

## MAR Legal Update

### FEDERAL TRADE COMMISSION “MARS” RULE Impact on Short Sale Negotiations

The Federal Trade Commission has issued a final rule that may impact real estate professionals who represent clients involved in short sale transactions. The Mortgage Assistance Relief Services (“MARS”) rule took full effect on January 31, 2011. While primarily directed at companies that offer loan modification services, negotiating a short sale with a lender will cause the real estate professional to fall within the requirements of MARS. Negotiations include communication with a lender about a short sale transaction on behalf of a seller. Someone that only becomes involved in a short sale transaction during the normal course of their brokerage activity will need to comply with MARS for the specific transactions involving a short sale if they will negotiate or arrange for negotiations with the lender. A brokerage which promotes itself as a MARS provider will have to satisfy additional requirements. The focus of this summary is for real estate professionals who, while acting in their licensed capacity as a real estate professional, provide services that may fall within the MARS rules. If someone is advertising and operating an actual MARS business, beyond simply acting as a real estate licensee, the requirements are much more comprehensive and will also trigger registration requirements under Maine’s Debt Management Services Act. They should review the complete rule in detail and consult with their legal counsel to assure their business practices fully comply with MARS and Maine law.

**MARKETING:** MARS requires an entity who specifically markets MARS to consumers to make certain general disclosures in all advertisements promoting MARS services, including telephone solicitations. A real estate brokerage that is not specifically seeking to be a MARS provider yet wants to mention its short sale experience/qualifications in its marketing materials may or may not need to provide the general MARS disclosures. The FTC’s practice is to review ads on a case-by-case basis to determine the impression it would make upon a “reasonable” consumer. An advertisement listing the accomplishments and types of services provided to clients which mentions experience with short sale transactions, among other services, may not need to comply with the MARS advertising rules. An advertisement identifying a licensee as having the SFR designation, without more, is also likely outside of the MARS advertising rules.

**REFERRALS:** MARS provides that any person that arranges for others to provide any mortgage assistance relief service is covered by the rule. Therefore, any licensee referring a client to a MARS provider in exchange for a referral fee will need to be careful that it is not “arranging” the mortgage relief services. If a real estate professional has a client in need of short sale assistance that they do not wish to provide directly, a possible solution is to offer the client a list of providers and allow the client to choose the MARS provider. Whether the real estate professional is seen as arranging the transaction will again be a factual determination, but allowing the client to choose the provider and making it clear that the client is not required to use the MARS providers offered by the real estate professional should remove the real estate professional from the need to comply with the MARS rule. The real estate professional should also disclose upfront any referral fee arrangements with the MARS provider to the client. The real estate professional also needs to take steps to assure that any MARS provider to whom it refers customers is complying with the MARS rule, as it is a violation if “substantial assistance” is provided to someone that you know or should have known is not complying with the rules.

**UPFRONT FEES:** MARS prohibits the receipt of upfront fees. If a brokerage takes an upfront fee from a seller and later helps negotiate a short sale, they will be in violation of MARS.

**BUYER'S REPRESENTATIVES:** Buyer's representatives may also need to comply with MARS if they negotiate a modification of a seller's loan with a lender while representing a potential buyer. Despite the fact that the buyer's representative does not otherwise represent the seller in the transaction, the buyer's representative will be seen as a MARS provider once they begin negotiating the terms of the short sale with the lender.

**RECORDKEEPING:** MARS also imposes record keeping requirements. All MARS advertisements, sales records for covered transactions, consumer communications, and consumer contracts must be retained for two (2) years.

**REQUIRED DISCLOSURES:** A real estate professional that advertises general MARS services not directed at a specific consumer will need to fully comply with the rules in all advertisements and should fully review the rules. For a real estate professional that only becomes involved in a short sale transaction during the normal course of their brokerage activity, there are three types of disclosures that will need to be made. New MARS Short Sale Disclosure forms have been created to assist in complying with these requirements.

1. **Consumer-Specific Commercial Communication.** This first disclosure has to be made before the real estate professional either negotiates a short sale with a lender or arranges for a provider to conduct these negotiations. The timing for the disclosure will depend on the facts of each transaction. If a licensee learns that a short sale will be required during its initial meeting with the seller, the broker will need to make the required disclosure at that time. A licensee who does not learn that a short sale is required until the first offer is received will not need to make the disclosure until that time.
2. **Short Sale Offer.** The second disclosure needs to be provided at the time the real estate professional delivers to the seller the written agreement from the lender or servicer incorporating the terms of the short sale offer.
3. **Notice of Material Differences.** When a written short sale offer is delivered to the seller, the real estate professional must also provide a notice from the lender that describes all material differences between the seller's current loan and the lender's proposal to modify the loan if the seller accepts the short sale offer, which may include the lender holding the seller liable for the deficiency amount. The third disclosure must accompany that notice of material differences.

**ON-GOING REGULATORY EFFORTS:** NAR is continuing to work with the FTC to see how obligations that exist under real estate brokerage agreements can be incorporated into and made consistent with the MARS disclosure and urging reinterpretation or amendment of the rule to eliminate coverage by the MARS rule if the main service being provided is selling a home, not providing foreclosure relief services.

**NAR'S LEGAL OVERVIEW** (requires Realtors.org login):  
<http://www.realtor.org/letterlw.nsf/pages/0211mars>

*Note: This information is general in nature and subject to change. March 2010.*