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The “Missing Link” Redux: Update on Home Affordable Modification Program

The Home Affordable Modification Program (“HAMP”) was created as part of the Administration’s Financial Stability Plan, announced on February 10, 2009. The initial details of HAMP were released on March 4, 2009. See [here](#) and [here](#) regarding these developments.

Fannie Mae and Freddie Mac have issued guidelines on how the loan modification program works for loans owned, securitized or guaranteed by them, and links to these guidelines can be found [here](#) and [here](#). The IRS clarified some of the tax questions that were raised, as we described in our recent client alert, [here](#).

What remained were questions about how this program would apply to loans in securitizations sponsored by entities other than Fannie Mae and Freddie Mac.

On April 6, 2009, the Treasury released Supplemental Directive 09-01 (“Directive 09-01”), supplying further details about HAMP, in particular for servicers of mortgage loans that are not owned, securitized or guaranteed by Fannie Mae or Freddie Mac. At the same time, the Treasury distributed the form of Servicer Participation Agreement (the “Agreement”). The Agreement must be signed by servicers of mortgage loans that are not owned, securitized or guaranteed by Fannie Mae or Freddie Mac who wish to participate in HAMP. Although participation in HAMP

loan modifications is voluntary, any servicer desiring to participate in any programs under the Administration’s Financial Stability Plan, including the public-private investment programs relating to the disposition of legacy loans and legacy securities, must participate in HAMP’s loan modification program.

In general, Directive 09-01 adds detail to items such as servicer reporting and financial incentives. The form of Agreement sets out the rights and obligations of the servicer and Fannie Mae as administrator.

Supplemental Directive 09-01

Financial Incentives. In Directive 09-01, the Treasury announced for the first time that it will cap the dollar amount of financial incentives that can be provided under HAMP to a servicer, investors and borrowers for successful loan modifications. The Treasury determines this cap by estimating the number of modifications to be made by the servicer under the program. The Treasury may adjust this cap after a full review of the servicer’s loans. Any adjustments to the cap are in the Treasury’s sole discretion. Once payments made to the servicer equal the cap, no new modifications pursuant to the HAMP program can be made by the servicer.

Modifications. Adjustable-rate mortgages and interest-only mortgages will convert to a fixed interest rate upon modification. If a loan's initial interest rate under the program is less than the Freddie Mac rate, the interest rate will increase annually until it equals the current Freddie Mac rate, at which point it will be fixed. In no case will negative amortization be permitted after the effective date of the modification.

Governing Documents. To assist servicers with HAMP modifications, the Treasury has made available at www.hmpadmin.com (its HAMP servicer administration website) a number of the "tools" necessary to make loan modifications, including a data "dictionary," borrower solicitation guidelines and materials, forms for use in verifying information provided by borrowers, and the forms of modification trial period plans and final modification agreements. The servicer is "strongly encouraged" to use the Treasury's forms. If a servicer wishes to use its own forms or make revisions to the Treasury's forms, however, the servicer must obtain the Treasury or Fannie Mae written approval. Approval is not needed for certain revisions noted in Directive 09-01, such as those made to comply with state or local laws.

Compliance and Reporting. The servicer must document its modifications and related actions under HAMP. The servicer must submit to both on-site and remote compliance assessments by Freddie Mac, which serves as the Treasury's "compliance agent." Servicers will be able to provide feedback before the rating and implication methodology for the compliance assessments becomes final. The servicer also must submit

periodic loan level data reporting on HAMP modifications to Fannie Mae.

Servicer Participation Agreement

General Terms. The Agreement must be signed by servicers of mortgage loans that are not owned or guaranteed by Fannie Mae or Freddie Mac who wish to participate in HAMP. It consists of the Agreement executed by Fannie Mae and the servicer and a Financial Instrument executed by the servicer. The servicer agrees to make modifications in accordance with HAMP in exchange for receiving financial incentives for itself, investors and borrowers. The financial incentives are subject to the cap discussed above. At the direction of the Treasury, Fannie Mae may reduce any portion of the purchase price by amounts owed to the U.S. government by the servicer, an investor or a borrower.

Termination. Fannie Mae may terminate the Agreement upon the occurrence of an event of default by the servicer. Events of default include any failure to comply with any directive issued by Fannie Mae or Freddie Mac as well as customary contractual events of default. Fannie Mae may seek to recover previously paid incentive fees if there is a servicer, investor or borrower event of default.

Fannie Mae also may terminate the Agreement upon written notice to the servicer (i) at the direction of the Treasury or (ii) in the event of merger, consolidation or change of control, or insolvency, of the servicer. The Agreement terminates automatically in the event of (i) the termination of the Financial Agency Agreement, dated February 19, 2009, between the Treasury and Fannie Mae or

(ii) the expiration or termination of HAMP. Fannie Mae also may require the servicer to submit to additional administrative oversight and additional financial reporting in lieu of termination of the Agreement.

The Financial Instrument. The Financial Instrument includes representations, warranties and covenants, including covenants to assist Freddie Mac and Fannie Mae in providing information under the Privacy Act of 1974 to Congress, the GAO, Inspectors General and other government entities, borrowers and the media. In addition, the servicer covenants to provide "call center support" for Fannie Mae's call center for borrowers and to provide an annual certification to Fannie Mae and Freddie Mac, the form of which is attached as an exhibit to the Agreement.

The annual certification form is more comprehensive than the Sarbanes-Oxley certification that is required to be filed with the SEC under the Securities Act of 1934. Furthermore, unlike the Sarbanes-Oxley certification, the new annual certification does not include the concept of "material compliance."

The "Initial Term" of the Agreement begins on the date of execution and ends on December 31, 2012, unless extended by the Treasury or terminated earlier in accordance with the Agreement.

Supplemental Directive 09-02

On April 21, 2009, the Treasury released Supplemental Directive 09-02 ("Directive 09-02" and together with Directive 09-01, the "Directives"). Directive 09-02 requires servicers to request from borrowers information with respect to their race, ethnicity and sex

in connection with potential HAMP loan modifications. Such data then must be reported to Fannie Mae in accordance with the data reporting requirements in the Agreement and Directive 09-02.

What's Still Missing?

Neither the Directives nor the Agreement flesh out the details of how and when incentive payments will be made to the various parties. Also, earlier announcements regarding HAMP included: "home price depreciation payments" to

investors, designed to at least partially offset losses from further home price declines after a modification under HAMP; incentive payments for short sales or deeds-in-lieu of foreclosure for borrowers who fail the NPV test or who fail to qualify for, or default under, loan modifications under HAMP; and incentive payments to eliminate junior liens subordinate to first-lien loans that are being modified under the program. No further details relating to these

types of compensation were included in the Directives or the Agreement.

Click [here](#) for the Directives, the Agreement and other information about the Making Home Affordable programs, including the Modification Program guidelines. If you have any questions about how Making Home Affordable will impact securitization transactions, feel free to contact any of the individuals noted in this client alert.



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