



The Monarch News Carrier*

“For the Serious Real Estate Professional”

Volume VII

May/June 2011

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FEDERAL TRADE COMMISSION’S MARS RULE UNDERScores BEST ADVICE FOR REALTORS®: STAY OUT OF SHORT SALE NEGOTIATIONS WITH SELLERS’ LENDERS!

By Ann L. Johnston

Notwithstanding serious efforts by NAR to negotiate an exception to the MARS rule (“Mortgage Assistance Relief Services,” aka “the Rule” effective January 1, 2011) for REALTORS®, the FTC has recently signaled that, at the end of the day, REALTORS® must comply with it. It was developed to quash mortgage assistance/foreclosure scams which have exploded ever since the financial meltdown of 2007-2008. Unfortunately, in this writer’s view, this is yet another example of regulations seemingly drafted in haste for political purposes but lacking the structure and applicability which would allow them to work effectively, at least in “REALTOR® World.” Nevertheless, for now REALTORS® are obliged to comply with these regulations IF they engage in activities relative to short sale negotiations with sellers’ lenders. Failure to comply can result in fines and penalties of up to \$16,000 for any violations, some even as much as \$16,000/day for any continuing violation in addition to other liability.

The MARS disclosure and record-keeping rules apply to REALTORS® who engage in some or all of the following activities:

- Negotiating a short sale with a lender or service for a seller/client;
- Representing to consumers that they are engaged in the business of assisting consumers in negotiating a short sale and/or avoiding foreclosure by doing so;
- Referring consumers to ANYONE OR FIRM who is a MARS provider unless the REALTOR® gives the consumer a list of short sale specialist firms from which to choose—in which case, according to NAR, the REALTOR® is least likely to be deemed a MARS provider and thus possibly not obligated to comply with the Rule;
- Additionally, REALTORS® who work with buyers may also have some disclosure duties if they communicate in any way with the seller and/or seller’s lender to assist in working out the short sale.
- Advertising to general (not specific) consumers of one’s short sale (or MARS) services must include language to the effect that:

“the short sale provider is neither associated with nor approved by any government or lender; if you accept our offer for service, your lender may still not agree to change your loan; if you stop making your mortgage payments, you could lose your home and damage your credit rating; and we may not accept any up front fees.” (The foregoing must be in font size at least 2 points larger than the rest of the advertisement.)

So what does this mean? All advertising to the general public (hard copy, website, email, etc.) must make a statement as suggested above. Additionally, at the first meeting with an owner/seller who is thinking about (hinting at) doing a short sale, you must provide a disclosure form (see NVAR Form K1357 “Mortgage Assistance Relief Services Disclosure—Consumer Specific Disclosure”) even if you are referring the owner/seller to a third party short sale specialist firm.

If you actually assist in negotiating the seller’s short sale with the lender, then you must also provide a second disclosure form (NVAR Form # 1358 Mortgage Assistance Relief Services Disclosure/Offer of Mortgage Relief) to the Seller when the lender has approved a short sale package and/or short sale which includes the lender’s offer of mortgage relief. Finally, you must keep records of any/all short sale activities and communications for at least 2 years.

For greater detail see: <http://www.realtor.org/letterlw.nsf/pages/0511marsq&a?OpenDocument&Login> wherein NAR lays out its most current understanding from the FTC of how REALTORS® are expected to practice under the Rule.

Perhaps the most important advice to be given any REALTOR® in all of this: DON’T become a MARS provider. Not so much because of the Rule and others of its potential future progeny, but precisely because, at base, with or without the Rule, **there is significant liability in handling these negotiations with a seller’s lender.** When you consider that government regulators, lenders and many others usually deemed to have significant knowledge, expertise and authority in the mortgage loan industry can’t figure out many of these issues (for example, the impact to credit and tax liability of a borrower who sells short), such should be more than fair warning to the rest of us to stay away from this specific area of the business. It’s fine to list, market and sell a property being sold short, but GET THE MONKEY OFF YOUR BACK: let the seller or attorneys with expertise in this area handle those negotiations.

In brief, unless a REALTOR® already has significant expertise in or wants to associate with an attorney who is a short sale expert, this writer’s suggestion is to stay away from it and concentrate on the sales/marketing aspect of the property being sold short. That alone should keep a REALTOR® plenty busy!

REALTOR® REMINDERS:

- ALWAYS REVIEW YOUR CONTRACTS BEFORE YOU SEND AN OFFER TO THE SELLER AND/OR BEFORE YOU ADVISE YOUR CLIENTS TO SIGN/RATIFY AN OFFER. Be sure you understand what that contract is saying! If you aren’t sure and represent a material term incorrectly to the client, that mistake will most likely be paid for out of your wallet as well as your pride!
- ALWAYS DELIVER NOTICES AND DOCUMENTS WITHIN THE TIME FRAME AND TO THE ADDRESS (EMAIL, STREET, FAX NUMBER) AS DIRECTED BY THE CONTRACT! It’s an even better practice to send a notice or documents not only as directed by the contract but also by express mail with a tracking system so you can prove delivery by that means as well.
- BEST ADVICE: ALWAYS TREAT YOUR CLIENTS WELL. Generally, claims do not follow professionals (doctors, lawyers, REALTORS®, etc) who treat their customers well, even in the face of some serious errors.

**Check out Monarch's current CE
Program offerings!!**

“Staying Out of REALTOR® Jail:
Avoiding the Most Common (and Costly)
REALTOR® Errors”

AND

“Buyer Agents As Heroes:
Better Serving Your Buyer Clients”

We'll bring our program to your office for 2HR or 4HR VA CE programs and/or 1, 2, 3, 4 HR Approved DC CE—or—check for our calendar of programs already scheduled.

For further details, contact Ann Johnston at Monarch Title via ann@monarchtitle.net.

For the best settlement services in the Metro DC area, contact our real estate professionals at any one of our convenient office locations:

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McLean, VA 22101
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Leesburg, Virginia

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Leesburg, VA 20175
703.771.0000
703.890.0830 Fax

Georgetown, Washington, DC

(Also serving Maryland)

1015 31st Street, NW
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Washington, DC 20007
202.298.6270
202.298.6275 Fax

Gainesville, Virginia

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Gainesville, VA 20155
703.753.0771
703.581.1310 Fax

Old Town Alexandria, Virginia

675 North Washington Street
Suite 435
Alexandria, VA 22314
703.852.7700
703.852.7719 Fax

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Suite 303
Springfield, VA 22150
703.852.7710
703.852.7717 Fax

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(Also serving Maryland)

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Bethesda, MD 20814
240.482.0589
240.482.3722 Fax

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205 Van Buren Street
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Herndon, VA 20170
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