

Federal Mortgage Modification and Foreclosure Prevention Efforts

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INTRODUCTION

Given the scope and complexity of the financial crisis, it is sometimes difficult to recall that the precipitating event related to defaults on subprime mortgages. Although many worried that rapidly rising home prices were creating an unsustainable housing “bubble,” few actually predicted the impact of a sustained decline in home values. Beginning in 2007, as adjustable rate mortgages reset to higher interest rates, subprime borrowers with underwater home values found they were unable to refinance at affordable rates. The resulting delinquencies and foreclosures¹ led to startling losses in the mortgage-related securities markets, spreading quickly to the broader credit markets. Looking back, the historic U.S. emphasis on home ownership fueled the development of a capital-raising superstructure that relied on the creation and sale of mortgage-related securities.

The federal government’s reaction to the current crisis includes legislative, policy, and program development efforts to increase mortgage modification, prevent foreclosures, and address the economic impact of the mortgage crisis. These efforts have been hampered by practices in the mortgage finance industry, notably the securitization of mortgages. Although mortgage securitization is credited with lowering mortgage rates and increasing available credit for home buyers, its structure and legal framework is now inhibiting systemic mortgage modification attempts. To the extent that government efforts continue to promote widespread home ownership as a central tenet of the “American dream,” we will be compelled to develop a new, more flexible framework for financing mortgage loan originations.

Below, we look at how the structure of mortgage securitization transactions limits the success of recent mortgage modification efforts and poses unique challenges for the creation of a uniform foreclosure prevention system. We then review federal mortgage modification and foreclosure prevention programs, including the administration’s Homeowner Affordability and Stability Plan, announced on February 18, 2009.²

MORTGAGE SECURITIZATION HAS IMPEDED LARGE-SCALE MODIFICATION EFFORTS

The majority of mortgage lenders sell the mortgage loans that they originate. Mortgage loans are bundled together into pools (usually by

an aggregator or a financial intermediary) and the pools are sold to specially created legal entities that then issue and sell mortgage-backed securities to investors. By selling the mortgage loans, the mortgage loans are removed from the lender's balance sheet—raising cash (from the sale) that supports new lending and creating “room” on the originator's balance sheet for new mortgage loans. These transactions may be executed independently by the lender or through government sponsored enterprises (GSEs) like Fannie Mae and Freddie Mac. To minimize the transaction costs associated with moving thousands of mortgages from the balance sheets of lenders to specially created entities, transaction structures and terms are highly consistent across the industry. As the mortgages are pooled and sold, a servicer is hired pursuant to a contract, typically a pooling and servicing agreement. That agreement requires action from the servicer, such as collecting mortgage payments made on the underlying mortgage loans deposited into the specially created entity and distributing payments to securitization trust security holders. The agreement generally prohibits the servicer from taking other actions, for example, imposing limitations on mortgage modification. These provisions are designed to protect the interests of the new indirect owners of the mortgage loans, the purchasers of the mortgage-backed securities. Typical restrictions on the servicer's ability to effect mortgage modification may include a cap on the number of mortgages that may be modified, requiring a default on the mortgage loan to be “reasonably foreseeable” before modification is permitted, mandating approval by the owners of the mortgage-backed securities for certain actions and imposing a general obligation to act only in a manner beneficial to the security holders. Should the mortgage pool experience any losses, the servicer's actions will be judged in hindsight against these imprecise standards, raising the risk of potentially costly litigation for the servicer. Consequently, servicers construe the provisions contained in these agreements narrowly.

Limitations on mortgage modifications also arise under the tax code provisions for REMICs,³ or real estate mortgage investment conduits, a widely used securitization structure. REMICs are passive entities not subject to taxation. A REMIC is a pass-through structure, where the income from the mortgage loans passes through the structure to the security holders. REMICs offer lenders a highly cost-effective approach for pooling residential mortgage loans. Significant modification⁴ of mortgages by the servicer of a REMIC could be seen as active management, possibly causing the entity to lose its REMIC status and potentially resulting in the imposition of a significant tax penalty.

Additionally, servicer compensation and staffing is based on historical costs of servicers and expected losses for similar pools of mortgage loans. During the financial crisis, as rising delinquency rates outstripped

expectations, servicers experienced extreme staffing shortages in the areas of collections, modifications and foreclosures.⁵

Designed for efficiency and homogeneity of product, the mortgage finance industry's legal, contractual, and operational structure is ill-suited to manage widespread mortgage modification efforts. As we discuss below, the federal government is developing programs, proposing legislation, and issuing tax guidance to address these constraints.

FEDERAL FORECLOSURE PREVENTION EFFORTS

Given the limited success of the private sector to engage in widespread mortgage modification, the federal government has undertaken a series of efforts to address the foreclosure crisis.

HOPE NOW Alliance

The HOPE NOW Alliance (HOPE NOW) was formed in the fall of 2007, at President Bush's request, in response to mounting foreclosures.⁶ HOPE NOW is a public-private partnership, an alliance between Fannie Mae, Freddie Mac, mortgage counselors, lenders, mortgage insurance companies, trade associations, and other mortgage market participants. Its goals are maximizing outreach efforts to distressed homeowners to keep them in their homes and creating a unified, coordinated plan to reach as many homeowners as possible.⁷ The organization established a Homeowner's HOPE Hotline that offers free counseling to homeowners seeking to avoid foreclosure. The Homeownership Preservation Foundation, an independent nonprofit, takes calls and directs homeowners to counselors approved by the U.S. Department of Housing and Urban Development. The organization also reaches out directly to at-risk homeowners through mailings and events.

There has been some criticism that HOPE NOW favors lenders over borrowers and that most of the help provided to borrowers has been in the form of temporary repayment plans rather than permanent mortgage modifications.⁸ HOPE NOW, however, highlights the more than one million homeowners it helped to avoid foreclosure.⁹ HOPE NOW worked closely with the U.S. Treasury, the Federal Housing Finance Agency, Fannie Mae, Freddie Mac, and mortgage loan servicers on other mortgage relief initiatives, such as the Streamlined Modification Plan.

Housing and Economic Recovery Act of 2008

The Housing and Economic Recovery Act of 2008 (HERA),¹⁰ an omnibus housing act, combines regulatory reform of GSEs, modernization of the Federal Housing Administration (FHA), and provisions to help

troubled borrowers. Within HERA, the Federal Housing Finance Regulatory Reform Act of 2008 created the Federal Housing Finance Agency (FHFA), a new regulator for Fannie Mae, Freddie Mac, and the Federal Home Loan Banks.¹¹ The FHFA has the authority to establish capital, management, and risk standards; to enforce its directives through cease and desist orders; to put a regulated entity into receivership; and to review and approve new product offerings.

Also under HERA, the Foreclosure Prevention Act of 2008¹² modernizes many aspects of FHA lending, including increasing the FHA loan limit, authorizing \$3.92 billion in supplemental Community Development Block Grant Funds for communities hardest hit by foreclosures, providing funds for housing counseling, and modifying loan disclosure requirements.

Finally, HERA included the Hope for Homeowners Act of 2008, establishing the HOPE for Homeowners program to help troubled borrowers.

Hope for Homeowners Act of 2008

The HOPE for Homeowners Program (H4H) is a temporary program within the FHA designed to refinance distressed mortgage loans. Unlike the majority of subsequent programs, H4H results in a new loan for the borrower, rather than a modification of the existing mortgage loan. The program began on October 1, 2008, and is scheduled to expire on September 30, 2011. H4H goals include ensuring that (1) homeowners can afford their mortgages over the long term; (2) there will be no bailout of investors and lenders, who will have to accept significant losses resulting from modified mortgages; (3) borrowers share any future equity and appreciation with the FHA; (4) lender, servicer, or investor participation in the program is voluntary; and (5) the program will restore confidence, liquidity, and transparency. Although the government estimated that 400,000 households would benefit from the program, to date, far fewer borrowers have successfully used the program. As of January 24, 2009, only 22 H4H loans had closed.¹³

H4H targets borrowers already in, or soon to be in, distress. Borrowers do not need to be delinquent on their mortgage payments in order to participate in the program. Other eligibility requirements include: (1) the mortgage is for a one- to four-unit primary residence, where the borrower does not own other residential real estate; (2) the mortgage was originated on or before January 1, 2008, and the borrower has made at least six mortgage payments; (3) the monthly mortgage payments are unaffordable, which is defined as exceeding 31% of the borrower's monthly gross income; and (4) the borrower will require assistance to continue making mortgage payments.¹⁴

H4H works with borrowers and lenders to refinance existing mortgages with FHA-insured fixed-rate mortgages. The borrower is required to have equity in the home when refinanced into the H4H loan. Given the decline in housing prices, in most cases, lenders will be required to write down their original mortgage. Borrowers are required to share with the government any new equity created in the refinancing and any future house price appreciation. The new FHA-insured mortgage will be a 30- or 40-year fixed-rate mortgage loan that does not exceed 96.5% of an updated appraisal value. The FHA collects up-front insurance premiums.

Mortgage modification efforts under H4H have been hampered by the existence of second mortgages on many borrowers' homes. Second mortgage lenders must consent to modification of the first mortgage, resulting in the extinguishment of their second lien on the related property. H4H provides that these second liens can only be eliminated through equity-sharing arrangements, an approach that investors and servicers find cumbersome and impractical. A recent amendment to H4H permits up-front payments to second lien holders to satisfy their claims against the borrower.¹⁵

Proposals to Amend H4H

Market participants and members of the government recommended changes to H4H to improve its effectiveness. The American Banker's Association (ABA) proposed several recommendations to improve H4H, including: (1) streamlining the underwriting process; (2) providing second lien holders greater incentives to extinguish or subordinate their interests; (3) providing lenders and servicers protection against litigation when they act reasonably and in good faith; and (4) offering incentives to participate for borrowers with no equity, including eliminating or significantly reducing the equity and appreciation sharing components of the program.

Federal Reserve Governor and member of the H4H oversight board Elizabeth A. Duke, noting that H4H has had only limited impact in part due to the "general reluctance of servicers and lenders to write down the principal of delinquent mortgages,"¹⁶ recently suggested that the government engage in bulk purchases of delinquent or at risk mortgages for refinancing through H4H to reach more homeowners.

Barney Frank, Chairman of the House Financial Services Committee, called for relaxing H4H standards and providing a safe harbor for mortgage servicers. Chairman Frank's proposals are now included in the proposed Helping Families Save Their Homes Act of 2009,¹⁷ discussed below, which would amend H4H by (1) reducing and permitting the elimination of the premium charged to the borrower modifying a

mortgage; (2) reducing the minimum amount of the write-down of the original mortgage to 93% of the original principal amount; and (3) providing a safe harbor from litigation for mortgage servicers who engage in specified mortgage loan modifications.

FDIC's Mod in a Box

On August 20, 2008, Federal Deposit Insurance Corporation (FDIC) Chairman Sheila Bair announced the implementation of a systematic Loan Modification Program (Modification Program) used by the FDIC as receiver of IndyMac Bank, F.S.B. The Modification Program, also called "Mod in a Box"¹⁸ by the FDIC, was made widely available on November 20, 2008, and is described as a solution for servicers struggling to negotiate modification terms on a case-by-case basis with individual borrowers. The program addresses one of the challenges of mortgage modification by establishing consistent standards.

The Modification Program uses the FHA recommended range of affordability for mortgages from 31% to 38% of the borrower's gross income. If a reduction of the mortgage to 38% will not decrease the borrower's payment by at least 10%,¹⁹ the ratio is lowered to 35%, and, if necessary to provide a 10% reduction, to 31%. In determining whether to pursue a modification, servicers must evaluate the net present value of the mortgage with and without a modification in order to determine whether the owner of the mortgage would benefit from a modification. Eligible mortgages include those at least 60 days delinquent or where default is reasonably foreseeable,²⁰ where the borrower is not in bankruptcy or facing imminent foreclosure, and where the mortgage is for the primary residence. The modification may include reducing the interest rate, extending the life of the mortgage loan, and partially forbearing principal, in each case to create a modified loan affordable for the life of the mortgage. One of the unique features of the Modification Program is the "bulk" approach to modifications. Servicers use borrower income information currently on file to calculate proposed modification terms. These potential modification terms are sent to delinquent borrowers in large mailings and interested borrowers are encouraged to respond. The FDIC also encourages use of community groups to contact and counsel borrowers locally; the community group receives a success fee of several hundred dollars for each modification.

The response to the program has been mixed. Mortgage lender groups recommended improvements for the Modification Program, including a proposal to require a current mortgage debt-to-gross-income ratio of at least 38%, to prevent borrowers from "gaming" the system. The proposal recom-

mends that lower ratios, down to 31%, be addressed through other modification programs or through more traditional mortgage loan workouts.²¹

The Modification Program was adopted by several banks. In November 2008, U.S. Bancorp adopted the Modification Program for mortgages acquired from two failed California banks, Downey Savings and Loan and PFF Bank & Trust, under an FDIC loss-sharing agreement.²² Additionally, as a condition to participating in Treasury's Targeted Investment Program and Asset Guarantee Program under the Emergency Economic Stabilization Act of 2008, Citigroup and Bank of America agreed to use the Modification Program.²³ In addition, the Modification Program served as a model and starting point for the subsequent development by the GSEs and Treasury of the modification programs discussed below.

Emergency Economic Stabilization Act of 2008

In late September 2008, the Secretary of the U.S. Department of the Treasury (Treasury) requested \$700 billion for a new program to purchase troubled assets from financial institutions. At that time, the mortgage crisis had evolved into a broader economic crisis and widespread uncertainty in the financial markets was leading to unprecedented tightening of credit. Treasury proposed purchasing troubled assets from financial institutions to prevent those institutions from experiencing further losses and write-downs, thereby restoring confidence in the system and stabilizing the economy. Presented as a three-page outline, Treasury's initial proposal was converted within days to the 169-page Emergency Economic Stabilization Act of 2008 (EESA).²⁴

Treasury's outline was significantly amended by both houses of Congress to include provisions focused on mortgage modification and foreclosure prevention. During Senate consideration of a draft of EESA, Senator Christopher Dodd noted that the "legislation would address, we hope, our Nation's economic emergency in three key ways: economic stabilization, taxpayer protection, and home ownership preservation.... The third priority advanced by this legislation is home ownership. This is not an ancillary objective; it is inherent, in my view, to our efforts to resolve this economic crisis."²⁵

EESA's foreclosure mitigation provisions include giving broad authority to Treasury to manage and modify mortgage-related assets it acquires.²⁶ Treasury must coordinate with the Federal Reserve, the FHFA, and the FDIC, each in its capacity as an owner of mortgages and mortgage-related securities, to identify opportunities for the purchase of classes of troubled assets that will improve Treasury's ability to improve mortgage modification and the restructuring process. Modifications of existing mortgages are encouraged through use of H4H, as well as by effecting term extensions, rate reductions, and principal write-downs,

and by amending servicing contracts to permit an increased proportion of mortgage loans in a securitized pool of mortgages to be modified, or removal of other limitations on mortgage modifications. Additionally, EESA requires Treasury to consent, where appropriate, to any reasonable mortgage modification requests.

Despite congressional efforts to include provisions in EESA to address the impact of the mortgage crisis on individual homeowners and Treasury's goal of addressing the impact of the mortgage crisis on the financial institutions experiencing losses from mortgage-related securities, the initial programs under EESA did not target mortgage-backed securities or foreclosure prevention. Faced with unforeseen challenges in implementing such programs and rapid degradation of the interbank credit and other markets, Treasury launched a series of programs designed to restore confidence in the banking system²⁷ and to prevent the collapse of the auto industry.²⁸ Treasury's shift in focus was scrutinized by the Congressional Oversight Panel (Panel), established by EESA to report on, inter alia, "the use by the [Treasury] of authority under" EESA and "the effectiveness of foreclosure mitigation efforts."²⁹ In its first report, the Panel asked Treasury to respond to numerous questions regarding its strategy and foreclosure reduction efforts.³⁰ The second report noted the Panel's belief that by January 2009, "Treasury's actions to minimize avoidable foreclosures have not met Congress' expectations."³¹ Members of Congress and the media similarly criticized Treasury's use of funds under EESA.³²

In mid-January 2009, Treasury required the final allocation of resources under the EESA.³³ The incoming administration, addressing concerns regarding the shifting strategy of Treasury away from the mortgage crisis, submitted a letter to congressional leaders committing to use no less than \$50 billion of EESA resources on foreclosure prevention programs.³⁴ On February 10, 2008, the administration released its Financial Stability Plan to address the economic crisis. The Financial Stability Plan combines EESA resources, legislative initiatives, and programs to be established in collaboration with other governmental entities and the private sector,³⁵ including two programs targeting the mortgage industry. Through the Private-Public Investment Program, Treasury will partner with private investors to purchase troubled mortgage-related assets from financial institutions. The second program, the Homeowner Affordability and Stability Plan (HASP), targeting mortgage modification, is discussed below.³⁶

Fannie Mae and Freddie Mac Streamlined Modification Program

Fannie Mae and Freddie Mac purchase mortgages and either retain them or sell them through securitization transactions; Fannie Mae and Freddie Mac guarantee payments to investors in securitizations. At the

end of 2008, more than 44% of the almost \$12 billion of residential mortgage debt outstanding was either owned or securitized by Fannie Mae and Freddie Mac.³⁷ However, only an estimated 20% of all seriously delinquent borrowers' mortgages are owned or guaranteed by the GSEs.³⁸ Nevertheless, given the reach of Fannie Mae and Freddie Mac across the mortgage industry, there has been a great deal of focus on their mortgage modification efforts.

On November 11, 2008, Fannie Mae and Freddie Mac announced the creation of the Streamlined Mortgage Modification Program (SMP).³⁹ In addition to Fannie Mae, Freddie Mac, and the servicers for their securitization transactions, the SMP is available for use by private mortgage lenders and their servicers. SMP, available for use beginning on December 15, 2008, reflects the collaborative efforts of Treasury, FHFA, Fannie Mae, Freddie Mac, and HOPE NOW.

Similar to the FDIC's Modification Program, SMP streamlines the mortgage modification process for participants by defining uniform borrower eligibility requirements. An eligible borrower must (1) be at least 90 days delinquent; (2) have a mortgage that closed on or before January 1, 2008; (3) occupy the related property, which must be a one-unit primary residence; (4) have a mortgage with a marked-to-market, loan-to-value ratio of at least 90%; and (5) not have filed for bankruptcy. Servicers will reach out to potentially qualifying borrowers and receive \$800 for each mortgage modified under the SMP. The goal of the SMP is to provide the borrower an affordable modified mortgage, with affordability defined as no more than 38% of monthly gross household income. Affordability can be achieved through a lowered interest rate, term extension of up to 40 years from the date of origination and forbearance of principal.

SMP's requirement that a borrower be 90 days delinquent raises two concerns. First, once a mortgage is 90 days delinquent, the borrower may have abandoned the property and severed communication with the servicer, rendering a modification impossible. Second, many borrowers can identify and document an imminent inability to meet mortgage payments, for example, due to near-term adjustments to interest rates or recently experienced hardships. Absent a contractual obligation to delay modification, postponing modification increases the likelihood that these borrowers will abandon the property and will disrupt payment flow to the mortgage owner or investor.

As discussed below, HASP offers enhanced incentives for servicers and permits modification as soon as permissible under the applicable contracts, rather than requiring that payments become delinquent. On

February 26, 2009, Fannie Mae announced its expectation that HASP would replace SMP.⁴⁰

Federal Reserve's Homeownership Preservation Policy for Residential Mortgage Assets

On January 30, 2009,⁴¹ the Federal Reserve announced the Homeownership Preservation Policy for Residential Mortgage Assets (Preservation Policy),⁴² a protocol for managing the residential mortgages it owns or controls. Under the Preservation Policy, the Federal Reserve will seek mortgage modifications and advise distressed homeowners as to the availability of other modification programs such as H4H. Eligible borrowers include those who are 60 days delinquent, with exceptions where the borrower has an upcoming trigger event, such as a resetting interest rate. Federal Reserve Banks will reach out to borrowers that are 60 days delinquent and will offer a modification if the net present value of the new mortgage will exceed the proceeds from foreclosure. The tools that the Federal Reserve Bank may employ to modify mortgages are similar to those under H4H, including a combination of interest rate reduction, term extension of up to 40 years, and partial forbearance of outstanding principal to create an affordable mortgage loan. The Federal Reserve's standard of affordability also requires that a senior mortgage represent no more than 38% of the borrower's income, with a senior and subordinate loan aggregating no more than 43% of the borrower's income.⁴³

Homeowner Affordability and Stability Plan: Making Home Affordable

On February 10, 2009, Treasury unveiled the Financial Stability Plan (Stability Plan),⁴⁴ broadly outlining the new administration's multi-pronged strategy to stabilize the economy and address a root cause of the financial crisis, the mortgage meltdown. Shortly thereafter, on February 18, 2009, the administration announced the three HASP programs, the mortgage-related components of the Stability Plan.

First, the Home Affordable Refinance program permits refinancing of mortgages owned or insured by Fannie Mae or Freddie Mac that may not have previously qualified for refinancing as a result of high loan-to-value ratios. Next, the Home Affordable Modification program was launched on March 4, 2009, when Treasury published detailed mortgage modification guidelines. The final component of the HASP is enhancing confidence in Fannie Mae and Freddie Mac through direct government support. These confidence-building efforts include Treasury and Federal Reserve⁴⁵ programs to purchase securities issued by Fannie Mae and Freddie Mac and Treasury's commitment to provide up to \$200 billion to

each of Fannie Mae and Freddie Mac, an increase over the commitments made on September 7, 2008.⁴⁶ These three programs are now titled Making Home Affordable.

Home Affordable Finance

Treasury estimates that the Home Affordable Refinance program will be available to four to five million homeowners. Borrowers with good payment histories and whose mortgages are owned or guaranteed by Fannie Mae or Freddie Mac will be eligible to refinance, even if their current home value exceeds 80% of their mortgage. The refinanced mortgages may offer lower fixed interest rates, which may include the opportunity to move from an adjustable rate mortgage to a fixed-rate mortgage. This program is scheduled to end in June 2010.⁴⁷

Home Affordable Modification

Home Affordable Modification provides standardized guidelines for mortgage modification, reflecting the input of numerous government agencies and industry groups. As launched on March 4, 2009, the program is in a trial period, and we expect additional fine-tuning over the coming weeks. Entities using the guidelines must execute Treasury's program agreements no later than December 31, 2009, and modifications under the program may be made through December 31, 2012.

Treasury has received commitments from the following to use the program for owned or managed mortgages: Fannie Mae, Freddie Mac, Ginnie Mae, the FHA, the Federal Reserve, the FDIC, the Department of Veterans Affairs, and the Department of Agriculture. Additionally, the Office of the Comptroller of the Currency, the Office of Thrift Supervision, the Federal Reserve, the FDIC, and the National Credit Union Administration are expected to encourage use of the program by institutions they supervise. Going forward, participants in Stability Plan programs will be required to use Home Affordable Modification.

Key features of Home Affordable Modification are highlighted below and the full guidelines are available at <http://www.financialstability.gov> and at <http://www.hmpadmin.com>.⁴⁸

- **Mortgage Eligibility:** mortgage originated on or before January 1, 2009, one- to four-family residence that is owner-occupied, no previous modification under the program, no automatic exclusions based on commenced bankruptcy proceeding or pending litigation, no minimum or maximum loan-to-value ratio, unpaid principal balance of single unit home may not exceed \$729,750⁴⁹

- **Shared Loss:** the mortgage owner or investor must absorb any losses through modifications from reducing current payments to 38% of the borrower's debt-to-income ratio; thereafter, Treasury will share losses on a dollar-for-dollar basis on modifications reducing current payments to 31% of the borrower's debt-to-income ratio
- **Servicer Incentives:** (1) \$1,000 for each modified mortgage; (2) up to \$1,000 per year for each borrower of a modified mortgage that remains current on the mortgage loan (for up to three years); (3) \$500 for modifications made prior to a delinquency; (4) \$250 and additional compensation based on a scale published by Treasury for the release of a second lien; and (5) where modification is not feasible, compensation to encourage alternatives to foreclosure, including permitting a sale for less than the unpaid amount of the mortgage loan or deeds-in-lieu of foreclosure
- **Borrower Incentives:** monthly payments, up to \$1,000 each year for five years, will be applied to reduce the principal balance of the mortgage as long as the borrower remains current
- **Lender/Investor Incentives:** \$1,500 payment for each modification made prior to a delinquency and payments to offset probable losses from home price declines
- **Modified Mortgage Targets:** 31% front-end debt-to-income ratio,⁵⁰ interest rate no lower than 2%,⁵¹ modified interest rate is fixed for five years with 1% per annum increases thereafter up to the interest rate cap determined using the guidelines at the time of modification and term extensions (40-year mortgages)
- **Underwriting:** income verification is required; property value determined within 60 days of modification based on the government sponsored enterprises' automated valuation model or a brokers price opinion
- **H4H:** participating servicers are required to consider borrowers for H4H; loans may enter the Home Affordable Modification trial period pending completion of a H4H modification
- **Trial Period:** borrower must remain current for 90 days, or three monthly mortgage payments, before incentive payments will be made
- **Transparency Provisions:** servicers required to maintain records covering borrower eligibility, underwriting, incentive payments, and property verification; Freddie Mac will audit compliance

The program addresses many of the concerns raised with prior mortgage modification programs and reflects the experience to date with H4H. The guidelines require compliance with any express pooling and servicing contractual restrictions for modifying current loans. Treasury hopes that widespread use of consistent and clear guidelines that include net present value and other objective measurements will enhance servicers' ability to modify mortgages. Concerns regarding the reasonableness of proposed modifications should be mitigated through use of a program that achieves industry-wide acceptance. Additionally, if passed, recently proposed H.R. 1106 would provide protection from legal liability for servicers performing loan modifications in compliance with the Trust in Lending Act and H.R. 1106's proposed standards.

The program's incentives include payments for each mortgage modified prior to the borrower becoming delinquent. The administration believes that requiring a borrower to be 60 or 90 days delinquent, a current requirement of many servicing agreements, encourages borrowers to cease making mortgage payments. Additionally, servicers are frequently unable to contact borrowers who abandon their residences during this 60- to 90-day period.

Many lenders have expressed reluctance to engage in modifications in geographic areas experiencing steep ongoing declines in real estate values, fearing that modified mortgages will quickly return to underwater status. To address this concern, the HASP includes a \$10 billion partial insurance program to make additional "Pay for Success" payments in the event of more marked declines in housing values. The mechanism for paying the insurance is unclear. Treasury's announcement states that the insurance payments could be set aside as reserves, providing a partial guarantee in the event that the home price declines (and therefore losses in cases of default) are higher than expected. It is not clear how a decline in home value will be measured or how much of a decline will be necessary to trigger a payment by Treasury.

In addition to the guidelines discussed above, the Home Affordable Modification program has other features designed to encourage modifications. For example, the following were outlined in Treasury's March 4, 2009, updated program description: required participation in loan modification programs by participants in other Stability Plan programs, permitting judicial modifications of home mortgages during bankruptcy, and improving the flexibility of H4H and other FHA programs to aid at-risk borrowers wishing to modify or refinance their mortgages.⁵²

Public-Private Investment Program

On March 23, 2009, Treasury released details of the Public-Private Investment Program (PPIP).⁵³ Under PPIP, Treasury and private investors

will jointly purchase troubled mortgage-related assets from financial institutions through a series of newly formed investment vehicles. Details of the two sub-programs, one to purchase loans and the other to purchase securities, are still being developed. Treasury has allocated EESA resources to the PPIP for the purchase of these mortgage-related assets, in a return to the original purposes of EESA. As noted above, EESA directs Treasury to seek mortgage modifications through its purchase programs.

The PPIP, however, is designed as an investment partnership between Treasury and private investors, and Treasury has yet to release its interpretation of the application of EESA's modification provisions to its private industry partners. However, the summary of terms for the loans program states that the loans acquired through the program will be subject to servicing standards established by the FDIC and Treasury.⁵⁴ Although the summary of terms does not reference Making Home Affordable, it is likely that "servicing standards established by the FDIC and Treasury" will not deviate significantly from the recently announced modification initiative.

Successful implementation of PPIP that includes a modification program based on Making Home Affordable may extend the scope of the program. On the other hand, imposition of the modification program may limit the participation of both buyers and sellers. Potential purchasers bidding for troubled mortgage-related assets will need to evaluate the potential impact of both the cost and result of modifications when conducting due diligence and bidding for asset pools. If a bid includes a significant "Making Home Affordable" discount, prospective sellers may prefer to retain troubled assets.

For these programs to be successful, Treasury and the other government entities finalizing the terms of Making Home Affordable and the Public-Private Investment Program will need to carefully balance two potentially conflicting goals.

Tax Initiatives

Given the importance of combating foreclosures, the White House announced a proposal in December 2007 that would freeze the initial "teaser" interest rates on adjustable rate mortgages subject to reset.⁵⁵ In conjunction with the proposal, the Internal Revenue Service (IRS) issued Rev. Proc. 2007-72,⁵⁶ which provided that, under certain conditions, the IRS will not challenge a REMIC's status as a pass-through tax-exempt entity for U.S. Federal income tax purposes in connection with "fast track modifications" of certain subprime mortgage loans under a framework recommended by the American Securitization Forum (ASF). A fast-track modification program is a program that permits servicers to modify eligible troubled mortgage loans subject to certain broad pa-

rameters.⁵⁷ Rev. Proc. 2007-72 was issued in an effort by Treasury and the IRS to stem foreclosures by removing barriers imposed by tax laws, arguably too restrictive in light of prevailing economic and market circumstances, to broad-based mortgage modification plans.⁵⁸

Rev. Proc. 2008-47,⁵⁹ issued in July 2008, provides that the IRS will not challenge the tax status of a REMIC or assert that a REMIC is engaged in a “prohibited transaction” when certain mortgage loans—primarily adjustable rate mortgages with teaser rates—held by a REMIC are modified by freezing rates prior to their reset in accordance with the American Securitization Forum’s “Streamlined Foreclosure and Loss Avoidance Framework for Securitized Subprime Adjustable Rate Mortgage Loans” (also issued in July 2008). Rev. Proc. 2008-47 amplifies and supersedes Rev. Proc. 2007-72. Despite this limited tax relief, however, a number of other serious tax questions remained that could create disincentives for mortgage modification programs.

On February 4, 2009, a bill was proposed in the United States Senate that would require that each securitization seeking tax-free REMIC status permit its servicer or trustee to “reasonably” modify or dispose of distressed mortgages or otherwise suffer the penalty of losing tax-free REMIC status.⁶⁰ The bill also provides that any modification or dispositions made under EESA’s Troubled Asset Relief Program will not be treated as prohibited transactions. Terminating REMIC status could have far-reaching consequences, not the least of which would be subjecting the securitization to an additional layer of tax. Accordingly, the bill is expected to face stiff criticism from the ASF and other industry participants and is not expected to pass in its current form.

On April 10, 2009, the IRS released guidance with respect to mortgage modifications made pursuant to the Home Affordable Modification plan the details of which were released on March 4, 2009, as discussed above. In Notice 2009-36,⁶¹ the IRS announced that it will issue regulations⁶² excepting payments made pursuant to the Home Affordable Modification plan from the imposition of a 100% confiscatory tax on certain contributions made to a REMIC after the startup day.⁶³ For example, without the Notice, incentive payments made to the REMIC could have been caught. In Rev. Proc. 2009-23,⁶⁴ the IRS also provided that it will not challenge a securitization vehicle’s tax status; nor will it impose a “prohibited transaction tax” on modifications made pursuant to the Home Affordable Modification plan. Rev. Proc. 2009-23 provides similar guidance to Rev. Proc. 2007-72 and Rev. Proc. 2008-47, also discussed above.

What is apparent from these numerous guidance provided by the IRS is that the REMIC rules were never designed to deal with broad-based

modification plans, particularly where the market is under extreme duress. Instead of the IRS issuing new guidance whenever the administration adopts a new plan to relieve the significant stresses on the mortgage market, it seems reasonable to amend the REMIC rules to attempt to deal with these situations. A possible interpretation of the temporary nature of the relief provided to date is that the Treasury and the IRS are not comfortable with the underlying conclusion they have reached in such guidance. The temporary relief could also be viewed that the tax law is not being interpreted consistently in all cases, which may raise fairness questions in its application. This is not to say that the Treasury and the IRS guidance issued thus far are without justification; clearly the administration believes it is the right policy decision. However, if the securitization market is to be revived, it seems that the REMIC tax rules should be revisited. Ad-hoc decision-making may not be the rational approach when REMIC amendments would provide more certainty and enhance confidence in the long-term views of Treasury and the IRS.

RECENT PROPOSALS

Systemic Foreclosure Prevention and Mortgage Modification Act

On November 14, 2008, the FDIC announced its loss-sharing proposal to promote affordable mortgage modifications.⁶⁵ The FDIC proposed to serve as a Treasury contractor to implement a program of systematic mortgage modifications and proposed a government loss share guarantee on redefaults of modified mortgages. The FDIC claims that a loss share guarantee would provide the incentive necessary to modify a large number of mortgages, while leveraging available government funds to affect more mortgages than outright purchases or specific incentives for each modification.

Introduced as the “Systemic Foreclosure Prevention and Mortgage Modification Act,” H.R. 37 is pending in the House Committee on Financial Services, and S. 73 is pending in the Senate Committee on Banking, Housing and Urban Affairs.

Mortgage Modification in Bankruptcy: Cramdown⁶⁶ Legislation

In personal bankruptcy cases, bankruptcy judges do not have the authority to modify the mortgage for the petitioner’s primary residence. Because there is no risk that a bankruptcy court could change the terms of a residential mortgage for owner-occupied property, there is one less risk of disrupted cash flows in mortgage finance transactions. The mort-

gage finance industry asserts that this creates reduced risk of loss for investors and, as a result, reduced mortgage financing costs. These reduced costs lead to lower interest rates and more affordable mortgages.

Consumer advocates, on the other hand, have long argued for Bankruptcy Code changes to permit bankruptcy modifications, increasing the likelihood that borrowers can retain their homes under more affordable terms. Given the unprecedented need to facilitate widespread mortgage modifications and limit ongoing housing price declines resulting from waves of foreclosures, there is renewed interest in amendments to the Bankruptcy Code. Two bills have been proposed to provide bankruptcy courts with more flexibility to effect mortgage modifications.

On March 5, 2009, the Helping Families Save Their Homes Act (H.R. 1106) was approved by the House of Representatives. H.R. 1106 combines several earlier efforts, including the Helping Families Save Their Homes in Bankruptcy Act of 2009 (H.R. 200) and its companion, the Emergency Homeownership and Equity Protection Act of 2009 (H.R. 225). If it is enacted, bankruptcy courts could modify residential mortgage loans for a borrower in a Chapter 13 proceeding.⁶⁷ In addition, H.R. 1106 includes provisions (1) authorizing bankruptcy judges to extend the mortgage repayment period and to reduce the mortgage interest rate; (2) waiving the bankruptcy counseling requirement for borrowers nearing foreclosure; (3) requiring lenders to provide notice when assessing fees and allowing bankruptcy judges to waive prepayment penalties; and (4) maintaining debtors' legal claims against predatory lenders while in bankruptcy.

H.R. 1106 also includes a safe harbor from litigation for servicers engaging in loan modifications in a manner consistent with HERA, regardless of servicing agreement provisions. To satisfy the HERA standard, (1) the servicer's actions must maximize the net present value of pooled mortgages to all investors as a whole; (2) the mortgage must be in default or default must be reasonably foreseeable; (3) the property must be owner-occupied; and (4) the anticipated recovery must exceed, on a net present value basis, the anticipated recovery through foreclosure.⁶⁸

H4H amendments and new authorizations to the FHA and the Rural Housing Service are included in H.R. 1106. The bill encourages lender participation in H4H by: (1) reducing the up-front fee from 3% to no more than 2% and the annual fee from 1.5% to no more than 1%; (2) providing that profit be shared based on a scale up to 50%, but terminating the fixed 50% sharing requirement, and allowing profit sharing with the original mortgage lender to encourage principal reductions; (3) authorizing payments to servicers of up \$1,000 for each refinanced mortgage loan; (4) permitting auctions to refinance loans on a wholesale or bulk basis; and (5) reducing the administrative burdens by making the re-

quirements more consistent with standard FHA practices. Finally, H.R. 1106 would expand the FHA's mortgage loan modification abilities by allowing increased reductions of interest payments.

These proposed bills, and prior efforts to modify the bankruptcy prohibition on mortgage modification, are generally lobbied against by the mortgage finance industry. On January 8, 2009, Senator Dick Durbin announced that an agreement in support of recently proposed cramdown legislation had been reached with Citigroup.⁶⁹ In a break from its industry peers, Citigroup was the first major mortgage lender to publicly support cramdown legislation. Consistent with the positions previously taken, industry groups such as the ABA and the Mortgage Bankers Association have raised concerns with the proposals to permit mortgage modification in bankruptcy. The ABA opposes the proposal "because it will leave in place overly broad mortgage cram-down authority and other provisions that will harm thousands of banks across the country that have made, and continue to make, good loans."⁷⁰ The Mortgage Bankers Association believes the legislation will have a "destabilizing effect... on an already turbulent mortgage market"⁷¹ and should be limited to subprime mortgage loans.

After approval by the House of Representatives, H.R. 1106 was sent to the Senate in March 2009. The cramdown provisions were not approved by the Senate and were deleted from the Senate version of the bill, S. 896. On May 20, 2009, the Helping Families Save Their Homes Act of 2009, including amendments to H4H and a servicer safe harbor, was signed into law.⁷²

Mortgage Reform and Anti-Predatory Lending Act

On March 26, 2009, House Representative Bradley Miller introduced H.R. 1728, the "Mortgage Reform and Anti-Predatory Lending Act."⁷³ H.R. 1728 is based on H.R. 3915, the 2007 bill with the same name that passed the House of Representatives in November 2007 but that never became law. Like H.R. 3915, the proposed bill imposes restrictions on the brokering and origination of residential mortgage loans that do not qualify for an exemption and makes certain assignees liable for the mortgage lenders' violations of the standards of care outlined in H.R. 1728, regardless of the assignees' knowledge of the originators' violations. Title II of the bill subjects every residential mortgage loan to two new federal standards that apply to creditors, assignees, and securitizers. First, at the time the mortgage is entered into, the creditor must make a reasonable, good-faith determination: that the consumer has a "reasonable ability to repay" the loan at a fully indexed, fully amortizing rate, based on verified and documented information including the consumer's credit history,

current and expected income, debt-to-income ratio, and other financial resources. Second, for refinancings, the loan must provide a “net tangible benefit” to the consumer, based on information known or obtained in good faith by the creditor. The federal banking agencies shall jointly prescribe regulations that define “net tangible benefit,” and the bill provides that loans for which the cost of refinancing exceeds the newly advanced principal specifically do not provide a net tangible benefit.

H.R. 1728 provides a limited “qualified mortgage” safe harbor for prime, fully documented 30-year fixed-rate mortgages that have no negative amortization or interest-only features. Such qualified mortgages are presumed to meet the ability to repay and net tangible benefit standards, though this presumption is rebuttable. Qualified mortgages are loans for which: (1) the APR does not exceed an “average prime offer rate” by more than 1.5 percentage points for a first lien and 3.5 percentage points for a subordinate lien; (2) the income and financial resources of the consumer are verified; (3) the underwriting process is based on a fully indexed rate; (4) the loan meets a combined debt-to-income (DTI) test prescribed by the federal banking agencies; and (5) the loan has a fixed-rate term of not less than or more than 30 years. The federal banking agencies shall jointly prescribe regulations that carry out the purposes of the qualified mortgage provision and may revise the criteria for defining a qualified mortgage when necessary or appropriate.

In addition, H.R. 1728 lowers the financial triggers for a residential mortgage loan to constitute a “high cost” loan under the Homeownership Equity Protection Act (HOEPA), thereby increasing the number of residential mortgage loans that could be subject to HOEPA, and expands the restrictions to which high cost loans are subject. Specifically, the bill: (1) lowers the APR trigger from 10% to 8% over comparable Treasuries, except if a dwelling is personal property and the loan is less than \$50,000; (2) lowers the points and fee trigger from 8% to 5% for transactions of \$20,000 or more and includes additional costs and fees in the trigger; (3) prohibits the financing of points and fees; (4) prohibits excessive fees for payoff information, modifications, or late payments; and (5) prohibits practices that increase the risk of foreclosure, such as balloon payments, encouraging a borrower to default, and call provisions.

H.R. 1728 was approved by the House of Representatives on May 7, 2009, and was presented to the Senate Committee on Banking, Housing and Urban Development on May 12, 2009.

CONCLUSION

As the mortgage crisis deepened, initial governmental efforts focused on encouraging private industry solutions, such as HOPE NOW. As the

broader economy began to suffer, the focus shifted from mortgages and the homeowner to the financial institutions comprising the banking and financial system. Treasury proposed EESA to address the mortgage industry's impact on financial institution balance sheets, rather than on Main Street checkbooks. Although it ultimately included provisions to address mortgage modification and foreclosure prevention, the overwhelming majority of the \$700 billion authorized under EESA will be spent resolving downstream impacts to the financial system. Similarly, the \$787 billion American Recovery and Reinvestment Act of 2009 targets the recession's constriction of the economy, rather than the root causes of the crisis. The ultimate impact of the mortgage crisis was, fundamentally, a crisis of confidence. Financial counterparties, market participants, and consumers withdrew from the economy, each unsure which institution would be next to announce a bailout or bankruptcy.

To be successful, efforts to rebuild confidence must target both systemically significant market participants: the financial institutions that make up the system and the individual consumer/borrowers who use that system. Those efforts should include both regulatory reform and recovery programs.

Recovery efforts targeted to consumers can contribute to the stabilization of the economy. The recently announced Homeowner Affordability and Stability Plan is the most comprehensive interagency federal action to date to address the impact of the mortgage crisis on individuals. Even if the program does not reach the administration's estimated seven to nine million homeowners, a federally sponsored, broad-scale program is needed to assure consumers that those responsible for building and safeguarding the financial system are focused on more than Wall Street. However, despite numerous governmental and GSE efforts to encourage mortgage modification, the utility of the programs they have developed is limited by the contractual obligations of mortgage servicers. If successful, legislative efforts to provide servicers a safe harbor from litigation may provide a temporary "work-around" for moving through the current crisis, but these temporary measures do not address the fundamental issues with the structure of mortgage finance.

We also expect to see a growing wave of reform efforts focused on the mortgage industry, including mortgage finance. The proposed legislative initiatives discussed above will be followed by others as attention is focused on alternative means of financing mortgage loan originations, as well as a new rubric for securitization type structures. Ultimately, the credit markets would be too constrained without a "securitization-like" funding approach; however, it is not yet clear how this market will return. The mortgage finance industry will need to reexamine the balance between market efficiency and flexibility. Securitization has produced a

highly efficient framework for originating, selling, and servicing mortgage loans. The previously unforeseen cost of that efficiency, however, is the inability of servicers to actively manage mortgages to maximize long-term value due to litigation concerns. Although reports indicate that the net present value of troubled mortgages is often higher under a mortgage modification than with a foreclosure, the system encourages foreclosure. In hindsight, the system's limits on modifications may have contributed to the depth of the foreclosure crisis. Reconsideration of the model, including tax laws, servicer compensation, servicing agreements, originate-to-sell models, the role of the GSEs and the federal agencies, and other fundamental elements of the securitization market should be examined to prevent history from repeating itself. Reform efforts will be widespread, addressing not only the root causes of the initial downturn but the inability of markets and market participants to prevent the dislocation in the mortgage market from growing into a global financial crisis.

NOTES

1. By September 30, 2008, the foreclosure rate had reached 2.75%, a level unseen in recent history. U.S. Government Accountability Office, Report to Congress, Troubled Asset Relief Program Additional Actions Needed to Better Ensure Integrity, Accountability and Transparency (December 2008) available at <http://www.gao.gov/new.items/d09161.pdf>. By January 2009, 2.9 million first lien mortgages were 60 or more days past due. Statement of Faith Schwartz, Subcommittee on Housing and Community Opportunity of the Committee on Financial Services, United States House of Representatives (March 19, 2009) available at <http://www.hopenow.com/media/statements/HOPE%20NOW%20Testimony%20HFSC%20Subcommittee%203-19-09%20FINAL.pdf>.

2. Press Release, Dep't of the Treasury, Homeowner Affordability and Stability Plan, Executive Summary (February 18, 2009) available at <http://www.treasury.gov/press/releases/tg33.htm>.

3. For a complete discussion of the REMIC rules and related tax considerations, see Humphreys, *Tales From the Credit Crunch: Selected Issues in the Taxation of Financial Instruments and Pooled Investment Vehicles*, Journal Tax'n Fin. Products, Volume 7, Issue 3, 2008, available at http://www.mofo.com/news/updates/files/Tales_from_the_Credit_Crunch.pdf.

4. Under the REMIC rules, certain changes would not be considered significant modifications. The rules expressly permit the following modifications: (1) changes in the terms of an obligation occasioned by default or a reasonably foreseeable default; (2) assumption of the obligation; (3) waiver of a due-on-sale clause or a due on encumbrance clause; and (4) conversion of an interest rate by a mortgagor pursuant to the terms of a convertible mortgage. Treas. Reg. Sec. 1-860G-2(b)(3).

5. Cordell, Dynan, Lehnert, Liang, and Mauskopf, Finance and Economics Discussion Series, Division of Research & Statistics and Monetary Affairs, Federal Reserve Board: The Incentives of Mortgage Servicers: Myths and Realities (September 8, 2008) available at <http://www.federalreserve.gov/pubs/feds/2008/200846/200846pap.pdf>.

6. U.S. Department of Housing and Urban Development, Statement by the President on Homeownership Financing (August 31, 2007) available at <http://www.hud.gov/content/releases/pr07-123statement.cfm>.

7. HOPE NOW, HOPE NOW Alliance Created to Help Distressed Homeowners (October 10, 2007) available at <http://www.fsround.org/media/pdfs/AllianceRelease.pdf>.

8. Christie, CNNMoney.com, Hope Now ramps up foreclosure-prevention (December 22, 2008) available at http://money.cnn.com/2008/12/22/real_estate/Hope_Now_looks_ahead/index.htm.

9. Press Release, HOPE NOW Alliance, HOPE NOW Projects Big Increases In Foreclosure Prevention Successes In 2009 (December 22, 2008) available at http://www.hopenow.com/upload/press_release/files/HOPE%20NOW%202008%20Year%20End%20-%20November%20Data%20Release.pdf.

10. Housing and Economic Recovery Act of 2008, Pub. L. No. 110-289 (2008) available at <http://www.govtrack.us/congress/billtext.xpd?bill=h110-3221>.

11. In September 2008, the FHFA was appointed as conservator of Fannie Mae and Freddie Mac under authority created in the Federal Housing Finance Regulatory Reform Act and replaced senior management at each institution.

12. Pub. L. No. 110-289, 122 Stat. 2830.

13. Hope for Homeowners Program Monthly Report for Congress January 2009 available at http://portal.hud.gov/pls/portal/docs/PAGE/FHA_HOME/LENDERS/H4H_MONTHLY_REPORTS_TO_CONGRESS/H4H%20REPORT%20TO%20CONGRESS%20JANUARY.PDF.

14. Housing and Urban Development, Fact Sheet: Hope for Homeowners to Provide Additional Mortgage Assistance to Struggling Homeowners available at http://portal.hud.gov/pls/portal/docs/PAGE/FHA_HOME/PRESS/H_FOR_H_PRESS_FACT_SHEET/H4H%20PRESS%20FACT%20SHEET_2_.PDF.

15. Fed. Housing Administration, HOPE for Homeowners Program Enhancements, available at http://portal.hud.gov/pls/portal/docs/PAGE/FHA_HOME/PRESS/H_FOR_H_PRESS_FACT_SHEET/H4H%20PRESS%20FACT%20SHEET_2_.PDF.

16. Speech by Governor Duke, Global Association of Risk Professionals' Risk Management Convention (February 11, 2009) available at: <http://www.federalreserve.gov/newsevents/speech/duke20090211a.htm>.

17. H.R. 1106, Helping Families Save Their Homes Act of 2009, available at: http://fwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:h1106ih.txt.pdf.

18. Fed. Deposit Insurance Corp., Loan Modification Program (2008) available at <http://www.fdic.gov/consumers/loans/loanmod/loanmodguide.html>.

19. For purposes of determining whether the 10% savings has been achieved, the Modification Program's housing-to-income ratio excludes the cost of taxes and insurance. Fed. Deposit Insurance Corp., Loan Modification Program (2008) available at <http://www.fdic.gov/consumers/loans/loanmod/loanmodguide.html>, p.3.

20. The Modification Program notes that contractual restrictions in IndyMac's pooling and servicing agreements prevented modification of loans where default was reasonably foreseeable, limiting the program to loans 60 days or more delinquent. Fed. Deposit Insurance Corp., Loan Modification Program (2008) available at <http://www.fdic.gov/consumers/loans/loanmod/loanmodguide.html>, footnote 1.

21. Yingling, Testimony on behalf of the American Bankers Association before the Committee on Financial Services, United States House of Representatives (January 7, 2009) available at <http://www.aba.com/NR/rdonlyres/222CE044-577A-11D5-AB84-00508B95258D/57352/January7HouseFinancialServicesUseofCPPFINAL.pdf>.

22. Press Release, Federal Deposit Insurance Corp., U.S. Bank Acquires All the Deposits of Two Southern California Institutions (November 21, 2008) available at <http://www.fdic.gov/news/news/press/2008/pr08124.html>.

23. Summary of Terms (November 24, 2008) available at <http://www.fdic.gov/news/news/press/2008/pr08125a.pdf>.

24. Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343 (2008).

25. 154 Cong. Rec. S10,225 (2008).

26. EESA, Pub. L. No. 110-343, § 109 (2008).

27. On October 14, 2008, Treasury launched the Capital Purchase Program to make capital investments in banking institutions. In announcing the program, Secretary Paulson stated “[T]oday’s actions are what we must do to restore confidence to our financial system,” Press Release, Dep’t of the Treasury, Statement by Secretary Henry M. Paulson, Jr. on Actions to Protect the U.S. Economy (October 14, 2008) available at <http://www.treas.gov/press/releases/hp1205.htm>. See also Press Release, Dep’t of the Treasury, Treasury Announces TARP Capital Purchase Program Description (October 14, 2008) available at <http://www.treas.gov/press/releases/hp1207.htm> and Press Release, Dep’t of the Treasury, Joint Statement by Treasury, Federal Reserve and FDIC (October 14, 2008) available at <http://www.treas.gov/press/releases/hp1206.htm>.

28. Press Release, Dep’t of the Treasury, Secretary Paulson Statement on Stabilizing the Automotive Industry (December 19, 2008) available at <http://www.treas.gov/press/releases/hp1332.htm>.

29. EESA, Pub. L. No. 110-343, § 125 (2008).

30. Questions included, “Is the strategy helping to reduce foreclosures? What steps has Treasury taken to reduce foreclosures? How effective have those steps been? Why has Treasury not generally required financial institutions to engage in specific mortgage foreclosure mitigation plans as a condition of receiving taxpayer funds? Why has Treasury required Citigroup to enact the FDIC mortgage modification program, but not required any other bank receiving TARP funds to do so? Is there a need for additional industry reporting on delinquency data, foreclosures, and loss mitigations efforts in a standard format, with appropriate analysis? Should Treasury be considering other models and more innovative uses of its new authority under the Act to avoid unnecessary foreclosures?” See Congressional Oversight Panel, Congressional Oversight Panel Report: Questions About the \$700 Billion Emergency Economic Stabilization Funds (December 10, 2008) available at <http://cop.senate.gov/reports/library/report-121008-cop.cfm>.

31. Accountability for the Troubled Assets Relief Program, Congressional Oversight Panel (January 9, 2009).

32. See, e.g., Davidoff, *New York Times*, Short-Term Solutions to Long-Term Problems (March 25, 2009) available at <http://www.nytimes.com/2009/03/26/business/26prof.html> and Statement of Senator Charles Grassley, Hearing Before the Committee on Finance “TARP Oversight: A Six Month Update” (Tuesday, March 31, 2009) available at <http://finance.senate.gov/press/Gpress/2009/prg033109.pdf>.

33. Section 115(a)(3) of EESA requires the President to certify a request for the final \$350 billion and provides Congress a limited 15-day period to pass a resolution in opposition to the request. EESA, Pub. L. No. 110-343, § 115(a)(3) (2008).

34. Letter from Larry Summers, Director-Designate National Economic Counsel, to Rep. Nancy Pelosi, Rep. John Boehner, Sen. Harry Reid and Sen. Mitch McConnell (January 15, 2009) available at <http://financialservices.house.gov/summers011509.pdf>.

35. Press Release, Dep’t of the Treasury, Secretary Geithner Introduces Financial Stability Plan (February 10, 2009) available at <http://www.financialstability.gov/latest/tg18.html>.

36. See Financial Stability Fact Sheet (February 10, 2009) available at <http://www.financialstability.gov/docs/fact-sheet.pdf>.

37. Enterprise Share of Residential Mortgage Debt Outstanding, 1990-2008, Federal Housing Finance Agency (March 12, 2009) available at <http://www.fhfa.gov/webfiles/1663/ESRMDO1990to2008.xls>.

38. James B. Lockhart III, Chairman Federal Housing Finance Agency, Presentation to Women in Housing and Finance: The Housing GSEs (December 10, 2008) available at <http://www.fhfa.gov/webfiles/216/WHF121008webversion.pdf>.

39. Fannie Mae, Announcement 08-33, Introduction of the Streamlined Modification Program (December 12, 2008) available at <https://www.efanniemae.com/sf/guides/ssg/annltrs/pdf/2008/0833.pdf>.

40. Press Release, Fannie Mae, Fannie Mae Reports Fourth-Quarter and Full-Year 2008 Results (February 26, 2009) available at http://www.fanniemae.com/media/pdf/newsreleases/form10k_newsrelease_022609.pdf.

41. Press Release, Federal Reserve Board of Governors (January 30, 2009) available at <http://www.federalreserve.gov/newsevents/press/bcreg/20090130a.htm>.

42. Federal Reserve Board of Governors, Homeownership Preservation Policy for Residential Mortgage Assets (January 30, 2009) available at <http://www.federalreserve.gov/newsevents/press/bcreg/bcreg20090130a1.pdf>.

43. The Preservation Policy includes all costs associated with the mortgage in the debt-to-income calculation, including real estate taxes, hazard and mortgage insurance, homeowners' association dues, ground rent, special assessments, and special charges. Federal Reserve Board of Governors, Homeownership Preservation Policy for Residential Mortgage Assets (January 30, 2009) available at <http://www.federalreserve.gov/newsevents/press/bcreg/bcreg20090130a1.pdf>, p.6.

44. Morrison & Foerster LLP, Take Two: Treasury Announces Financial Stability Plan (February 10, 2009) available at <http://www.mofo.com/news/updates/files/090210Treasury.pdf>.

45. Press Release, Federal Reserve Board of Governors, FOMC Statement (March 18, 2009) available at <http://www.federalreserve.gov/newsevents/press/monetary/20090318a.htm> and Press Release, Federal Reserve Board of Governors, Federal Reserve announces it will initiate a program to purchase the direct obligations of housing-related GSEs and mortgage-backed securities backed by Fannie Mae, Freddie Mac, and Ginnie Mae (November 25, 2008) available at <http://www.federalreserve.gov/newsevents/press/monetary/20081125b.htm>.

46. Press Release, U.S. Dep't of the Treasury, Statement by Secretary Tim Geithner on Treasury's Commitment to Fannie Mae and Freddie Mac (February 18, 2009) available at <http://www.financialstability.gov/latest/tg32.html>.

47. U.S. Dep't of the Treasury, Making Home Affordable Summary of Guidelines (March 4, 2009) available at http://www.treas.gov/press/releases/reports/guidelines_summary.pdf and U.S. Dep't of the Treasury, Making Home Affordable Updated Detailed Program Description (March 4, 2009) available at http://www.treas.gov/press/releases/reports/housing_fact_sheet.pdf.

48. HASP, Home Affordable Modification, and Home Affordable Refinance are not the subject of rulemaking and the program guidelines and rules are not codified in the Code of Federal Regulations. Participating servicers enter into a contract with Fannie Mae, designated by Treasury as the financial agent for the United States. Treasury appointed Freddie Mac as compliance agent for the HASP. Program information is available through government sponsored Web sites.

49. In addition to the \$729,750 limit for single unit residences, the unpaid principal balance of the mortgage loan prior to capitalization must be no greater than \$934,200 for two units, \$1,129,250 for three units and \$1,403,400 for four units. See

Home Affordable Modification Program Guidelines (March 4, 2009) available at http://www.treas.gov/press/releases/reports/modification_program_guidelines.pdf and Home Affordable Modification Program, Supplemental Directive 09-01 Introduction of the Home Affordable Mortgage Program (April 6, 2009) available at http://www.hmpadmin.com/docs/Supplemental_Directive_09-01.pdf.

50. The front-end debt-to-income ratio is the ratio of PITIA to monthly gross income, where PITIA is principal, interest, taxes, homeowners, hazard, and flood insurance and homeowners association or condominium fees but does not include mortgage insurance premiums.

51. The FDIC's Modification Plan imposes a 3% floor on interest rates and similarly increases the reduced interest rate by 1% per year after five years.

52. Dep't of the Treasury, Making Home Affordable Updated Detailed Program Description (March 4, 2009) available at http://www.treas.gov/press/releases/reports/housing_fact_sheet.pdf.

53. Press Release, Dep't of the Treasury, Treasury Department Releases Details on Public Private Investment Program (March 23, 2009) available at <http://www.financialstability.gov/latest/tg65.html>.

54. Dep't of the Treasury, Legacy Loans Program Summary of Terms (March 23, 2009) available at http://treas.gov/press/releases/reports/legacy_loans_terms.pdf.

55. The plan, popularly known as the "Paulson-Jackson Plan," was announced as a private sector initiative brokered by former Treasury Secretary Henry Paulson and Housing and Urban Development Secretary Alphonso Jackson.

56. 2007-52 I.R.B. 1257.

57. Specifically, Rev. Proc. 2007-72 provided that the IRS would not (1) challenge a securitization vehicle's qualification as a REMIC on the grounds that the loan modifications are not permitted under the REMIC rules; (2) contend that the loan modifications are prohibited transactions under the REMIC rules; and (3) challenge a securitization vehicle's qualification as a REMIC on the grounds that the loan modifications resulted in a "deemed reissuance" of the REMIC regular interests.

58. See Morrison & Foerster LLP, Tax Talk (December 2008) available at <http://www.mofo.com/news/updates/files/081219TaxTalk.pdf>.

59. 2008-31 I.R.B. 272.

60. The "Real Estate Mortgage Investment Conduit Improvement Act of 2009" is available at: <http://www.opencongress.org/bill/111-s376/text>. Senators Jack Reed (D-RI), Christopher Dodd (D-CT), John Kerry (D-MA), Charles Schumer (D-NY), and Debbie Stabenow (D-MI) introduced the bill. The bill originally was proposed as an amendment to the Senate's version of the American Recovery and Reinvestment Act of 2009 (the "stimulus bill") but was not part of the final stimulus bill that was signed into law on February 17, 2009.

61. I.R.B. 2009-17.

62. Taxpayers may rely on the Notice pending further guidance. I.R.B. 2009-17.

63. If cash is contributed after the "startup day" to the REMIC, unless otherwise exempted, the REMIC rules impose a 100% tax on the amount of the contribution. Exemptions to this general rule include: (i) any contribution to facilitate a cleanup call (as defined in regulations) or a qualified liquidation; (ii) any payment in the nature of a guarantee; (iii) any contribution during the three-month period beginning on the startup day; (iv) any contribution to a qualified reserve fund by any holder of a residual interest in the REMIC; and (v) any other contribution permitted in regulations. I.R.C. § 860G(d)(1), (2).

64. I.R.B. 2009-17. It is effective for modifications made after March 4, 2009.

65. Federal Deposit Insurance Corp, FDIC Loss Sharing Proposal to Promote Affordable Loan Modifications, available at <http://www.fdic.gov/consumers/loans/loanmod/index.html>.

66. Detractors of proposals to permit bankruptcy court judges to modify the terms of mortgage loans on owner-occupied primary residences refer to bankruptcy modification as “cramdowns,” as the modified mortgage terms are crammed down the lender’s throat.

67. In general, to qualify for Chapter 13, a consumer’s secured debts (excluding a mortgage on primary residence) cannot exceed \$1,010,650, and unsecured debts cannot be more than \$336,900. Chapter 13 allows the debtor to pay creditors over time, generally five years, an amount on each secured claim and unsecured creditors at a rate higher than what creditors would receive in a Chapter 7 liquidation using a “plan” proposed by the debtor and approved by the bankruptcy court. An important aspect of every Chapter 13 proceeding is the debtor’s ability to establish a current value for secured collateral. Current value is often lower than the loan amount and the court will “cram down” the amount owed on the secured claim to such lower amount. The remainder of the secured loan becomes an unsecured claim against the debtor. The value of the allowed secured claim is governed by section 506(a) of the Bankruptcy Code. See 11 U.S.C.A. §506(a).

68. H.R. 1106 requires mortgage servicers who modify loans under the safe harbor to regularly report to Treasury on the extent, scope, and results of the servicer’s modification activities.

69. Press Release, Senator Dick Durbin, Agreement Reached with one of the Country’s Biggest Mortgage Lenders on Bankruptcy Reform January 8, 2009) available at <http://durbin.senate.gov/showRelease.cfm?releaseId=306480>.

70. Press Release, American Bankers Association, ABA Statement in Opposition to Agreement on Mortgage Cram-down Legislation (January 9, 2009) available at <http://www.aba.com/Press+Room/010909MortgageCramDownLegislation.htm>.

71. Press Release, Mortgage Bankers Assn, Courson and Kittle React to Mortgage Cramdown Deal (January 8, 2009) available at <http://www.mbaa.org/NewsandMedia/PressCenter/67030.htm>.

72. Pub. L. No. 111-22.

73. H.R. 1728, as introduced on March 26, 2009, is available at <http://www.govtrack.us/congress/billtext.xpd?bill=h111-1728>.