

Consumer Track

Beyond HAMP and HARP: What's Next for Underwater Homeowners

Richardo I. Kilpatrick, Moderator

*Kilpatrick & Associates, PC
Auburn Hills, Mich.*

Prof. David G. Epstein

*University of Richmond Law School and
ABI Scholar in Residence; Alexandria, Va.*

David P. Leibowitz

Lakelaw; Waukegan, Ill.

Hon. Cecelia G. Morris

*U.S. Bankruptcy Court (S.D.N.Y.)
Poughkeepsie*



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Characteristics of Mortgage Mediation Programs in Bankruptcy

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David P. Leibowitz

Lakelaw, Waukegan Illinois

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Mortgage foreclosure in the United States continues at a very high rate. According to RealtyTrac,¹ 1 of every 634 housing units was subjected to a foreclosure filing in December of 2011. Even though foreclosure activity has declined 34% from 2010, close to 2.7 million foreclosures were commenced in 2011 with almost 1.9 million properties going to foreclosure.² RealtyTrac predicts that foreclosure activity in 2012 will be higher than it was in 2011 but still below the peak of 2010.³

Naturally, exercise of creditors' rights such as foreclosure often results in invocation of debtor's remedies such as bankruptcy, and in particular chapter 13. This is particularly the case where mortgagors have been unsuccessful in obtaining modification or other relief from their mortgages in the context of state court mortgage foreclosure proceedings. Mortgagors are even more likely to seek relief in bankruptcy court in states where mortgages are foreclosed in accordance with accelerated non-judicial foreclosure proceedings.

Programs specifically addressing mortgage issues have been identified in bankruptcy courts for the following districts:

- Florida, Middle District (Orlando Division)⁴
- Indiana, Northern District (Fort Wayne, Lafayette)⁵
- New York, Eastern District⁶

¹ <http://www.realtytrac.com/trendcenter/trend.html>

² Realty Trac®Year-End 2011 U.S. Foreclosure Market Report TM, cited at <http://www.realtytrac.com/trendcenter/trend.html>

³ *Id.*

⁴ <http://www.flmb.uscourts.gov/jennemann/documents/mortgagemodificationmediation.pdf>;
<http://www.flmb.uscourts.gov/jennemann/documents/mediationorder.pdf>;
<http://www.flmb.uscourts.gov/jennemann/documents/mediationorder.pdf>;

⁵ This program applies to chapter 13 cases assigned to Bankruptcy Judge Grant.
http://www.innb.uscourts.gov/pdfs/2011-08-12_loss-mit_order.pdf;
http://www.innb.uscourts.gov/pdfs/Loss_Mitigation_Procedures_final.pdf

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- New York, Southern District⁷
- Rhode Island⁸
- Wisconsin, Eastern Division⁹

This is not necessarily an exclusive listing of bankruptcy court annexed mortgage loss mitigation programs. Generalized alternate dispute resolution (ADR) programs exist in bankruptcy courts in many other jurisdictions. Since these don't specifically relate to issues pertaining to residential mortgages, they are not addressed here.¹⁰ Such general ADR programs could be useful in addressing mortgage foreclosures. Practitioners in courts having generic ADR programs can consider invoking them in residential mortgage foreclosure cases.

The work summarizes the salient features of each of the bankruptcy residential mortgage mediation/mitigation programs. In particular, common features as well as characteristic particular to any individual program are identified.

Statistics have been maintained and published by the Bankruptcy Court for the District of Rhode Island. The SDNY also maintains statistics—the Clerk's office should have them. I do not know where they are being kept, does Una? These will be examined so as to allow for a qualitative baseline of comparison to other programs. Variances from the Rhode Island

⁶ General Order 543 (Bankr. ED NY December 8, 2009)

⁷ *In re Adoption of Modified Loss Mitigation Program Procedures*, General Order M-413, Amending General Order M-364 (Bankr. SD. NY December 29, 2010).

⁸ Fourth Amended Loss Mitigation Program and Procedures (Bankr. D. RI. Rev. 2/14/11)

⁹ Chapter 13 Mortgage Modification Mediation Program

<http://www.wieb.uscourts.gov/dmdocuments/mmm%20description.pdf>;

<http://www.wieb.uscourts.gov/dmdocuments/MMM%20Process%20for%20Website.pdf>

<http://www.wieb.uscourts.gov/dmdocuments/mmm%20order.pdf>

See also MMM-Document Checklist and forms at:

<http://www.wieb.uscourts.gov/index.php/component/content/article/38-cle-credits/71-lou-jones-cle-page>

¹⁰ See National Consumer Law Center Bankruptcy Mortgage Project at:

<http://www.bankruptcymortgageproject.org/>;

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experience may be considered to determine the relative efficacy of programs whose features vary from the Rhode Island example.

The experience in bankruptcy court annexed loss mitigation is of particular importance in light of the failure of Home Affordable Modification Program to achieve substantial results for either residential borrowers or lenders. It is in this context that Senator Sheldon Whitehouse of Rhode Island introduced a bill in the United States Senate, to facilitate bankruptcy court orders for foreclosure mediation between homeowners and lenders.¹¹ This bill has been referred to the Judiciary Committee and remains pending on the Senate Legislative Calendar for markup and reporting.¹² The bill would amend section 105 of the Bankruptcy Code so as to explicitly grant authority to the bankruptcy court to establish loss mitigation programs. Moreover, time limitations for the automatic stay would tolled pursuant to Section 362(e) of the Bankruptcy Code under this proposed legislation.

The table which follows summarizes many of the most important features of selected residential mortgage mitigation programs in selected bankruptcy courts. For a complete review of the programs, reference is directed to the source materials. It is not intended that the table produced here reflect each provision or feature of the respective programs. Rather, it is intended to compare and contrast the general provisions of the respective programs.

¹¹ Limiting Investor and Homeowner Loss in Foreclosure Act of 2010 (S. 222. 112th Congress, 1st Session)

¹² Companion H.R. 2713 was introduced in the House of Representatives on July 30, 2011. It was referred to the House Subcommittee on Courts, Commercial and Administrative Law where it remains pending as well.

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Court	Scope	How Initiated	Mediator	Process	Implementation
MD FL	<p>Abbreviated procedure published</p> <p>Informal setting</p> <p>Fast track</p> <p>Emulates program in state court;</p> <p>Required dedication of 31% of gross income to the mortgage;</p>	<p>Debtor's and debtor's counsel must determine that modification is feasible</p>	<p>Debtors pay \$385 mediator's fee prior to commencement;</p> <p>Mediator selected from approved list or a mediator may be chosen by the court;</p>	<p>Required information to be provided to the lender before mediation may commence;</p> <p>Lenders may participate remotely;</p> <p>Federal Rule of Evidence 408 applies;</p> <p>No requirements to settle. A large majority of cases end in impasse.</p>	<p>Details not clear from court's website.</p>
ND IN	<p>Similar to Rhode Island</p>	<p>Similar to Rhode Island</p>	<p>No mediator</p>	<p>Similar to all other programs</p>	<p>Duty of good faith negotiation.</p> <p>Sanctions if a party fails to participate in good faith or if loss mitigation is sought in bad faith.</p> <p>A creditor who considers information under pre-established guidelines like HAMP, HAFA, FHA loss mitigation procedures is considered to have acted in good faith.</p>

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<p>NY ED</p>	<p><i>Loss Mitigation Program</i></p> <p>All mortgage loans whether conventional, prime, sub-prime, securitized servicer or trustee.</p> <p>Residential property only including cooperatives</p> <p>Other creditors can participate as necessary;</p> <p>Chapter 13 trustee as necessary;</p> <p>Co-debtor or third parties as necessary;</p> <p>Loss mitigation includes full range of solutions including loan modification, loan refinance, forbearance, short sales, deed in lieu of foreclosure or any other remedial solution.</p>	<p>By debtor under plan;</p> <p>By request subject to right of creditor to object within 14 days;</p> <p>By creditor;</p> <p>By bankruptcy court on its own motion;</p> <p>On objection of any party, the court shall hold a hearing and not enter a loss mitigation order until a hearing is held on the objection.</p>	<p>Any party might request or the bankruptcy court might direct a mediator to participate.</p> <p>Mediator to be selected from the Mediation Register maintained by the bankruptcy court.</p>	<p><i>Loss Mitigation Order</i> is entered with various dates and deadlines.</p> <p>No lift stay motion during pendency of mediation except to avoid irreparable injury;</p> <p>Time within which to object to confirmation extended to 14 days after end of loss mitigation procedure. Federal Rule of Evidence 408 applies</p>	<p>Duty of good faith negotiation;</p> <p>Parties to exchange contact information in writing;</p> <p>Loss mitigation sessions to be held including an initial session and subsequent sessions;</p> <p>Bankruptcy court's assistance is available;</p> <p>Settlement authority is required</p> <p>Dismissal not required as a condition to loss mitigation</p> <p>May be coordinated with other programs in New York State Unified Court System.</p>
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<p>NY SD</p>	<p><i>Loss Mitigation Program</i></p> <p>All mortgage loans whether conventional, prime, sub-prime, securitized servicer or trustee.</p> <p>Residential property only including cooperatives;</p> <p>Other creditors can participate as necessary;</p> <p>Chapter 13 trustee as necessary;</p> <p>Co-debtor or third parties as necessary;</p> <p>Loss mitigation includes full range of solutions including loan modification, loan refinance, forbearance, short sales, deed in lieu of foreclosure or any other remedial solution.</p>	<p>Debtor’s provision in Chapter 13 plan;</p> <p>Creditor’s request;</p> <p>Bankruptcy Court’s own motion</p>	<p>Independent mediator may be appointed in accordance with mediation procedures in Court’s General Orders</p>	<p>Loss mitigation order to be issued;</p> <p>Loss Mitigation Order to set deadlines;</p> <p>No lift stay motion while mediation in progress;</p> <p>Document exchange through <i>Creditor Loss Mitigation Affidavit</i> and <i>Debtor Loss Mitigation Affidavit</i>;</p> <p>Status report;</p> <p>Initial contact to discuss how mediation will be handled;</p> <p>Settlement authority for both parties mandatory;</p> <p>Time within which objections to plan might be made extended 14 days after termination of Loss Mitigation Period.</p> <p>Federal Rule 408 applies to all communications</p>	<p>Settlement to be considered by Court;</p> <p><i>Loss Mitigation Report</i> to be submitted to the Court;</p> <p>May be coordinated with other programs including programs in New York State Court system.</p> <p>Duty to negotiate in good faith by all parties</p>
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<p>RI</p>	<p><i>Fourth Amended Loss Mitigation Program</i></p> <p>Resolution in context of bankruptcy rather than dismissal is encouraged</p> <p>All mortgage loans whether conventional, prime, sub-prime, securitized servicer or trustee.</p> <p>Loss mitigation includes full range of solutions including loan modification, loan refinance, forbearance, short sales, deed in lieu of foreclosure or any other remedial solution.</p>	<p>By debtor in a provision of the Model Chapter 13 plan;</p> <p>By the Debtor through a <i>Notice and/or Request for Loss Mitigation</i></p> <p>One creditor per request form.</p> <p>Subject to objection by creditor within 14 days.</p> <p>By a creditor through service of <i>Request for Loss Mitigation with Proposed Loss Mitigation Order</i>;</p> <p>On the Bankruptcy Court's own motion.</p> <p>All loss mitigation orders subject to notice and hearing. Creditors have right to object.</p> <p>Court encourages consent to Loss Mitigation Process</p>	<p>No explicit requirement for a mediator. Bankruptcy Court assistance invited as to any subject</p>	<p>Requirement that borrower make regular payments during the loss mitigation process not a condition for participation in the Loss Mitigation Program;</p> <p>Objections to participation must be timely and provide specific reasons as to why respondent believes that loss mitigation would not be successful</p> <p>Loss mitigation order contains specific deadlines;</p> <p>Flexible procedures for conduct of loss mitigation sessions;</p> <p>Federal Rule 408 applies to all communications</p>	<p>Lift stay motion postponed until end of Loss Mitigation period;</p> <p>Deadlines for objection to discharge might be extended;</p> <p>Debtor's failure to cooperate may lead to creditor's motion to terminate loss mitigation order;</p> <p>Confirmation hearing continued until after loss mitigation period has ended</p> <p>Debtors must remain current with plan payments'</p> <p>All parties must negotiate in good faith</p> <p>Dismissal not required to effectuate a resolution</p>
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<p>WI ED</p>	<p>Designed to allow “qualified chapter 13 debtors” to keep their homes.</p> <p>Program does not contemplate a full range of mortgage mitigation possibilities.</p>	<p>Initiated by Debtor’s motion to participate in <i>Mortgage Modification Mediation</i>.</p> <p>Lender has 21 days within which to respond;</p> <p>Motion must allege that debtor has a regular income, is owner occupant of resident property used as debtor’s property; mortgage balance less than \$729,750; mortgage payment not affordable due to financial hardship; complete schedules; 2 years tax returns; last 60 days’ pay advices; any other document lender requests</p> <p>No mediation without full documentation. Failure to provide documents is grounds for dismissal from program.</p>	<p>Debtor pays \$125 fee to mediator.</p> <p>Lender pays \$125 fee to mediator as well</p> <p>Mediation to be completed within 60 days of appointment of mediator;</p>	<p>Many conditions to debtor’s participation:</p> <p>Successful mediation requires debtor to agree not to dismiss chapter 13 for 9 months;</p> <p>Doomsday provision for 1 year so that any missed payment results in automatic stay to be lifted without hearing.</p> <p>If no successful mediation, debtor consents to relief from stay or proposes an amended chapter 13.</p>	<p>Lender will participate by a representative with settlement authority;</p> <p>Lender will participate in good faith negotiations;</p> <p>Full details provided in Court’s forms of <i>Motion, Consent and Order</i>.</p>
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Characteristics of Mortgage Mediation Programs in Bankruptcy***Variations among Programs***

The programs in the bankruptcy courts in the Eastern District of New York, the Southern District of New York and the District of Rhode Island are virtually identical.—neither does the SDNY or the EDNY. The procedures do allow for the parties to request appointment of a mediator, as they would be able to do in any other bankruptcy court dispute. Having a mediator appointed is very rare. The program in the Middle District of Florida requires the appointment of a mediator. I am unsure about any of the others. The Loss mitigation program in the Southern District of New York is colloquially referred to as “mediation *without* a mediator.” The ability to force communication between the parties without appointing a mediator saves money and time for all involved. Each program demands settlement authority and good faith negotiation. Each program invites active participation by the court.

In contrast to the New York and Rhode Island programs, the Wisconsin Mortgage Modification and Mediation Program runs parallel to the Home Affordable Modification Program in many respects. It appears to be available to fewer debtors and appears to be subject to more qualifications and conditions for a debtor to participate. Similarly, the program in the Middle District of Florida seems to require that the debtor be in a position to meet HAMP guidelines as a pre-condition to participation in mortgage modification. In the Middle District of Florida, it appears that the borrower is explicitly required to pay the mediator’s fees.

The Northern District of Indiana program appears to be similar to that of Rhode Island with the exception that good faith action of lender is granted a safe harbor in the event that the lender demonstrates that it considered the loan modification or mitigation in accordance with HAMP, HAFA, FHA or related guidelines. There is no provision for a mediator in Judge Grant’s

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program in the Northern District of Indiana. The Middle District of Florida program also appears to follow HAMP guidelines. While it does provide for mediation, at the expense of the debtor, it anticipates a rather low success rate.

On the other hand, the programs in New York and Rhode Island seem to anticipate a higher success rate. A factor which can be identified as a possible explanation for the higher expected success rate in the two New York programs and the Rhode Island program is the active intervention and participation of bankruptcy judges in these programs. The judges in these jurisdictions have encouraged the parties to seek their assistance. A judge's active intervention can be an important predictive factor for success in mortgage loss mitigation programs in bankruptcy. In Southern District of New York the Court holds special "loss mitigation" calendars between once or twice a month to keep things moving—the mortgage modification process slows when the Court does not hold regular status conferences. Receiving a modification is not the only benchmark of a "successful" loss mitigation program in the Southern District of New York. Here, a loss mitigation is considered a "success" when the parties are actively communicating with each other. From the Court's perspective, it is as valuable for homeowners who cannot afford their mortgage to review their options and decide to walk away as it is for homeowners to be able to modify a mortgage and make it more affordable. In the Southern District of New York, the Court, the lawyers and the parties embrace the same definition of success, which helps ensure that the debtors and creditors work together to see if anything can be done to save a home from foreclosure.

Characteristics of Mortgage Mediation Programs in Bankruptcy***Rhode Island Statistics and their Implications***

The United States Bankruptcy Court for the District of Rhode Island has maintained statistics for its mortgage loss mitigation program since its inception.¹³ During the first year of the program, 2009-2010, 553 requests for participation in the program were granted of which 222 resulted in loan modifications approved by the court. Modifications included principal reductions and reductions in interest rate in the substantial majority of cases. The maturity date was extended in more cases than not but not in the overwhelming majority of cases which experienced reduction of payments and reduction in rates.

For the period from 2010 through 2011, statistics are incomplete as many about half of the 680 loan modification requests remained pending as of October 31, 2011. Of the 344 requests which were completed, just over 30% were deemed to have been successful. Of these successful loan modifications, about 90% resulted in both reduction of monthly interest payments and a reduction in interest rate. Slightly more than half of them resulted in an extension of the maturity date. The majority of cases which failed were due to the inability of the debtor to file the required loan documentation. A few were vacated owing to loan modifications having been granted outside the court's loss mitigation program. Too little information is available for meaningful analysis of loss mitigation results subsequent to October, 2011.

It appears that the Rhode Island program has been reasonably successful, both in quantitative and qualitative terms. One might expect that programs similar to the Rhode Island program would yield similar results. One might anticipate that programs with lesser expectations

¹³ <http://www.rib.uscourts.gov/newhome/LossMitigation/Statistics.asp>

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of creditors and greater expectations upon debtors might yield fewer mortgage modification or mitigation agreements. If the bankruptcy courts which administer and oversee a mortgage modification and mitigation program expect it to succeed, then it would seem that the parties who participate in the program can be expected to take additional efforts to make the program succeed. A program which anticipates relatively little success can be anticipated to realize that self-fulfilling prophecy.

Conclusion

Bankruptcy Court annexed mortgage modification and mitigation programs can be successful with or without a mediation component. The most important factors are the good faith participation of the parties and the expectation of the courts that the parties truly use their best efforts to come to a mutually agreeable resolution. Additional efforts along these lines can be expected to yield increasingly better results to the benefit of both mortgagors and mortgagees, not to mention the national economy as well. Senate Bill 222, if enacted, could have an additional salutary impact on court annexed mortgage modification and mitigation programs.

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parently, during the three-month trial modification period, the servicer reports the mortgage payments in a way that can seriously lower a homeowner's credit score. Nevertheless, this may be the better of two options where foreclosure is the alternative.

There are no easy answers for clients who are worried about how workout agreements or foreclosure will affect their credit record. Most adverse information about a consumer's credit history is reported for seven years. Bankruptcy can be reported for ten years. A wealth of information about credit reporting can be found in National Consumer Law Center, *Fair Credit Reporting*.⁹⁵ There is also substantial information for clients about credit reporting and how to improve a bad credit report in the *NCLC Guide to Surviving Debt*.⁹⁶

Unfortunately, there are no hard and fast rules about how any individual credit granting decision will be made based on a particular notation on a credit report. Each creditor evaluates credit reports differently. A notation which is fatal to an application for credit with one creditor may not preclude credit on reasonable terms from a different creditor.

Here is some general information which may be useful to clients who are worried about their credit:

- Concerns about future credit should rarely influence how homeowners address their current problem. A consumer cannot control how the credit report is evaluated by those who check credit reports. Any delinquency will usually mean "bad credit risk" to most creditors even if it is paid in full relatively quickly. There are generally more important concerns in the foreclosure avoidance process than the potential future impact on a consumer's credit rating which will result from one type of foreclosure avoidance plan over another.
- A foreclosure avoidance plan of any type is likely to look better on the credit report than a completed foreclosure. Any effort which prevents a foreclosure from being completed will show a creditor that the homeowner has made an effort. Repayment plans and loan modifications, if they cure the arrears, will show that the homeowners have gotten back on their feet.
- A completed foreclosure is usually fatal to applications for new mortgages from reputable lenders for about two years. Bankruptcy is also usually fatal for two years. The completed foreclosure will be an important consideration for most lenders even after the two years has expired until the notation is deleted from the credit record after seven years.
- A deed in lieu of foreclosure is not a big improvement over foreclosure. One myth about credit reporting is that a deed in lieu of foreclosure is going to keep a

borrower in good standing on their credit record. A deed in lieu of foreclosure is a strong black mark on a credit record; it is viewed only slightly less negatively than a foreclosure. A deed in lieu should be considered when appropriate, but it should not be seen as a "silver bullet" for future credit.

- In a modification that is part of a litigation settlement, the consumer can and should require creditors to help repair your client's credit.⁹⁷
- Unsecured credit, such as a credit card, is often available even to people with a recent foreclosure on their credit records. There is a great deal of competition in the credit card business. Companies even compete for borrowers with bad credit records. It is a good idea for the consumer to shop around for reasonable terms, rather than simply accepting the first offer. Lower interest rates and fees may be available. Many finance companies and other "hard money" lenders prey on people's beliefs that they have no other potential source of credit.
- The consumer should avoid credit repair scams. For-profit credit repair is almost always a scam. No one can clean a credit record entirely if there have been delinquencies on debts within the past seven years. Some credit repair companies recommend credit "fixes" which are illegal. Others charge a great deal of money to write letters to credit reporting agencies that a consumer can write just as easily for free.

2.7.3 Consequences for Receipt of Public Benefits

While not common, loan modifications may affect a borrower's eligibility for public benefits. Because of the wide variation in public benefit eligibility from state to state, a public benefits expert should be consulted. Any detrimental effects should be considered before the loan modification agreement is executed.⁹⁸

2.8 The Home Affordable Modification Program (HAMP)

2.8.1 The Basics

2.8.1.1 Overview of the Making Home Affordable Program

The Obama Administration announced the Making Home Affordable Program in February 2009. The program is slated to end December 31, 2012. The program consists of

⁹⁵ (6th ed. 2006 and Supp.).

⁹⁶ (2005 ed.).

⁹⁷ See § 10.9.3, *infra*.

⁹⁸ See § 10.9.8, *infra*.

two components. Section 2.9, *infra*, discusses the Home Affordable Refinance Program (HARP), the program component set up to refinance loans owned or securitized by Fannie Mae or Freddie Mac.

This section examines the other component, created to modify all eligible mortgages to lower their monthly payment to an affordable level. The centerpiece of the program is the modification plan—now known as the Home Affordable Modification Program or HAMP—which applies to loans originated on or before January 1, 2009. This program was designed to standardize industry practices regarding mortgage loan modifications. In fact, most servicers now participate in the program and are obligated to first evaluate eligible borrowers for HAMP modifications before proceeding to consider non-HAMP modifications, other workout options, or foreclosure. Section 6.4.5, *infra*, discusses the servicer's failure to comply with HAMP as a foreclosure defense.

2.8.1.2 HAMP Described

Homeowners who are behind on their mortgages may be offered the opportunity to modify the terms of their first mortgage under the Home Affordable Modification Program (HAMP) developed by the U.S. Department of the Treasury. Homeowners will be offered a modification that lowers their monthly mortgage payment to a targeted 31% of their monthly gross income. This level of payment may be achieved by reducing the interest rate, extending the term of the loan, or deferring payment on a part of the principal.

HAMP is now the largest mortgage loan modification program in the nation in terms of its size and scope. The program covers loans held or insured by Fannie Mae, Freddie Mac, FHA, VA, and privately securitized mortgages. Though servicer participation is voluntary, most servicers participate in the program. Financial institutions receiving assistance under the Financial Stability Plan were required to implement the program. Servicers of non-GSE mortgages entered into agreements with the Department of Treasury which required them to review all eligible mortgages for inclusion in the program if doing so would not violate investor servicing agreements. Over one hundred servicers have now signed agreements with Treasury to modify first lien mortgages under the program.⁹⁹ Detailed program guidelines and a list of participating servicers are available on the Treasury's website at www.financialstability.gov.

⁹⁹ A copy of the Servicer Participation Agreement can be obtained on the program's administrative website at www.hmpadmin.com. Copies of executed agreements with participating servicers can be obtained from the Department of Treasury's website at http://financialstability.gov/impact/contracts_list.htm. Servicers had until December 31, 2009 to sign the agreement. Servicers of second lien mortgages have until October 3, 2010 to sign an amended or new agreement to participate in that portion of the program.

Aside from modifying first lien mortgages, the program was expanded to further assist borrowers in reducing their debt burden by making second lien mortgage loans more affordable. A second lien mortgage program was added to HAMP that requires participating servicers to modify or pay off such mortgages. For those borrowers who do not qualify for a HAMP modification or fall off the program, the Home Affordable Foreclosure Alternatives portion of the program offers a streamlined short sale or deed in lieu of foreclosure process. A new program focuses on unemployed borrowers, and a new plan is due out soon to encourage loan principal write-downs, which are not currently required under the program.¹⁰⁰

The program sought to streamline and standardize industry practices regarding mortgage loan modifications. However, since its launch the modification program has had a series of well publicized setbacks. Most notably, the program has helped far fewer homeowners than projected, with many people stuck in the trial portion of the plan. In addition, borrowers and advocates reported a high degree of noncompliance among servicers with program guidelines, including wrongful denials, offers of unsustainable modifications that did not comply with program guidelines, and premature foreclosure sales held without a proper HAMP review. In response, Treasury has increased emphasis on timelines and notice to borrowers. Legal advocates are also bringing cases challenging servicer noncompliance with the program.¹⁰¹ The details of the program and Treasury's response to its implementation, however, are constantly evolving and advocates are advised to keep abreast of program developments.

2.8.1.3 Obtaining Current Information on HAMP

The Home Affordable Modification Program has undergone several key changes since its introduction in February 2009. General information about the modification portion of the program is available on the Making Home Affordable Program's official website, www.makinghomeaffordable.gov. This site includes a list of participating servicers, program forms and calculators, as well as a loan look up feature to determine if a loan is held by Fannie Mae or Freddie Mac. In theory, all covered operating subsidiaries will also be listed on the official website.

Detailed program guidelines are available on the administrative website designed for the servicers of non-GSE mortgages that participate in the program at www.hmpadmin.com/portal/programs/hamp.html. This website contains so-called "Supplemental Directives" and other documents (such as

¹⁰⁰ See *Testimony of Phyllis Caldwell, Chief Homeownership Preservation Officer, U.S. Department of Treasury, Before the House Financial Services Subcommittee on Housing and Community Opportunity* (Apr. 14, 2010), available at http://makinghomeaffordable.gov/pr_04152010.html.

¹⁰¹ See § 6.4.5, *infra*.

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FAQs) issued by the Department of Treasury to help servicers implement the program. Model forms are posted on this site as well.

The supplemental directives and other documents on the HAMP administrative website provide general guidance to servicers of non-GSE loans. Fannie Mae and Freddie Mac issue their own HAMP-related guidance through industry announcements or bulletins on their respective websites. Information on FHA and VA HAMP is available on their respective websites as well.

Another useful site is the HAMP section of Treasury’s Financial Stability website. This site, www.financialstability.gov/roadtostability/homeowner.html, has program reports, fact sheets, and case examples.

2.8.2 HAMP Eligibility

2.8.2.1 General Program Eligibility

The program has a two tier eligibility process. Borrowers and the properties securing the loans to be modified must meet the basic program requirements. If the basic eligibility requirements are satisfied, then servicers will perform a key evaluation—called a net present value test—to determine whether it is more cost effective to modify the loan or foreclose.

In general, borrowers who are current on their mortgage or in foreclosure are eligible for a modification under HAMP. For borrowers who are current or less than sixty days delinquent, the servicer must determine whether a payment default is imminent based on its own standards so long as those standards are consistent with applicable contractual agreements with investors and accounting rules. At a minimum, however, the servicer must evaluate the borrower’s financial condition in light of the borrower’s stated hardship and inquire as to the condition of the property.¹⁰² Common reasons that a borrower may be in imminent danger of default include illness, unemployment or underemployment, divorce, or scheduled interest rate increase within 120 days. Other key eligibility requirements include:

- The borrower’s monthly mortgage payment, before modification, must be greater than 31% of his monthly gross income.¹⁰³

- The loan is a first lien mortgage originated on or before January 1, 2009.¹⁰⁴
- The loan is secured by a one-to-four unit property which is the borrower’s principal residence. Cooperative share mortgages and loans on manufactured homes and condominiums are eligible.
- The property may not be vacant or condemned. Borrowers temporarily absent from their home (due to military service or incarceration for example) may qualify for HAMP so long as the house is not vacant.
- The loan has not been previously modified under HAMP.

A borrower in active litigation regarding the mortgage loan may qualify for HAMP. As discussed at § 2.8.6, *infra*, borrowers in an active chapter 13 or 7 bankruptcy may also qualify for HAMP.

Eligible first lien mortgages must have an unpaid principal balance (prior to capitalization of the arrears) equal to or less than:

- One unit: \$729,750;
- Two units: \$934,200;
- Three units: \$1,129,250;
- Four units: \$1,403,400.

2.8.2.2 Net Present Value Test

2.8.2.2.1 General

The core eligibility requirement under HAMP is the net present value (NPV) test. The NPV test compares the net present value of the money the servicer would receive if the loan were modified with what would be received if no modification were made. Servicer guidelines require servicers to first combine the present value of the unmodified payment stream with the value realized after a foreclosure prior to comparing the result with the value of a modification. Servicers are also expected to include the risk of prepayment in determining the value of a loan modification (but not, apparently, in setting the value of the payment stream pre-modification).

If the servicer can expect a greater return from modifying the mortgage (the NPV of the modified loan is higher than the NPV of the loan before modification), then the modification is considered to be “NPV Positive” and the servicer must modify the mortgage absent fraud or a prohibition in the securitization contracts.

102 See Dep’t of Treasury, Supplemental Directive 09-01 (Apr. 6, 2009), available at www.hmpadmin.com/portal/programs/hamp/servicer.html.

103 Monthly mortgage payment includes principal, interest, property taxes, hazard insurance, flood insurance, condominium association fees and homeowners’ association fees (including any escrow payment shortage amounts subject to a repayment plan). The monthly mortgage payment amount does not include payment for mortgage insurance premiums or junior mortgages. If the mortgage payment will change due to an interest rate reset

on an adjustable rate mortgage, servicers will use the higher of either the borrower’s current scheduled monthly payment or a fully amortizing payment based on the note reset rate using the index value as of the date of the evaluation. See Dep’t of Treasury, Supplemental Directive 09-01 (Apr. 6, 2009), available at www.hmpadmin.com/portal/programs/hamp/servicer.html.

104 See § 2.8.9, *infra* (the Second Lien Mortgage Program).

If the test produces a “NPV Negative” because the projected return would be greater without a modification, the servicer has the option to modify the loan at its discretion. If the mortgage is serviced for a third-party investor, the servicer in this situation must obtain the investor’s express permission.

Details of the specific factors to be considered under the program’s NPV test are not available to the public.¹⁰⁵ The FDIC, when it developed its own loan modification program, developed a calculator that is publicly available, and that is often a useful tool in evaluating whether a homeowner should pursue a HAMP modification or other workout. The FDIC NPV analysis and its relation to the HAMP NPV is discussed later in this section. Several private, for-profit companies are now pushing their own versions of the NPV test. Advocates should be cautious in using these for-profit services. Treasury has not disclosed the NPV test or the assumptions to any company, other than servicers, and servicers are barred from redisclosing the NPV test or the assumptions built into the NPV test to any third party, on pain of criminal prosecution. Worse, the public documentation of the NPV test is itself inaccurate, according to a report by the Special Inspector General for TARP.¹⁰⁶

2.8.2.2.2 The FDIC’s spreadsheet

Shortly after its takeover of IndyMac Federal Bank, the FDIC created a model loan modification program for the financial services industry. As part of that program, the FDIC created a spreadsheet for the industry to use when performing the net present value test. Unlike the HAMP NPV analysis, the FDIC’s spreadsheet is publicly available at www.fdic.gov/consumers/loans/loanmod/NPV.xls. The FDIC spreadsheet is a useful tool in a HAMP application, for a foreclosure mediation, or for other workout negotiations. It provides fast and objective results, with very few inputs from the homeowner; since most of the information is publicly available or within the knowledge of both the servicer and the homeowner. It is also verifiable, uses

conservative assumptions, and has been recommended in several states for use in foreclosure mediation programs.

The FDIC’s spreadsheet evaluates the following features:

- *Affordability*: The FDIC uses a range of affordability ratios, from 31% to 38% of income. The “affordability ratio” is the ratio between the homeowner’s gross monthly income and the monthly mortgage payment (PITI).¹⁰⁷ A homeowner will not be approved for a loan modification where the modification contains an affordability ratio of less than 31% or more than 38%. If a homeowner is already paying less than 31% of her income for PITI, a loan modification will not be approved. What ratio the homeowner ends up with depends on how much the payment is reduced. In general, only if the homeowner is currently paying 38% or less of her income will her ratio be reduced below 38%. In no circumstances will the final ratio be less than 31%. The target affordability ratio, once determined, drives the rest of the calculations.
- *Reduction of Payment*: Payments under the FDIC program must be reduced by at least 10%. If a 10% reduction of the payment puts the homeowner below a 31% affordability ratio, the modification will be denied. Only homeowners who are currently paying more than 38% of their income in PITI will have their payments reduced by more than 10%.
- *Modified Payment*: The modified payment is calculated after the affordability standard is set. The program follows a standard modification waterfall, which is a sequence of steps designed to reduce the borrower’s monthly mortgage payment to no more than 31% of their gross monthly income.¹⁰⁸ Interest is reduced first, to a floor of 3%, holding the length of the loan current; next the amortization and payments are extended out to forty years;¹⁰⁹ and finally, if nothing else works to get the payment low enough, principal forbearance necessary to reduce the modified payment to its target is calculated. No interest is charged on the forborne principal. Under the FDIC program and similar to Making Home Affordable Modification Program, the payments stay low for five years and then step up a percentage point every year, until the Freddie Mac rate effective at the time the loan modification was made is reached.

¹⁰⁵ The Department of Treasury did prepare a document describing the base NPV model, and has published an illustrative spreadsheet. The document describing the base model allows servicers to change key inputs, including the discount rate, default rate, and the REO stigma. The servicer must, however, use the home price appreciation provided in the base NPV model. They do not have the discretion to substitute a different projection. See Dep’t of Treasury, Home Affordable Modification Program, Base Net Present Value (NPV) Model Specifications (June 11, 2009), available at www.hmpadmin.com/portal/programs/hamp/servicer.html.

¹⁰⁶ Office of the Special Inspector General for the Troubled Asset Relief Program, Factors Affecting Implementation of the Home Affordable Modification Program (Mar. 25, 2010), available at www.sig tarp.gov/reports/audit/2010/Factors_Affecting_Implementation_of_the_Home_Affordable_Modification_Program.pdf.

¹⁰⁷ PITI means a payment that covers principal, interest, taxes, and insurance, the latter two portions of the payment being escrowed to pay property taxes, condominium fees, hazard insurance, and the like.

¹⁰⁸ See § 2.8.5, *infra*.

¹⁰⁹ If the loan has an existing schedule of longer than forty years, that existing schedule of payments will be maintained. Earlier versions of the spreadsheet did not extend the payments, only the amortization term, due to concerns that pooling and securitization agreements—and REMIC and FASB rules—prohibited the extension of the repayment term of the loan.

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- *Foreclosure Scenario:* An REO value¹¹⁰ is determined by discounting the current value by the price appreciation forecast (an estimate of future value for the property), the stigma of being sold as REO property rather than owner-occupied, and the estimated months to foreclosure. Assumed foreclosure costs (estimated by state) and interest losses (based on the note rate) are subtracted from the discounted current value to arrive at the REO value. The difference between this REO value and the current unpaid principal balance is then discounted to present value, using the current Freddie Mac rate for the expected rate of return. The FDIC further assumes that some percentage of foreclosures will cure on their own. If a servicer assumes that most loans in foreclosure will cure on their own, either through refinancing, or sale, or the homeowner coming up with the funds on their own to reinstate the loan, then the cost of doing a foreclosure becomes very small, and few loans will be modified. The more costly a foreclosure (the larger the negative number), the more likely a loan modification will be made.
- *Value of Modification:* The value of the modification (LMV) is based on two numbers: (1) the present value of the payment schedule (PVP—present value of payments)¹¹¹ and (2) the anticipated loss from foreclosure in the event the borrower redefaults (RFL—redefault foreclosure loss).¹¹² Both the present value of the payments (PVP) and the loss after a foreclosure (RFL) are then multiplied by the chance they will happen: the present value of the payments (PVP) is multiplied by the chance that the loan modification will be successful (C1); the loss suffered if there is a foreclosure after the loan modification (RFL) is multiplied by the chance that the loan modification will fail (C2). Those two probabilistic calculations are added together to give the value of the modification. ($PVP \times C1 + RFL \times C2 = LMV$).
- *Does the Modification Pass?:* The value of the modification (cell E28) is compared to the present value of the anticipated foreclosure loss (cell B41). Both the results of the foreclosure scenario and the value of the loan modification will often be stated as negative numbers, particularly when the potential loss from a foreclosure is high (remember that the value of a modification includes the risk of a delayed foreclosure). The value of the modification may be a positive number,

when, for example, the loss from a foreclosure is relatively small compared to the potential payment stream from a loan modification. As long as the value of the loan modification is greater—or represents a smaller loss—than the present value of the anticipated foreclosure, the net present value test is passed, and a modification, on the payment terms worked out by the program, is deemed to be in the best interests of the investor.

Most of the assumptions embedded in the spreadsheet are conservative and cut against the homeowner. Key areas for advocacy when using the spreadsheet to get a loan modification include the following:

- Home price appreciation forecast (cells B32, E22);
- REO stigma discount (cell B33);
- Months to foreclosure (cell B34);
- Months to REO sale (cell B35);
- Foreclosure costs (cell B36);
- Months to redefault (cell E20);
- Redefault rate (cell E21).

2.8.2.2.3 *Spreadsheet's auto-completion feature*

The FDIC spreadsheet auto-completes several fields, including the homeowner's current monthly payment and taxes and insurance escrow amounts, as well as the Freddie Mac weekly mortgage rate. You can and should override these fields with the actual current information. The auto-completed information is often wrong and can lead to homeowners being improperly denied loan modifications. In addition to filling out the gray shaded cells, you *must* update with current information the following cells:

- Current Freddie rate (cell B5);¹¹³
- Current monthly mortgage payment (cell B19);
- Current interest payment (cell B20);¹¹⁴
- Monthly taxes and insurance (cell B27).

2.8.2.2.4 *Comparison between HAMP's NPV and the FDIC spreadsheet*

How different the results will be in practice from the FDIC spreadsheet is difficult to determine without seeing the formulae.

¹¹⁰ REO stands for real estate owned and refers to real estate which is purchased by the mortgage holder at a foreclosure sale.

¹¹¹ The present value calculation does not currently include the forborne principal, which appears to be a mistake.

¹¹² The loss suffered after a foreclosure is calculated in a similar manner as in the foreclosure scenario, allowing for the additional delay in prosecuting the foreclosure and the payments received before the loan modification fails.

¹¹³ Find the current Freddie Mac Weekly Primary Mortgage Market Survey at www.freddiemac.com/dlink/html/PMMS/display/PMMSOutputYr.jsp. The relevant rate is the thirty-year mortgage rate.

¹¹⁴ An easy way to get the correct amount for a fully amortizing loan is to change the reference in the formula in cell B20 from B11, the original interest rate, to B14, the current interest rate.

	HAMP	FDIC Program
Affordability target	31%	38%
Redefault rate	Will be based on actual performance of modified loans; however, servicers are free to use their own numbers, even if higher than the average	40%
Past-due escrow and interest	Capitalized	Capitalized
Interest rate floor	2%	3%
Interest rate cap	Freddie Mac Weekly Primary Market Mortgage Rate	Freddie Mac Weekly Primary Market Mortgage Rate
Waterfall	1) Interest rate reduction 2) Extend term to 480 months 3) Principal forbearance	1) Interest rate reduction 2) Extend term to 480 months 3) Principal forbearance
Principal forgiveness permitted	Yes	No
Required reduction in payment	6%	10%
Discount rate (rate used for present value calculations)	Freddie Mac Weekly Primary Market Mortgage Rate plus as much as 250 basis points	Freddie Mac Weekly Primary Market Mortgage Rate
Home price appreciation forecast	Special, nonpublic, dataset prepared by FHFA	Case-Shiller Home Price Index (proprietary dataset)
REO stigma	Fannie Mae and Freddie Mac REO sales	Servicer's history, if adjusted, or National Association of Realtors Existing Home Sales Data

2.8.3 The Procedure to Seek a HAMP Modification

2.8.3.1 Participating Servicers Must Consider Eligible Loans for Modification

As described above, while participation in HAMP is voluntary, most servicers are participating.¹¹⁵ Participating servicers must consider all eligible mortgage loans for modification unless prohibited under investor guidelines. If contractual agreements, such as pooling and servicing agreements restrict participation in the program, servicers are required to use reasonable efforts to obtain waivers or approvals from the parties.¹¹⁶ These efforts include contacting the investor in writing at least once to encourage the investor to permit modifications under HAMP.¹¹⁷

Servicers must actively pre-screen all first lien mortgages with two or more payments due and owing to determine if they meet the basic criteria for HAMP.¹¹⁸ The servicer is required to perform a NPV test on eligible loans that are at

least sixty days delinquent or at risk of default. Then servicers must proactively solicit any borrower whose loan passes the pre-screen, unless the servicer has documented that the investor is not willing to participate in HAMP.

2.8.3.2 Initiating the Application Process

Frequently, the servicer will be the only party with whom the borrower has had any contact. Only on investigation will it become apparent that the servicer is acting on another entity's behalf. It is appropriate to begin the workout process with the servicer. The servicer should have workout specialists who will take applications and provide information on the prerequisites and standards for a workout. As with any negotiation, a record should be made of contacts with the servicer and significant communications, including any agreement to delay the foreclosure sale, should be confirmed in writing.

A borrower who is two or more payments behind and whose loan meets basic HAMP guidelines, should receive written letters, telephone calls, or other solicitations from the servicer offering a HAMP workout. Borrowers who are current on their mortgage or in bankruptcy will need to contact the servicer to initiate a review under program guidelines. Following contact with the servicer, the borrower will be sent an initial package which includes a Request for Modification and Affidavit (RMA) or similar

¹¹⁵ See § 2.8.1.2, *supra*.

¹¹⁶ These efforts include contacting an investor in writing at least once to encourage them to permit modifications under HAMP. See Dep't of Treasury, Supplemental Directive 10-02 (Mar. 24, 2010), available at www.hmpadmin.com/portal/programs/hamp/servicer.html.

¹¹⁷ See Dep't of Treasury, Supplemental Directive 10-02 (Mar. 24, 2010), available at www.hmpadmin.com/portal/programs/hamp/servicer.html.

¹¹⁸ See Dep't of Treasury, Supplemental Directive 10-02 (Mar. 24,

2010), available at www.hmpadmin.com/portal/programs/hamp/servicer.html.

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form requesting basic financial information. The process for entering this trial period has changed.¹¹⁹ Now servicers must fully verify that a borrower is eligible for HAMP prior to offering them a trial period plan.¹²⁰

Before the borrower can be offered a trial period plan, he or she must sign and return the RMA form, IRS Form 4506-T (Request for Transcript of Tax Return), and provide proof of income. Income will be verified with copies of two recent pay stubs, not more than ninety days old, and the most recent federal tax return. Other documentation may be requested for self-employed borrowers and those who receive child support, Social Security, disability, public assistance, rental and other forms of income.¹²¹ Non-borrower income may be considered if the servicer believes the income can reasonably be relied on to support the mortgage payment.

At their option, applicants may ask servicers to consider certain types of income in the HAMP evaluation. The borrower may choose to have income from alimony, maintenance, or child support considered.¹²² Effective July 1, 2010, unemployment insurance benefits and other sources of temporary income related to unemployment will no longer be considered a source of income for HAMP.¹²³

The borrower may include income from a non-borrower that is reasonably likely to continue, but this is risky in case that income stops being directed to the borrower. Inclusion of additional income may help borrowers whose low income otherwise produces a negative NPV test result. On the other hand, including the optional income may preclude eligibility because the borrower will be pushed under the 31% debt-to-income ratio that is a threshold requirement for HAMP or result in an unsustainable modification, when the alimony, child support, or income from the non-borrower

ceases (since homeowners can only receive one HAMP modification and may not be re-evaluated even if their income drops through no fault of their own). In any case, borrowers are entitled to have their application considered with and without the optional income and must receive a modification if they qualify under either scenario.

Practitioners may wish to run their clients through the FDIC Loan-Mod-in-a-Box before submitting the income documentation to the servicer. The FDIC Loan-Mod-in-a-Box will give practitioners a rough estimate as to whether the optional income is necessary for a positive NPV. If it is not necessary, it should not be included in the submission to the servicer. In cases where a homeowner is denied for failure to pass the NPV, advocates should assess whether there is additional “optional” income that could be included in a resubmission.

The RMA contains a hardship affidavit. Every borrower and co-borrower seeking modification, whether in default or not, must sign a hardship affidavit which describes any current or anticipated hardship, such as a reduction or loss of income, change in household financial circumstances, increase in monthly mortgage payment or other expenses, lack of sufficient cash reserves, excessive debt payments, or overextension with creditors. A hardship affidavit and the RMA are on the HAMP administrative website. The forms contain simple check off boxes and neither has to be notarized. Submission of the standard RMA is all that is needed to trigger the servicer’s duty to evaluate the homeowner for a HAMP modification, although the servicer may request additional information is required by its contractual agreements with investors.

Borrowers should be mindful that anyone who signed the original loan document will be required to sign all the modification documents, including the RMA, and the income of the co-borrower will be included in all calculations. Only if the co-borrower is deceased or divorced are absent co-borrowers necessarily excluded from the HAMP loan modification documents, although the servicer may use its discretion in other cases where the co-borrower is absent from the household or cannot sign, due to disability, military deployment, or incarceration, for example.¹²⁴ If the co-borrower is deceased or is no longer part of the household, the borrower will need to provide proof with a death certificate or divorce decree. Quitclaim deeds from one borrower to another may also be useful, particularly in the case of never-married and now-separated borrowers.

119 The initial Treasury Supplemental Directive 09-01 (Apr. 6, 2009) authorized services to initiate trial modification plans based on verbal or “stated” income information from borrowers. Servicers would then verify this information during the trial plan period. Effective June 1, 2010 this option is no longer permitted. Servicers must evaluate borrowers for trial modifications using documentation of income and other eligibility standards. Dep’t of Treasury, Supplemental Directive 10-01 (Jan. 28, 2010), *available at* www.hmpadmin.com/portal/programs/hamp/servicer.html.

120 *See* Dep’t of Treasury, Supplemental Directive 10-01 (Jan. 28, 2010), *available at* www.hmpadmin.com/portal/programs/hamp/servicer.html.

121 For a complete list of acceptable proofs of income see Dep’t of Treasury, Supplemental Directive 10-01 (Jan. 28, 2010), *available at* www.hmpadmin.com/portal/programs/hamp/servicer.html.

122 Dep’t of Treasury, Supplemental Directive 09-07 (Oct. 8, 2009), *available at* www.hmpadmin.com/portal/programs/hamp/servicer.html; Supplemental Directive 09-01 (Apr. 6, 2009), *available at* www.hmpadmin.com/portal/programs/hamp/servicer.html.

123 Dep’t of Treasury, Supplemental Directive 10-04 (May 11, 2010), *available at* www.hmpadmin.com/portal/programs/hamp/servicer.html.

124 *See* Dep’t of Treasury, Supplemental Directive 10-01 (Jan. 28, 2010), *available at* www.hmpadmin.com/portal/programs/hamp/servicer.html; Dep’t of Treasury, Supplemental Directive 09-01 (Apr. 6, 2009), *available at* www.hmpadmin.com/portal/programs/hamp/servicer.html.

2.8.3.3 Servicer's Review of the Application

Once the initial package of information is submitted, servicers are required to acknowledge receipt within ten business days and review the documentation provided by the borrower for completeness within thirty calendar days. During that time the servicer will be evaluating the borrower's credit report to verify debts, liens and occupancy status. The servicer will also obtain the property's value from an automated system or other source.

Borrowers often have to submit the same documents over and over again, leading to substantial delays in the conversion of active trial modifications to permanent modifications.¹²⁵ Aside from the new requirement that servicers must acknowledge receipt of the initial package of information within ten business days, if the documentation is incomplete servicers must make at least two attempts to contact the borrower in writing, the first attempt should be within thirty calendar days of receiving the initial documents.¹²⁶ The first notice must give the borrower at least thirty calendar days to provide the designated information. A second notice must give the borrower an additional fifteen calendar days.¹²⁷

Once the servicer receives a complete set of documents, the borrower should either be approved for a trial period plan and sent the relevant notice, or denied a HAMP modification.

2.8.3.4 Where an Application Is Denied

2.8.3.4.1 Notice requirement

Supplemental Directive 09-08¹²⁸ requires notice if a borrower is not offered a trial period plan, a permanent HAMP modification, or if the servicer contends that eligibility may

be denied because the borrower did not provide required financial information.

With the exception of the incomplete information notice, all notices must be mailed no later than ten business days from the date the servicer determines that a HAMP modification will not be offered. The non-approval notice should clearly specify why the borrower is not being offered a HAMP modification,¹²⁹ providing the primary reason or reasons for the non-approval.¹³⁰ Importantly, if the notice discusses other non-HAMP loss mitigation options that are being considered or offered to the borrower, it must clearly state that the borrower was considered, but is not eligible, for HAMP. The absence of the borrower notices required by Supplemental Directive 09-08 should be used to argue that the borrower is still being considered for HAMP, and that a foreclosure sale must therefore not take place.¹³¹

2.8.3.4.2 Denial based on a negative NPV analysis

If the borrower is rejected for a HAMP modification because the test is "NPV Negative," the notice must give the borrower the option of receiving certain data inputs that went into the NPV calculation, including the interest rate, borrower's gross income, real estate taxes, insurance, and other information that that was used in the analysis.¹³² Treasury does not require other key inputs, including the amount of foreclosure fees claimed or the home valuation, to be disclosed to the borrower, but servicers do sometimes disclose these inputs, and advocates should be sure to request all inputs.

The borrower (or her representative) has thirty calendar days from the date of the notice of non-approval to request the NPV data. The servicer must provide it within ten business days of the request. Once the borrower receives the

125 A twin problem is servicers rejecting documents for minor imperfections. Treasury addressed this issue in Supplemental Directive 10-01 by calling on servicers to use good business judgment in accepting documents with imperfections (blank fields, erasures, inaccurate dates, etc.) if there is no indication of fraud.

126 See Dep't of Treasury, Supplemental Directive 10-02 (Mar. 24, 2010), available at www.hmpadmin.com/portal/programs/hamp/servicer.html (discussion of servicer standards regarding borrower outreach and communication); Dep't of Treasury, Supplemental Directive 10-01 (Jan. 28, 2010), available at www.hmpadmin.com/portal/programs/hamp/servicer.html (discussion of servicer standards regarding borrower outreach and communication).

127 See Dep't of Treasury, Supplemental Directive 10-02 (Mar. 24, 2010), available at www.hmpadmin.com/portal/programs/hamp/servicer.html (discussion of servicer standards regarding borrower outreach and communication); Dep't of Treasury, Supplemental Directive 10-01 (Jan. 28, 2010), available at www.hmpadmin.com/portal/programs/hamp/servicer.html (discussion of servicer standards regarding borrower outreach and communication).

128 Mandatory for servicers as of Jan. 1, 2010.

129 See Dep't of Treasury, Supplemental Directive 09-08 (Nov. 3, 2009), available at www.hmpadmin.com/portal/programs/hamp/servicer.html.

130 The notices must comply with the Equal Credit Opportunity Act, when applicable. Dep't of Treasury, Supplemental Directive 09-08, at 1 (Nov. 3, 2009), available at www.hmpadmin.com/portal/programs/hamp/servicer.html.

131 See Dep't of Treasury, Supplemental Directive 09-01, at 14 (Apr. 6, 2009), available at www.hmpadmin.com/portal/programs/hamp/servicer.html; Supplemental Documentation—Frequently Asked Questions Home Affordable Modification Program ("HAMP FAQs") Q53, available at www.hmpadmin.com/portal/docs/hamp_servicer/hampfaqs.pdf.

132 The available NPV inputs include the: unpaid balance on the original loan; interest rate before modification; months delinquent; next ARM reset date (if applicable); next ARM reset rate (if applicable); principal and interest before modification; monthly insurance payment; monthly real estate taxes; monthly HOA fee (if applicable); monthly gross income; borrower's total monthly obligations; borrower/ co-borrower FICO; zip code; and state. See Dep't of Treasury, Supplemental Directive 09-08 (Nov. 3, 2009), available at www.hmpadmin.com/portal/programs/hamp/servicer.html.

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input data from the servicer, the borrower can review the information to ensure it is correct. If the information is inaccurate, the borrower has thirty calendar days to provide the servicer with the correct information. During that thirty-day period, the servicer is not allowed to proceed to a foreclosure sale. However, as with other HAMP provisions forbidding foreclosure sales during various stages of the evaluation process, advocates should not rely on servicers to comply with the thirty-day ban automatically. Advocates should take steps to ensure that the foreclosure sale is indeed cancelled and other foreclosure action suspended.

If the borrower finds “material” errors, the servicer must redo the NPV test. The material standard probably means that they are likely to change the outcome of the NPV test. Since the test score is not public, consumers will have to proceed using their best guess as to whether the error is significant enough to have made a difference.

Another option to obtain complete NPV information, as well as other records of the servicer’s eligibility determination, is to send a Qualified Written Request (QWR) under RESPA, which imposes requirements on servicers to respond to borrower requests for information or correction of account errors.¹³³ Using a QWR in this manner is discussed at § 6.4.5.9, *infra*. Chapter 8, *infra*, also includes a complete discussion of qualified written requests. Discovery is another option to obtain this information. The administration has opined that servicers’ NPV analyses are proprietary, which may be raised in any discovery request.

2.8.3.4.3 Denial based on investor not participating in the HAMP program

If the borrower is sent a non-approval notice as required by Supplemental Directive 09-08 stating that the investor is simply not participating in the program, there are a number of steps borrowers and advocates can take to challenge that assertion. HAMP requires servicers, not investors, to participate in the program. Nonetheless, in certain limited situations existing contracts between servicers and the trusts that own the mortgages may limit servicers’ authority to modify loans. These terms in pooling and servicing agreements are the exception rather than the rule. Large investors like Fannie Mae and Freddie Mac require that their mortgages be modified under HAMP guidelines, as do insurers like the FHA and VA under their respective HAMP programs.

Supplemental Directive 10-02 requires servicers to provide Fannie Mae (in its role as program administrator) with a list of investors who choose not to modify their mortgages according to program guidelines. The list should be available after September 1, 2010. Though there are no plans to make this list publicly available, it could be obtained in

discovery or a FOIA request. This list should be checked to find out if an investor is truly not willing to modify the loan under HAMP. The borrower must first obtain the name of the holder of their mortgage. A written request under 15 U.S.C. § 1641(f)(2) to the servicer asking for the identify of the holder should be sufficient, if the request is not honored verbally.¹³⁴ The servicer is liable for statutory damages and attorney fees under TILA if it does not provide the information. In addition, if there is mortgage insurance on the loan, the borrower should contact the mortgage insurance company. Private mortgage insurers may be involved in evaluating loans for modification, and unlike the servicer, they stand to lose money if the loan forecloses.

Servicers should also be asked to identify the document which indicates that the loan prohibits modification. Investors do not make these decisions on a case-by-case basis; servicers are typically given broad discretion to modify mortgages in pooling and servicing agreements (PSAs). Few PSAs forbid all modifications. If there is a conflict between the PSA and a HAMP modification, HAMP guidelines allow the servicer to skip steps in the modification process (the waterfall) if required by the PSA or to substitute amortization extension for term extension. The guidelines also require that servicer make “reasonable efforts” to get the investors to waive the restrictions on HAMP modifications contained in the PSAs. Reasonable efforts include, but are not limited to, writing the investor at least once to request a waiver. Servicers should be able to document the reasonable steps they have taken to obtain a waiver. Advocates should not rely on a servicer’s representation as to what the PSA says, but should insist on reviewing it themselves.¹³⁵ In particular, advocates should be aware that most PSAs contain multiple clauses governing PSAs, often including one that forbids modifications except where modifications are specifically allowed elsewhere in the document. A common example of the type of clause that freely allows modification is regarding loans in default or at imminent risk of default.

If the servicer refuses answer questions, borrowers and advocates should escalate the matter through the servicer’s in-house escalation team or Treasury if necessary by emailing escalations@hmpadmin.com. Discovery is, of course, another option for acquiring information from servicers.

2.8.4 The Trial Period Plan

If the application is accepted, the homeowner, prior to obtaining a permanent loan modification, will be required to participate in a trial period plan, by making monthly pay-

¹³³ 12 U.S.C. § 2605. See also Regulation X, the implementing regulation for RESPA, especially 24 C.F.R. § 3500.21.

¹³⁴ See § 1.3.3.3.2, *supra*; National Consumer Law Center, Truth in Lending §§ 2.3.5.2, 6.6.2.4.2, 8.6.5.2 (6th ed. 2007 and Supp.).

¹³⁵ How to locate and review a PSA is detailed at § 1.3.3.4.3, *supra* (documentation).

ments based on the proposed new loan terms for an initial three-month period (or longer if necessary to comply with investor guidelines). The homeowner will be sent a notice that will outline the terms of the trial modification and payment due dates. Borrowers are not required to sign and return the notice; instead they need only send in the first payment by the due date.

The HAMP trial period is essentially a period of forbearance where the servicer is agreeing to temporarily take less than the full payment due under the terms of the note and mortgage (which are not altered during the trial period). This means that at the end of the trial period borrowers will owe more on their loans than when they started. If the borrower receives a permanent modification, these arrearages (interest, escrow advances to third parties, fees, etc.) will be capitalized. If the borrower falls off the trial period plan, however, the borrower will be deeper in arrearages. This is especially problematic for borrowers who were current prior to entering a trial period plan. Servicers have used the arrearages accumulated during the trial period as the basis for initiating foreclosures. Moreover, the reporting of trial period payments to credit bureaus means that borrowers who are current will experience a negative mark on their credit report, even if they make every trial period payment in full and on time.

If a borrower is not eligible for HAMP, or if they fall off the trial period plan, the servicer should consider the borrower for other workout options, including non-HAMP modifications, forbearance, short sales, deeds in lieu of foreclosure (including those under the program's Home Affordable Foreclosure Alternatives) and refinance programs. Borrowers may be re-evaluated under the program guidelines if their financial circumstances change.¹³⁶

2.8.5 The Permanent Modification

To receive a permanent loan modification, the borrower must be current at the end of the trial period. Current means that the borrower has made each trial period payment by the last day of the month in which it was due. Borrowers who do not make the trial period payments when due are considered to have failed the trial period, and are not eligible for HAMP, though servicers have the discretion to make exceptions for mitigating circumstances.¹³⁷

The permanent modification will become effective the first day of the month following the trial period. The effective date of the permanent modification is specified in the trial plan agreement; the servicer's delay in executing the

final permanent modification cannot alter the effective date of the permanent modification or the amount of unpaid principal due under the permanent modification. The conversion is not automatic however, and servicer delays in converting trial modifications to permanent modifications have been one of the problems most cited by advocates.

The terms of the HAMP modification are determined by a standard process. To reach the targeted monthly payment, servicers must follow a sequence of steps (referred to as the "standard modification waterfall") to reduce the borrower's monthly mortgage payment to no more than 31% of their gross monthly income. Note that servicers under HAMP are not precluded from agreeing to a modification that reduces the borrower's monthly payment to below 31%, so long as the modification otherwise complies with the program's guidelines.

The modification sequence first requires the servicer to capitalize any accrued interest, escrow advances to third parties, and servicing advances paid to third parties (not retained by the servicer) related to the preservation of the property and enforcement of the mortgage, if allowed by state law. Only third-party fees that are "reasonable and necessary" should be capitalized. Late fees may not be capitalized and must be waived by the servicer if the borrower completes the initial three-month trial period.

Next the interest rate is reduced. It can be reduced to as low as 2% to reach the affordability target. The interest rate on the modified loan will be fixed for five years and then adjust upwards 1% per year (or less) until it reaches the interest rate cap. The interest rate cap is the lesser of (1) the fully indexed and fully amortizing contract rate or (2) the Freddie Mac Primary Mortgage Market Survey rate for thirty-year fixed rate mortgage loans (on the date the modification is prepared).¹³⁸ Once capped, the rate is fixed for the remainder of the term.

If a 2% interest rate does not result in an affordable payment (31% of the homeowner's gross monthly income) then the servicer will extend the term of the loan (to a maximum of forty years); and if necessary, defer payment on a portion of the principal.¹³⁹ If term extension is not permitted by an applicable pooling and servicing agreement, the servicer may reamortize the mortgage based on an amortization schedule of up to 480 months with a balloon due at maturity under the original term of the mortgage.

¹³⁸ The Freddie Mac Primary Mortgage Market Survey rate is available at www.freddiemac.com.

¹³⁹ Treasury guidelines set limits on the portion of loan principal that may be deferred under the forbearance waterfall step. The forbearance amount is limited to the greater of 30% of the unpaid principal balance or an amount that leaves an interest-bearing principal of at least 100% of the property's current fair market value. If forbearance must exceed these levels in order to produce the affordable payment, the borrower fails the NPV test. Dep't of Treasury Supplemental Directive 10-01 (Jan. 28, 2010), available at www.hmpadmin.com/portal/programs/hamp/servicer.html.

¹³⁶ See Dep't of Treasury, Supplemental Directive 10-01 (Jan. 28, 2010), available at www.hmpadmin.com/portal/programs/hamp/servicer.html.

¹³⁷ Mitigating circumstances are not defined. Instead servicers must use good business judgment. See Dep't of Treasury, Supplemental Directive 10-01 (Jan. 28, 2010), available at www.hmpadmin.com/portal/programs/hamp/servicer.html.

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However, negative amortization after the effective date of the modification is prohibited.

If payment on a portion of the principal is deferred, no interest will accrue on the forbearance amount. This amount will be a balloon payment, that is, it will be due at the end of the loan term or when the loan is paid off or refinanced. Mortgage holders and servicers are not required to forgive a portion of the principal under program guidelines. However, servicers are permitted to forgive principal before any steps in the waterfall process described above (though subsequent steps may not be skipped).

The 31% payment target is based on the borrower's housing expense payment (principal, interest, taxes, property insurance, homeowner's or condominium association fees). The servicer is also required to determine the borrower's total monthly debt ratio ("back-end ratio") by considering the borrower's payments on other installment debt and liens. Counseling is required only for homeowners whose debt-to-income ratio is equal to or greater than 55%. There is no cost for any required counseling.

There is also no cost for the modification and servicers cannot require that homeowners make a cash contribution. If the mortgage account does not have an escrow for taxes and insurance, the borrower must agree to set up an escrow account before the initial trial period. Presumably, the no cash contribution policy should mean that any initial escrow deposit will be capitalized in the new principal amount.

2.8.6 Borrowers in Bankruptcy

Borrowers with active chapter 7 or chapter 13 bankruptcy cases must be considered for HAMP if the borrower, borrower's counsel, or the bankruptcy trustee (with the borrower's permission) submits a request to the servicer.¹⁴⁰ Though servicers are not required to solicit these borrowers for HAMP, they must work with the borrower or the borrower's counsel to obtain the approval of the court or trustee in keeping with local court rules and procedures. This includes extending the trial period plan as necessary to accommodate delays in obtaining court approval or receiving trial period payments from the trustee. However, servicers are not required to extend the trial period beyond two additional months.¹⁴¹

Borrowers who file for bankruptcy after entering a HAMP trial period plan may not be denied a permanent modification on the basis of a bankruptcy filing. Borrowers who received a chapter 7 discharge of personal liability on the mortgage are eligible for HAMP.¹⁴² It is irrelevant whether the borrower reaffirmed the debt in bankruptcy, and the servicer cannot ask the borrower to reaffirm as part of the HAMP approval process.

A servicer cannot object to confirmation of a chapter 13 plan, move for relief from the automatic stay, or move for dismissal of the chapter 13 case on the basis that the borrower paid amounts due under the trial period plan (as opposed to the non-modified mortgage payment). Servicers may waive the HAMP trial period altogether and offer eligible chapter 13 debtors a permanent modification if:

- The borrower makes all post-petition payments that are due on the first lien mortgage prior to the effective date to the HAMP agreement, and at least three of the payments are equal to or greater than the modified payment;
- The modification is approved by the bankruptcy court, if required; and
- The waiver of the trial period plan is permitted by investor guidelines;

This waiver to the trial period plan, however, is at the discretion of the servicer and it depends on whether the servicer has developed the systems capability to process the waiver.

The procedure for requesting a HAMP is slightly modified for borrowers in active bankruptcy. Servicer may accept copies of bankruptcy schedules and tax returns, instead of the standard Request for a Modification and Affidavit (or similar form) and IRS Form 4506T-EZ. The bankruptcy schedules must be current (less than ninety days old) or updated evidence of income must be provided. A hardship affidavit must be provided if one was not completed earlier. These procedures are optional for servicers. Borrowers in bankruptcy may submit HAMP application documents in the same manner as borrowers not in bankruptcy. Unless the servicer has clearly authorized the alternative procedures, the better practice may be for bankruptcy debtors to follow the general HAMP application process.

¹⁴⁰ See Dep't of Treasury, Supplemental Directive 10-02 (Mar. 24, 2010), available at www.hmpadmin.com/portal/programs/hamp/servicer.html. This is a change in policy. Previously, borrowers in active bankruptcy proceedings were only eligible for HAMP at the servicer's discretion. See Dep't of Treasury, Supplemental Directive 09-01 (Apr. 6, 2009), available at www.hmpadmin.com/portal/programs/hamp/servicer.html.

¹⁴¹ This would result in a total trial period of five months. See Dep't of Treasury, Supplemental Directive 10-02 (Mar. 24, 2010), available at www.hmpadmin.com/portal/programs/hamp/servicer.html.

¹⁴² For borrowers who obtained a prior chapter 7 discharge, the HAMP Modification Agreement will be amended to insert the following language in section 1: "I was discharged in Chapter 7 bankruptcy proceeding subsequent to the execution of the Loan Documents. Based on this representation, Lender agrees that I will not have personal liability on the debt pursuant to this Agreement." See Dep't of Treasury, Supplemental Directive 10-02 (Mar. 24, 2010), available at www.hmpadmin.com/portal/programs/hamp/servicer.html.

2.8.7 Restrictions on Foreclosure Actions

The initiation or continuation of foreclosure proceedings during the HAMP modification process has generated an avalanche of complaints about the program. Many foreclosure sales have been completed while a HAMP request was pending, in violation of the servicer's contract with Treasury and program guidelines.

In response, Treasury tightened some requirements regarding the foreclosure process. Servicers are prohibited from referring a loan to foreclosure or conducting a scheduled sale until the borrower has been evaluated for HAMP and determined ineligible for the program; failed to make a required trial period plan payment by the last day of the month in which the payments is due; provide the required documents after at least two written requests; or failed to respond entirely to the servicer's outreach efforts.¹⁴³ Additionally, once the borrower is in a trial modification based on verified income, the servicer may not refer the loan to foreclosure or proceed with a pending foreclosure. If a loan was already referred to foreclosure prior to the borrower entering a trial period based on verified income, the servicer must take steps to stop the foreclosure process, including taking action to ensure that a judgment does not enter in a state with a judicial foreclosure process.

The sale is delayed slightly for borrowers who receive notice that they are not approved for HAMP. Servicers must wait thirty calendar days after the date of the non-approval notice, or longer if necessary to review additional material provided by the borrower in response to the notice, to conduct a foreclosure sale. They do not have to wait thirty days if the reason the borrower was not approved for the program was due to the ineligibility of the property or mortgage loan or if the borrower does not accept the offer. Practitioners report that many servicers are routinely sending borrowers notice that the borrower has declined to participate in the program; borrowers should be advised to contest such notices immediately.

A servicer does not have a duty to suspend a scheduled foreclosure sale unless the borrower's request for a HAMP modification is received by midnight seven business days prior to the sale date.¹⁴⁴ In addition to meeting the deadline, the borrower's submission must be complete—meaning the servicer must receive an RMA form, an IRS Form 4506T,

and a required proof of income. Servicers are allowed to impose other requirements on the submission process up to thirty days before the scheduled sale. For example, the servicer may require that the documents be sent certified or express mail or to either the servicer or foreclosure attorney/foreclosure trustee. These requirements must be posted on the servicer's website and sent to the borrower in writing. Borrowers who contact the servicer before the deadline should be told the submission requirements. Given that servicers can vary the submission requirements, borrowers are advised to check with the servicer prior to submitting any documentation which will be relied on to postpone a scheduled sale.

2.8.8 HAMP Incentives to Servicers, Holders, and Homeowners

HAMP has an extensive incentive compensation programs for servicers, holders, and homeowners, but as of yet no penalty for servicer noncompliance. If the borrower completes the three-month trial period, the servicers will receive an incentive payment of \$1000 for each loan modification, plus an additional \$500 if the homeowner was current when the loan was modified. The servicer will receive an incentive payment of up to \$1000 each year the homeowner remains in the program for up to three years.

If the homeowner was current with payments when the loan was modified, the lender or investor receives a one-time \$1500 bonus. If the lender or investor reduces the monthly payment to 38% of the homeowner's gross monthly income, then the program will share in the cost of any further reduction to the affordability target of 31% of the homeowner's gross monthly income.

Borrowers will receive an incentive payment that will be applied towards reducing the principal balance of the mortgage. So long as the homeowner is current on the modified mortgage, he or she will receive \$1000 each year for up to five years. The incentive payment is to be applied first to the interest bearing unpaid principal balance (before being applied to any deferred principal forbearance).

2.8.9 The Second Lien Modification Program (2MP)

2.8.9.1 2MP Described

After implementing HAMP, Treasury announced a separate program to deal with second liens in August 2009. The Second Lien Modification Program (referred to as 2MP) is intended to complement HAMP by providing borrowers with sustainable monthly payments or complete extinguishment of second lien mortgage loans. The program was temporarily shelved and reintroduced in March 2010, and

¹⁴³ See Dep't of Treasury, Supplemental Directive 10-02 (Mar. 24, 2010), available at www.hmpadmin.com/portal/programs/hamp/servicer.html. Note that the policy with respect to temporary suspension of foreclosure proceedings completely supersedes earlier section in Dep't of Treasury, Supplemental Directive 09-01 (Apr. 6, 2009), available at www.hmpadmin.com/portal/programs/hamp/servicer.html.

¹⁴⁴ Borrowers who were denied a HAMP modification and request reconsideration are subject to the same deadline. See Dep't of Treasury, Supplemental Directive 10-02 (Mar. 24, 2010), available at www.hmpadmin.com/portal/programs/hamp/servicer.html.

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servicers must sign a new or amended agreement with Treasury by October 3, 2010 to participate in the program.¹⁴⁵ Servicers who do not currently participate in the first lien program under HAMP are eligible to participate in the second lien program. The four largest servicers, Bank of America, Chase, Citi, and Wells Fargo, have signed agreements to participate in 2MP.

Modification of a second lien mortgage will not become effective unless the modification of the corresponding first lien mortgage is effective under HAMP. Participating servicers are required to offer to modify a borrower's second lien mortgage and dismiss any outstanding foreclosure action. The offer to modify the second lien mortgage may be made during the HAMP trial period, or later on the date the HAMP modification becomes effective.

Only mortgages in the second lien position originated on or before January 1, 2009 are eligible to be modified or extinguished under the program. A mortgage lien that would be in the second position but for a tax lien, a mechanic's lien, or other non-mortgage related lien is eligible. A second mortgage on which no interest is charged and no payments are due until the first lien is paid in full (e.g., a FHA partial claim) is not eligible. A loan with a small balance (less than \$5000), or scheduled monthly payment of less than \$100 may not be modified, though the loan itself could be extinguished under program guidelines.¹⁴⁶

In general, servicers of second mortgages may rely on information and documents provided to the servicer of the first lien mortgage under HAMP and are not required to verify any financial information provided by the borrower in connection with that process. They may conclude that if the borrower faced imminent default or was delinquent on the first mortgage, then default is reasonably foreseeable with respect to the second mortgage. Moreover, the servicer is not required to perform a net present value test on the second mortgage as it is assumed that modification of the first and second mortgage under HAMP guidelines will result in a positive net present value.

To qualify for the program, the second lien mortgage may be current or delinquent. Mortgages insured, guaranteed, or held by the federal government, (e.g., FHA, VA, Rural Development) are not eligible. If the borrower is evaluated for the program and not offered a modification, the servicer should mail a notice within ten days of that evaluation. If borrowers enter into second lien modification agreements, they must do so by December 31, 2012.

2.8.9.2 The 2MP Trial Period Plan

A three-month trial period may be required under the program if the borrower is delinquent on a second lien mortgage when offered the modification. A trial plan is not required if the borrower is current on the mortgage and the amount of the borrower's monthly payment is equal to or greater than the amount that will be due after modification. If the borrower is delinquent they must enter a trial period plan with payments as proposed under the second lien modification. The plan may run concurrently or overlap the HAMP trial period.¹⁴⁷ Additionally, if the HAMP-modified first lien falls out of good standing while the second lien is in a trial period, the servicer is not required to offer a modification on the second lien.

Borrowers must make each trial period payment no later than thirty days from the due date. The servicer may, however, extend the trial period for one additional month if the borrower did not make the final trial period payment on time.

2.8.9.3 2MP Modification/Extinguishment Steps

The program provides two alternatives for servicers of second lien mortgages: modify the loan, or receive a payment in exchange for releasing the lien (extinguishment). Servicers may partially extinguish or forgive a portion of the principal and then modify the loan. However, the converse is not allowed; if the second lien mortgage is modified under 2MP, the loan is not eligible later for a full or partial extinguishment of the loan.

The standard to modify a second lien mortgage requires the servicer to first capitalize any accrued interest and advances to third parties. Only those third-party fees that are reasonable and necessary may be capitalized.¹⁴⁸ Late fees and other ancillary fees (e.g., insufficient fund fees, over limit fees, annual fees) may not be capitalized and must be waived by the servicer unless the borrower fails to complete the 2MP trial period and the second lien is not modified.

Next the borrower's interest rate must be reduced to 1% for amortizing loans (payment of both principal and interest). For interest only loans servicers have the option of

145 The details for this program are contained in Dep't of Treasury, Supplemental Directive 09-05 Revised, issued on Mar. 26, 2010, and subsequent announcements and are available at www.hmpadmin.com/portal/programs/hamp/servicer.html.

146 See Dep't of Treasury, Supplemental Directive 09-05R (Mar. 26, 2010), available at www.hmpadmin.com/portal/programs/hamp/servicer.html.

147 Since the modification of the second lien cannot be effective until the HAMP modification of the first lien is effective, the trial period on the second lien may be longer than three months if there is an overlap in the trial periods. The borrower must continue to make payments during the trial period regardless of its length. See Dep't of Treasury, Supplemental Directive 09-05R (Mar. 26, 2010), available at www.hmpadmin.com/portal/programs/hamp/servicer.html.

148 These are described as the costs and expensed incurred in servicing the second lien, including costs related to the preservation and protection of property and enforcement of the mortgage. See Dep't of Treasury, Supplemental Directive 09-05R (Mar. 26, 2010), available at www.hmpadmin.com/portal/programs/hamp/servicer.html.

converting the loan to an amortizing loan at 1% or keeping the interest only feature and reducing the interest rate to 2%. For partially amortizing loans (such as convertible HELOCs), if 50% or more of the lien (based on the unpaid principal balance) is amortizing, the servicer may reduce the interest rate to 1%. If less than 50% of the loan is amortizing then the servicer will use the same options available for interest only loans.

After five years, the interest rate on the second lien mortgage will reset to the then current interest rate on the modified first mortgage, with the same interest rate cap as on the first lien mortgage.¹⁴⁹ Servicers, however, do have the discretion to offer an interest rate lower than the interest on the HAMP modified first mortgage.

The next step involves extending the term of the mortgage. For amortizing second lien mortgages, the term is extended to match (at a minimum) the term of the first lien mortgage modified under HAMP. The term can be extended up to forty years if allowed by applicable servicing agreements. If a term extension is not permitted, then the second lien mortgage may be reamortized (with a new amortization period that matches the first mortgage or up to forty years); reamortization in this manner will result in a balloon payment at the maturity of the loan. With an interest only mortgage that is not converted, the amortization will begin after year five.¹⁵⁰

Finally, if there was principal forbearance or forgiveness on the HAMP-modified first lien mortgage, the servicer must *forbear* principal on the second lien in the same proportion. There is no requirement that the servicer forgive principal on the second lien. However, if the servicer chooses to forgive principal, it may elect this option in lieu of an interest rate reduction.

All loans modified under the program must result in a closed-end second mortgage. If the mortgage is an open-end line of credit, the servicer must terminate the borrower's ability to draw additional amounts on the credit line while the modification becomes effective.

A servicer may elect to get a payoff (extinguishment) of the second lien mortgage as an alternative to or in conjunction with the modification of the mortgage. A portion or the entire amount of the second mortgage may be paid off based on a formula. To exercise this option, the servicer may not

charge the borrower a fee or require the borrower to sign a promissory note.

The formula for compensating investors to extinguish the lien is based on the borrower's combined loan-to-value (CLTV) ratio and the degree of delinquency on the mortgage.¹⁵¹ For loans that are more than six months past due, the lender or investor will be paid six cents per dollar of unpaid principal balance extinguished. For loans that are less than or equal to six months past due, a higher range of payments is allowed depending on the borrower's CLTV, ranging from ten cents per dollar of unpaid principal balance extinguished for a second lien with greater than 140% CLTV to twenty-one cents per dollar of unpaid principal balance extinguished for a second lien with less than 115% CLTV.

2.8.9.4 2MP and Borrowers in Bankruptcy

The guidelines regarding borrowers in bankruptcy in 2MP parallel those of the first lien modification program.¹⁵² Borrowers with active chapter 7 or chapter 13 bankruptcy cases are eligible for 2MP if the borrower, borrower's counsel or the bankruptcy trustee (with the borrower's permission) submits a request to the servicer. Servicers must work with the borrower or the borrower's counsel to obtain any court or trustee approvals. Borrowers who are in a trial period plan and subsequently file for bankruptcy may not be denied a 2MP permanent modification on the basis of a bankruptcy filing.

2.8.9.5 2MP Incentives

Servicers of second liens modified or extinguished under the program receive a \$500 fee. If the amount of the borrower's monthly payment on the second lien is reduced by six percent or more, the servicer will also receive a fee of \$250 for up to three years as long as both the HAMP modification and second lien modification remain in good standing and the loan has not been paid in full. This is in addition to any incentive compensation the servicer may have received for modifying the first lien under HAMP. The borrower will receive a fee of up to \$250 for up to five years under the same terms. However the fee will be applied to reduce the principal balance owed on the mortgage.

No incentives will be paid to servicers for modifying the second lien unless both the first and second liens are in good standing. If the borrower misses three consecutive payments at any time the account is no longer in good standing and that status cannot be restored. Servicers and borrowers are

¹⁴⁹ In the alternative, servicers may do a gradual interest rate step up after five years if a pooling and servicing or other agreement calls for it. At no time, however, may the interest rate on the second lien exceed the interest rate on the modified first lien mortgage. See Dep't of Treasury, Supplemental Directive 09-05R (Mar. 26, 2010), available at www.hmpadmin.com/portal/programs/hamp/servicer.html.

¹⁵⁰ For partially amortizing loans, if 50% or more of the lien is amortizing, it is treated as a fully amortizing loan; if less than 50% of the loan is amortizing the loan may be treated like a fully amortizing loan or interest-only loan. See Dep't of Treasury, Supplemental Directive 09-05R (Mar. 26, 2010), available at www.hmpadmin.com/portal/programs/hamp/servicer.html.

¹⁵¹ The combined loan-to-value ratio (CLTV) is the ratio of the current total unpaid principal balance of the HAMP-modified first lien and the current total unpaid principal balance of the unmodified second lien divided by the property value (which was obtained in connection with the HAMP modification).

¹⁵² See § 2.8.6, *supra*.

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no longer eligible to receive further incentive payments. Borrowers will lose incentive payments already accrued.

2.8.10 Home Affordable Unemployment Program (UP)

The Department of Treasury on May 11, 2010 announced the Home Affordable Unemployment Program (UP), effective July 1, 2010.¹⁵³ For three months, participants have their monthly mortgage payment reduced to less than or equal to 31% of the borrowers gross monthly household income and may be suspended in full. Servicers are given discretion to extend the three-month period according to their investor/regulatory guidelines.

Homeowners seeking to participate must meet HAMP eligibility requirements and be unemployed when applying, be entitled to receive unemployment benefits in the month of the UP forbearance effective date, and request a UP forbearance plan before missing three monthly mortgage payments. In addition, servicers have discretion to require a borrower to have received three months of unemployment benefits before commencement of the plan. Eligibility ceases if the homeowner is re-employed during the three months of reduced payments. Homeowners in a permanent HAMP modification are not eligible for an UP forbearance, but can convert from a trial plan to UP forbearance, and are still eligible for UP forbearance if they have previously been found ineligible for HAMP.

Even if an unemployed homeowner requests assistance for HAMP, the homeowner must first be evaluated for an UP forbearance plan and offered the UP forbearance before they can be considered for HAMP. Borrowers in an UP forbearance plan will be evaluated for HAMP at either reemployment or thirty days prior to the UP period expiring. The forbearance period under UP does not count toward the HAMP three-month trial plan.

It is possible that this new program will actually make things worse for homeowners. Since the program requires forbearance for only three months, it will not address the needs of those unemployed for longer terms. In addition, the plan requires evaluation for a HAMP modification thirty days before the end of the forbearance, possibly only eight weeks into the borrower's unemployment, long before most unemployed workers have found re-employment.

Unlike a regular HAMP trial plan, that portion of the three monthly payments that are reduced get added into the principal amount due. Additionally, late fees will continue to accrue during the processing of the forbearance request and during the forbearance itself. These late fees will only be waived in the unlikely event of a permanent HAMP modification.

¹⁵³ Dep't of Treasury, Supplemental Directive 10-04 (May 11, 2010), available at www.hmpadmin.com/portal/programs/hamp/servicer.html.

Another drawback of the program is that many homeowners have used unemployment benefits to support HAMP modified mortgage payments. The Treasury supplemental directive announcing UP states that unemployment insurance benefits and other sources of temporary income related to unemployment will no longer be considered a source of income for HAMP.¹⁵⁴ Now unemployment benefits are no longer to be counted as income, regardless of how long the homeowner expects to receive unemployment benefits.

Homeowners must request a forbearance under this plan before they are three months delinquent, but servicers may require them to receive three months of unemployment benefits before approving them for a forbearance. Care must be taken in coordinating these timing requirements.

2.8.11 Home Affordable Foreclosure Alternatives (HAFA)

2.8.11.1 HAFA Described

Assistance is available for borrowers who do not qualify for HAMP, who are offered a modification but decline it, who default on a HAMP modification, or who do not successfully complete the terms of a trial period plan. Under the Home Affordable Foreclosure Alternatives (HAFA) portion of the program, borrowers are offered a short sale or a deed in lieu of foreclosure as a means of avoiding foreclosure. The program is part of HAMP and servicers may not solicit a borrower for the program until he or she has been evaluated for a HAMP modification. In addition, before offering a HAFA alternative, servicers must consider other (non-HAMP) loan modifications or workout options that will help the borrower keep his or her home. The details for this program are contained in Supplemental Directive 09-09 Revised, issued on March 26, 2010, and subsequent announcements.¹⁵⁵

As with HAMP, this program's aim is to simplify and streamline the process for obtaining a short sale or deed in lieu of foreclosure with a standard process and compressed timeframe. Borrowers must first meet the basic eligibility criteria for HAMP.¹⁵⁶ Any financial and hardship informa-

¹⁵⁴ *Id.*

¹⁵⁵ Note that this replaces in its entirety, Dep't of Treasury, Supplemental Directive 09-09 (Nov. 30, 2009). Both supplemental directives are available at www.hmpadmin.com/portal/programs/hamp/servicer.html.

¹⁵⁶ These include that the one to four unit property is the borrower's principal residence; the current unpaid principal balance is equal to or less than \$729,750; the borrower's total monthly payment exceed 31% of the borrower's gross monthly income; and the loan was originated on or before January 1, 2009. The HAMP NPV test does not project investor cash flow from either a short sale or deed in lieu of foreclosure and will not be performed as part of HAFA. See Dep't of Treasury, Supplemental Directives 09-09R (Mar. 26, 2010) and 09-01 (Apr. 6, 2009),

tion collected from the borrower as part of that process will be used to evaluate the borrower for HAFAs. A servicer may, however, request updated financial information to comply with investor guidelines. While the short sale or deed in lieu is being implemented, the borrower's total monthly payment should be reduced to no more than 31% of his or her gross monthly income.

Every potentially eligible borrower must be considered for HAFAs before the loan is referred to foreclosure or a pending sale is conducted. This evaluation must take place within thirty calendar days of the date the borrower does not qualify for HAMP, does not complete the trial period plan, misses two consecutive payments on a HAMP modification (and is therefore delinquent), or simply requests a short sale or deed in lieu of foreclosure. If the loan was already referred to foreclosure before evaluation, the foreclosure process may continue during the evaluation under HAFAs, but the sale itself cannot be completed. Once the HAFAs evaluation is complete, the loan may be referred to foreclosure, although the sale cannot take place while the borrower is still within the HAFAs processing timeframe. Borrowers with active chapter 7 or chapter 13 bankruptcy cases may be considered for HAFAs if the borrower, borrower's counsel, or the bankruptcy trustee submits a request to the servicer.

Under both HAFAs options, the borrower, working with real estate professionals, is required to deliver clear and marketable title. A portion of the gross proceeds from the short sale may be used to pay junior lien holders to release their liens. Each lien holder, in order of priority, may be paid no more than six percent of the unpaid principal balance of their loan, up to an aggregate cap of \$6000. Servicers may, but are not required to, negotiate with junior lien holders on behalf of borrowers.

To participate in HAFAs, investors are required to waive all rights to seek a deficiency judgment with respect to the first mortgage and they may not require the borrower to sign a promissory note for the deficiency. In addition, servicers may not charge borrowers administrative processing fees for HAFAs, though they may require the borrower to waive reimbursement for escrow surplus or other items. Upon successful completion of the HAFAs short sale or deed in lieu the borrower will receive \$3000 to pay moving costs; the servicer will be paid \$1500; and investors will be paid up to \$2000 for allowing a portion of the short sale proceeds to be used to pay off junior lien holders.

2.8.11.2 HAFAs Short Sales

With a HAFAs short sale, the servicer allows the borrower to sell the property for less than the total amount due on the mortgage. The servicer will accept the net proceeds from the sale of the property in full satisfaction of the total amount

due on the first mortgage. The transaction costs that may be deducted from the gross sales proceeds to determine the minimum net proceeds depend on the reasonable and customary real estate transaction costs in a community, but typically include real estate commissions, title and attorney fees, taxes, etc. The servicer is allowed to set the policy (consistent with investor guidelines) regarding net sales proceeds, though that policy should be in writing and applied consistently across all loans serviced for that investor.

Servicers have ten business days to respond after receiving a request for approval of a short sale. The approval notice will state the minimum net sales proceeds. That approval notice, and corresponding threshold for net sales proceeds, is effective for 120 calendar days but may be extended an additional eight months at the discretion of the servicer. Borrowers will have at least forty-five days from the date of the sales contract to close the transaction.

2.8.11.3 HAFAs Deeds in Lieu of Foreclosure

With a deed in lieu of foreclosure the borrower voluntarily transfers ownership of mortgaged property to the servicer in full satisfaction of the total amount due on the first mortgage. The borrower must provide marketable title, free of any mortgages, liens, or other encumbrances. Servicers will usually require that the borrower attempt to sell the property through a short sale before agreeing to accept a deed in lieu of foreclosure.

2.9 Making Home Affordable Refinance Program (HARP)

The Making Home Affordable Refinance Program (known as HARP) is designed to assist homeowners who are current on their mortgage but wish to refinance into a more affordable loan. The program also targets homeowners who are unable to refinance because of declining property values. Homeowners will be offered fixed-rate mortgage with a fifteen- or thirty-year term. Only homeowners with loans that are owned or securitized by Fannie Mae or Freddie Mac will qualify for this program. The program's sunset date was extended and the program is now slated to end on June 30, 2011.

To qualify the homeowner must be the owner occupant of a one to four unit property. The homeowner must be current on his or her mortgage. Current means the homeowner has not been more than thirty days late in the past twelve months. The refinancing program applies only to first mortgages that do not exceed 125% of the current market value of the property.

Both Fannie Mae and Freddie Mac have established toll-free telephone numbers and a website to provide information on the loans they own or securitize.

available at www.hmpadmin.com/portal/programs/hamp/servicer.html

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- For Fannie Mae, call 1-800-7FANNIE (8:00 a.m. to 8:00 p.m. EST) or check www.fanniemae.com/homeaffordable.
- For Freddie Mac, call 1-800-FREDDIE (8:00 a.m. to 8:00 p.m. EST) or check www.freddiemac.com/avoidforeclosure.

The interest rate on the refinanced loan will be based on the market rate in effect at the time of the refinance. The loan will not include prepayment penalties or balloon payments, and the borrower cannot receive cash from the loan. Only transaction costs, such as the cost of an appraisal or title report, may be included in the refinanced amount.

2.10 Hope for Homeowners, HOPE NOW, and Project Lifeline

2.10.1 Hope for Homeowners (H4H)

The HOPE for Homeowners (H4H) program was created in 2008 to allow eligible homeowners to refinance into FHA-insured thirty-year fixed rate mortgages.¹⁵⁷ Any type of mortgage is eligible to be refinanced under the program including prime mortgages, subprime mortgages (e.g., interest only, payment-option adjustable rate mortgages) and government-backed mortgages. The program was substantially overhauled in 2009 to increase its flexibility and eliminate certain features, such as the requirement that homeowners share a portion of any future appreciation with the FHA. The program is temporary and will end on September 30, 2011, unless extended.¹⁵⁸

Homeowners who are current or delinquent on their mortgage at the time of the refinance are eligible for the program if they have not intentionally defaulted on their mortgage or any other substantial debt within the last five years. An intentional default means that the homeowner had available funds that could pay the mortgage and other debts without hardship. Disputed debts may be excluded from consideration. In addition, if delinquent on the mortgage, the borrower must have made a minimum of six full payments on the first mortgage and spend more than 31% of their gross monthly income on making all mortgage payments. Borrowers convicted of fraud under state or federal law in the past ten years do not qualify under program guidelines. The borrower must also certify that they did not knowingly or willfully provide false information to obtain the mortgage being refinanced under the program. Borrowers in bankruptcy may participate in the program.

Only mortgages originated on or before January 1, 2008 are eligible to be refinanced. They must secure a property that is the homeowner's primary and only residence. This means the homeowner cannot have an ownership interest in other residential real estate, including second homes or rental properties. Also, homeowners with a net worth of over \$1,000,000 (including retirement assets) are excluded from the program.

The amount of the H4H mortgage cannot exceed a nationwide maximum mortgage limit as follows:

One-unit property	\$ 550,440
Two-units property	\$ 704,682
Three-units property	\$ 851,796
Four-units property	\$1,058,574

The new FHA-insured mortgage will have a loan-to-value (LTV) of between 90% and 105% of the current appraised value of the property (excluding the upfront mortgage insurance premium (UFMIP)) depending on the status of the loan being refinanced. If the homeowner was current on the loan being refinanced, the LTV on the new H4H loan will be 105% of the current appraised value of the property (excluding UFMIP). If the homeowner was delinquent, the LTV will be either 90% or 96.5% of the current appraised value of the property, depending on the borrower's debt-to-income ratio. For homeowners with credit scores below 500 the maximum LTV is 90% of the current appraised value of the property.

Holders of the primary or secondary mortgage to be refinanced are required to waive all prepayment penalties and late fees (including insufficient fund fees) and accept reduced payoff amounts as payment in full. The homeowner will be required to pay an annual premium of not more than 0.75% of the remaining principal balance of the new insured mortgage. The 0.75% annual premium will be collected for the life of the H4H mortgage.¹⁵⁹ An upfront mortgage insurance premium of 2% of the base loan amount is also charged.

The H4H program creates an equity-sharing system between the homeowner and HUD.¹⁶⁰ Now called an "exit premium," the homeowners must share with HUD a portion of the initial equity in the property. The initial equity is the lesser of: (1) the appraised value of the property at the time of the H4H origination less the original principal balance on the H4H mortgage or (2) the outstanding amount due under all existing mortgages, less the original principal balance on the H4H mortgage. If the homeowner sells the property or refinances the loan, HUD and the homeowner will share in the equity as shown in the chart below:

157 12 U.S.C. § 1715z-23. Additional statutory changes to the H4H program were made by the Helping Families Save Their Homes Act of 2009, Pub. Law No. 111-22, § 202 (May 20, 2009).

158 The program is described in Dep't of Hous. & Urban Dev. Mortgagee Letter 2009-43 (Oct. 20, 2009).

159 *Id.*

160 12 U.S.C. § 1715z-23(k).