely and ensure that an appropriate compliance program is in place to help avoid liability. In light of the new MARS Rule, lead generators and affiliate marketers will want to review their own – and their clients' – advertising and marketing practices, policies and procedures, as appropriate, and understand the services provided to the consumer.

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Jonathan Pompan*, an attorney in the Washington, DC office of Venable LLP, represents nonprofit and for-profit companies in regulated industries in a wide variety of areas including advertising and marketing law compliance, as well as in connection with Federal Trade Commission and state investigations and law enforcement actions. For more information, please contact Mr. Pompan at 202.344.4383 or* ***jlpompan@Venable.com****.*

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