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Safe Harbor for Loan Modification Plans

As the Obama Administration announced the details of its Home Affordable Modification Program (“HAMP”) in March and April, 2009, one crucial element remained missing: a “safe harbor” for loan modifications made under HAMP. That safe harbor was provided by the Helping Families Save Their Homes Act of 2009 (the “Act”), which was enacted by Congress on May 19, 2009, and signed into law by President Obama the following day.

Under HAMP, participating servicers must follow HAMP’s modification protocol for all residential mortgage loans they service, and must use their best efforts to apply the protocol to securitized loans. HAMP modifications may present a challenge for securitized loans because many securitization transactions restrict (or in some cases prohibit altogether) a servicer’s ability to modify mortgage loans unless specific criteria are satisfied, and some transactions limit the percentage or number of loans in a pool that can be modified. In addition, in some transactions, it is unclear whether a loan modification must benefit all investors in the transaction or simply be in the best interests of some, but not all, classes of investors.

To encourage more loan modifications under HAMP and refinancings under the Hope for Homeowners program, the Act offers a safe harbor. First, the Act provides

that if a servicer has a duty to maximize the net present value of mortgage loans to investors or other parties, such duty is to be construed as a duty to all such investors and not to any individual or group of investors and other parties. The Act specifies that a servicer will be deemed to have satisfied that duty if, prior to December 31, 2012, it implements a “qualified loss mitigation plan” that permits modification or loss mitigation action with respect to loans secured by owner-occupied properties and for which there is a payment default or such default is imminent or reasonably foreseeable (as defined in guidelines issued by the Secretary of the Treasury under the Emergency Economic Stabilization Act of 2008 (“EESA”); e.g., HAMP), and the servicer reasonably determines, consistent with such guidelines, that the application of such qualified loss mitigation plan to a mortgage “or class of mortgages” will likely provide an anticipated recovery on the outstanding principal debt that will exceed the anticipated recovery through foreclosures. A “qualified loss mitigation plan” is defined to include any residential loan modification, workout or other loss mitigation plan described or authorized by the Secretary of the Treasury under the EESA, and any refinancing under the Hope for Homeowners program.

Under the “safe harbor,” a servicer that is deemed to be acting in the best interests

of all investors or other parties, as described above, will not be liable to any such party, and the servicer will not be subject to any injunction, stay or other equitable relief by any such party, based solely upon the implementation of a qualified loss mitigation plan. The safe harbor extends to any person, including a trustee, issuer or loan originator, who cooperates with a servicer when such cooperation is necessary for the servicer to implement such a plan. In such an instance, the trustee, issuer or other cooperating person will not be liable for

monetary damages or subject to injunction, stay or other equitable relief, based solely on such cooperation. However, the safe harbor does not affect the liability of any servicer or other person for actual fraud in the origination or servicing of a loan or implementation of a loss mitigation plan, or for violations of law.

Finally, the Act provides that the qualified loss mitigation plan guidelines issued by the Secretary of the Treasury under EESA "shall constitute standard industry practice for purposes of all Federal and State laws."

The safe harbor provisions are contained in Section 201 of the Act. The official version of the act is not yet available, but copies are available of [S.896](#) and the [amendment](#) as passed by the House of Representatives. If you have any questions about HAMP or the Act, feel free to contact any of the individuals noted in this client alert.



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