HUNTON & WILLIAMS

Client Alert

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Update Regarding HAMP and Loan Modifications

In connection with the December 31, 2016, expiration of the Home Affordable Modification Program (HAMP), Fannie Mae and Freddie Mac (collectively, the Enterprises) have announced their Flex Modification foreclosure prevention program (Flex Mod).[1] In addition to replacing HAMP, Flex Mod will replace the Enterprises' Standard and Streamlined Modification programs.

The expiration of HAMP means that there will no longer be a standard loss mitigation program that cuts across servicer and investor types. However, federal government agencies continue to emphasize the importance of loss mitigation programs and have encouraged stakeholders to consider guiding principles for future loss mitigation programs. In addition, amendments to the Consumer Financial Protection Bureau's (CFPB) mortgage servicing rules that enhance borrower protections surrounding loss mitigation are scheduled to take effect later this year.

The Flex Modification Program

The Enterprises developed Flex Mod at the direction of the Federal Housing Finance Agency (FHFA), incorporating certain elements of HAMP, input received from various industry participants and features of the Enterprises' Standard and Streamlined Modifications. Flex Mod can be used for loans that are 60 days or more delinquent, or for loans that are current or less than 60 days delinquent if at risk of imminent default.

Prior to implementing a Flex Mod, servicers must continue to follow the existing loss mitigation evaluation hierarchies imposed by the Enterprises. Servicers are required to evaluate borrowers under Flex Mod no later than October 1, 2017. However, servicers were able to begin submitting cases to Fannie Mae as early as March 1, 2017. Freddie Mac began allowing servicers to evaluate borrowers for a Flex Mod Trial Period Plan on February 15, 2017, and plans to update its system to allow for data submission starting May 1, 2017. While servicers are permitted to use the existing Standard and Streamlined Modifications prior to October 1, once a servicer starts evaluating borrowers under Flex Mod, it must discontinue using the existing programs.

Eligibility requirements for Flex Mod are similar to Standard and Streamlined Modifications, with minor updates to the eligibility exclusions. Borrowers less than 90 days delinquent are required to submit a Borrower Response Package. For such borrowers, the Flex Mod will target a 20 percent payment reduction and 40 percent housing expense-to-income ratio. Streamlined provisions are available to borrowers that are 90 days or more delinquent; such borrowers are not required to submit a Borrower Response Package, and the program will target a 20 percent payment reduction.

[1] For additional information, see Fannie Mae's Fact Sheet and Lender Letter LL-2016-06 and Freddie Mac's Bulletin 2016-22 and Bulletin 2017-1.

To be eligible, a mortgage must have been originated at least 12 months prior to evaluation date for the Flex Modification. Loans insured by FHA, VA and RHS are ineligible for the program (although, as described below, such loans may be eligible for loss mitigation programs offered by those agencies).

Servicers will be eligible to receive incentive payments in connection with Flex Mod. For Fannie Mae, the incentive payments will be consistent with those for a Fannie Mae Streamlined Modification. For Freddie Mac, the incentive payments will follow the current structure for Freddie Mac Standard and Streamlined Modifications.

Federal and Agency Loss Mitigation Programs

As noted above, Flex Mod comes at the heels of the expiration of HAMP, which was introduced by the US Department of Treasury (Treasury) in response to the financial crisis in 2009 as part of the Making Home Affordable (MHA) Program. To help borrowers avoid default and foreclosure, HAMP provided a uniform, standardized loss mitigation process across servicer and investor types to reduce borrowers' monthly payments to an affordable and sustainable amount. HAMP provided incentive compensation to servicers, borrowers and investors upon the reporting of a permanent modification.

In the years following HAMP's enactment, additional loss mitigation options were rolled out under the MHA, such as the Home Affordable Foreclosure Alternatives Program (HAFA), and loss mitigation offerings under HAMP were expanded. In 2011, the Enterprises, at the direction of FHFA, rolled out their Servicing Alignment Initiative (SAI), which set default servicing standards to limit the Enterprises' financial losses.

The application deadline for HAMP was December 30, 2016.[2] For applications submitted prior to that date, the effective date of the modification must be on or before December 1, 2017. To be considered for a Streamline HAMP modification after December 30, 2016, the borrower must have submitted at least one component of a loss mitigation application on or before that date (and meet certain other criteria), and the effective date of the modification must be on or before December 1, 2017. For borrowers that default on a HAMP trial period plan on or after December 31, 2016, a servicer may still extend a Streamline HAMP offer, provided that certain conditions are met and the permanent modification is effective on or before December 1, 2017.

Although the application deadline has expired, Treasury will pay incentive compensation for permanent modifications that have been reported before May 1, 2018, following the April 2018 reporting cycle. If a modification is completed by December 1, 2017, but not reported before May 1, 2018, Treasury will not make any incentive payments, and for non-GSE loans the servicer must still honor all terms of the modification, including payment of incentives to the borrower, servicer or investor.

For loans guaranteed or insured by government agencies, FHA, VA and Rural Development each introduced their own loss mitigation programs, known as FHA-HAMP,[3] VA-HAMP[4] and RD –HAMP (referred to as RD Special Loan Servicing).[5] In addition, under Treasury FHA-HAMP and RD-HAMP, borrowers and servicers are eligible for incentive payments from Treasury. To be eligible, the borrower

[2] Servicers should consult the *Making Home Affordable® Program Handbook for Servicers of Non-GSE Mortgages* for complete details regarding HAMP expiration, available at: https://www.hmpadmin.com/portal/programs/docs/hamp_servicer/mhahandbook_51.pdf.

[3] See https://www.hmpadmin.com/portal/programs/fha_hamp.jsp and https://portal.hud.gov/hudportal/HUD?src=/hudprograms/fhahamp.

[4] See http://www.benefits.va.gov/homeloans/documents/circulars/26_14_22.pdf.

[5] See https://www.hmpadmin.com/portal/programs/rd_hamp.jsp.

must have made a written request for modification on or before December 30, 2016, and the effective date of the permanent modification must be on or before December 1, 2017. Notwithstanding these deadlines for Treasury incentive payments, the agency-specific HAMP programs continue to be available past December 2016.

Federal Agency Loss Mitigation Recommendations

As HAMP's expiration approached, the Treasury, FHFA and FHA (collectively, the Agencies) published a joint white paper in July 2016 recommending guiding principles for future loss mitigation programs in a post-crisis era, including accessibility, affordability, sustainability, transparency and accountability.[6]

The CFPB issued its own document in August 2016 addressing principles for loss mitigation solutions in a post-HAMP environment, noting that such principles are intended to build on, but are distinct from, the CFPB's mortgage servicing rules, supervisory authority and enforcement authority.[7] While the CFPB also echoed the need for accessibility, affordability, sustainability and transparency, it indicated that its mortgage servicing rules provide a framework for the accountability principle.

Loss Mitigation Under the CFPB's Servicing Rules

The CFPB's servicing rules do not impose a duty on a servicer to provide any specific loss mitigation option, but according to the CFPB, the rules act as "regulatory guardrails" to the loss mitigation process. Although the CFPB cannot mandate a particular loss mitigation option, it has devoted significant attention to loss mitigation issues over the years through its rulemaking, supervisory highlights, bulletins and enforcement activities.

The CFPB's mortgage servicing rules, which became effective in January 2014, already incorporate some servicing standards from HAMP and SAI into the servicing standards contained in Regulation X, such as the prohibition on dual tracking borrowers for foreclosure and loss mitigation, the requirement to provide a single point of contact to borrowers during loss mitigation, and mandatory outreach to delinquent borrowers during a specified time period.

In 2016, the CFPB published a final servicing rule (the 2016 Rule) that, among other things, will enhance borrower protections in the loss mitigation area. The 2016 Rule revises and clarifies a number of the loss mitigation provisions of Regulation X, including, but not limited to, the following:

- A servicer is required to meet the loss mitigation requirements more than once in the life of a loan if a borrower becomes current on payments between loss mitigation applications.
- Upon receiving a complete loss mitigation application, a servicer must provide written notice to the borrower within five days.
- If a borrower submits a complete loss mitigation application more than 37 days before a foreclosure sale, a servicer may not move for an order of sale or conduct a foreclosure sale, except under certain specified circumstances.
- If a servicer is joining the foreclosure action of a superior or subordinate lienholder, it is not required to wait until a borrower is more than 120 days delinquent.

[6] "Guiding Principles for the Future of Loss Mitigation: How the Lessons Learned from the Financial Crisis Can Influence the Path Forward," July 25, 2016 (*available at* https://www.treasury.gov/press-center/press-releases/Documents/guiding-principles-future-of-loss-mitigation.pdf).

[7] "CFPB's Principles for the Future of Loss Mitigation," August 2, 2016 *available at* http://files.consumerfinance.gov/f/documents/20160802_CFPB_Principles_for_Future_of_Loss_Mitigation.pdf.

- When a transferee servicer receives a loan for which there is a loss mitigation application pending, the transferee servicer must comply with the loss mitigation timeframes that were applicable to the transferor servicer.

The 2016 Rule also affords new consumer protections for successors in interest. For example, a confirmed successor in interest will have the same rights as a borrower when it comes to the loss mitigation requirements under Regulation X.

The enhanced loss mitigation provisions of the 2016 Rule are scheduled to take effect October 19, 2017, while the provisions regarding successors in interest are scheduled to take effect April 19, 2018.

Takeaways

Although borrowers may no longer submit applications for HAMP, Enterprise and agency-specific loss mitigation programs continue to be available, and private investors are expected to continue refining their own loss mitigation offerings. As an important overlay to these programs, servicers should be working diligently toward operationalizing and implementing the CFPB's servicing rule amendments, which, once effective, will impose important requirements on servicers offering loss mitigation options to borrowers.

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