

Are You A Short Sale Expert?

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If you have obtained a designation as a short sale expert, provide services to individuals or brokers based upon your expertise as a short sale expert or charge specific fees for negotiating short sales, you must comply with the Federal Trade Commission's MARS Rule. The Federal Trade Commission ("FTC") put into effect the Mortgage Assistance Relief Services ("MARS") Rule ("MARS Rule" or "Rule") which became effective on January 31, 2011. It was generally understood that any real estate broker who was involved in negotiating with a lender to obtain a short sale consent on behalf of a seller would fall within the MARS Rule and therefore be required to make a series of disclosures and comply with the various requirements of the Rule.

Non-Experts Are Not Subject to the Rule

On July 15, 2011, the FTC announced that it would not enforce most of the provisions of the MARS Rule against real estate professionals who are acting in their licensed capacity while assisting sellers to obtain a short sale for their residence. The National Association of Realtors worked actively to obtain this result from the FTC. The original intent of the MARS Rule was to regulate an estimated 5,000 businesses which had been offering loan modification services to consumers. It was not originally intended for real estate brokers. Many of the entities originally targeted were "foreclosure rescue companies." The FTC and State Attorneys General had clear evidence that consumers received very little benefit from these foreclosure rescue companies most of which charged advance fees for services of limited or no value to the consumer.

When the Rule was finally placed into effect, it essentially blanketed the entire real estate profession far exceeding its original intent. While the National Association of Realtors was successful in obtaining the July 15, 2011 FTC decision that it would not enforce the Rule against real estate professionals acting in their licensed capacity, it is clear that those Realtors who hold themselves out as specialists in short sales or believe that they have the ability to effectively negotiate on behalf of consumers and other brokers short sale settlements with lenders, must comply with the Rule.

Summary of MARS Requirements:

- 1. NO ADVANCED FEES.** The MARS Rule contains a prohibition against requesting or receiving an advanced fee for acting on behalf of a seller in dealing with a mortgage holder or servicer. The FTC Guide prohibits the expert from "conducting an initial consultation and charging a fee for it, charging a fee to review or order a customer's mortgage or foreclosure documents, or charging a fee for gathering financial or other information from a customer."

It is clear that if a real estate broker representing a seller finds himself or herself in a position of having to negotiate with a lender to accept a short sale in order to bring about a transaction and the agent did not hold himself or herself out as an expert and is not charging a special fee for the service, the broker need not make any special disclosures required by the Act. If however a separate fee is being charged or expertise

is inferred or implied, the receipt of such additional compensation would be deemed to be a violation of the MARS Rule.

2. **DISCLOSURES IN ADVERTISING.** The MARS Rule covers advertising on TV, radio, the internet or other media in what it refers to as “general commercial communications.” When a short sale expert advertises his or her services all such advertising must include a disclosure which states:

“IMPORTANT NOTICE: ABC Realty is not associated with the government, and our service is not approved by the government or your lender. Even if you accept this offer and use our service, your lender may not agree to change your loan. If you stop paying your mortgage, you could lose your home and damage your credit rating.”

If a broker places an advertisement on his call waiting system advertising services as a short sale expert, the audible advertisement must be preceded by a statement: “Before using this service, consider the following information.” This statement would then be followed by the above advertising disclosure in full.

3. **SEEKING PROSPECTIVE CUSTOMERS.** The FTC Guide requires that additional disclosures be made in any “consumer-specific commercial communication.” This includes a letter, a phone call, an e-mail, text or the like which is directed at a person whom a short sale expert is soliciting in order to provide services. Such consumer-specific commercial communications must include a specific disclosure as follows:

“IMPORTANT NOTICE: You may stop doing business with us at any time. You may accept or reject the offer of mortgage assistance we obtain from your lender (or servicer). If you reject the offer, you do not have to pay us. If you accept the offer, you will have to pay us (insert amount or method for calculating the amount of the payment) for our services. ABC Realty is not associated with the government, and our service is not approved by the government or your lender. Even if you accept this offer and use our service, your lender may not agree to change your loan. If you stop paying your mortgage, you could lose your home and damage your credit rating.”

4. **COMMUNICATING A SHORT SALE OFFER FROM A LENDER OR SERVICER.** Additional disclosure requirements accrue when a short sale expert actually obtains an offer of mortgage relief from the owner’s lender or servicer.

There are two separate disclosures to be made. The first disclosure must be made on a separate written page and must state:

“IMPORTANT NOTICE: Before buying this service, consider the following information: This is an offer of mortgage assistance we obtained from your lender (or servicer). You may accept or reject the offer. If you reject the offer, you do not have to pay us. If you accept the offer, you will have to pay us (same amount as disclosed previously) for our services. If you stop paying your mortgage, you could lose your home and damage your credit rating.”

The second disclosure that the short sale expert must provide is a separate notice from the lender or servicer. The FTC Guide states: “You have to give your customer a separate one-page written notice **from the customer’s lender or servicer** that explains all material differences between the offer of mortgage relief you got from the lender or servicer and the customer’s current loan.”

5. **TRUTH IN ADVERTISING.** Under the MARS Rule, it is illegal to misrepresent, either expressly or by implication, any “material aspect” of the services you provide as a short sale expert. A “material aspect” of your services includes any information that might affect a consumer’s decision to use your services. All statements that you make about the benefits, your performance or the efficacy of your services must be truthful and be backed by competent and reliable evidence. The Rule also makes it illegal to tell a consumer to stop communicating with his or her lender or servicer.

6. **RECORD-KEEPING.** If you are a short sale expert the Rule requires that certain records be retained for two years and all employees and independent contractors affiliated with your firm must adhere to the requirements of the MARS Rule. The records that must be retained include:
 1. Advertising and promotional materials;
 2. Sales records;
 3. Communications with consumers; and
 4. Agreements with consumers.

Who Enforces the MARS Rule?

The Federal Trade Commission was originally designated as the agency responsible for enforcement of the MARS Rule. As finalized, the Rule grants to the Consumer Financial Protection Bureau (“CFPB”) and State Attorneys General the ability to enforce the Rule. Now that the FTC has announced that it will not enforce most provisions of the MARS Rule against real estate brokers, it is anticipated that the CFPB and State Attorneys General will similarly not use the Rule against licensees acting in the ordinary course of their real estate brokerage activities.

For more information about the MARS Rule, including a full print-out of the Rule as adopted, those who are actively engaged in this activity will find important information at

www.realtor.org/letterlw.nsf. Even salespersons and brokers who are not holding themselves out as short sale experts should be aware that the FTC intends to enforce the Rule against any real estate professional who makes a misrepresentation to a client during the course of assisting the client to obtain a short sale transaction. Accordingly, even for real estate professionals who do not hold themselves out as experts, it behooves any agent involved in a short sale to be familiar with the Act and to comply with the disclosures in case an error is inadvertently made.

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