

OCTOBER 8, 2009: A BUSY HAMP DAY IN D.C.

*New HAMP Supplemental Directive 09-07,
The HAMP 500,000 Modification Milestone Announcement,
New Servicer Performance Report, COB 9-30-09*

*Making Home Affordable Remaining Problems & Solutions:
Rising Foreclosures & The Threat of Negative Equity
Effective, Efficient, Equally Fair, & Transparent (“EEET”) Communication Process,
Senior Level Authority - Dedicated Professional-to-Professional Approval Contacts*

Neutral Analysis – Part 1

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THE MHA/HAMP PROGRAM STATUS UPDATE

On October 8, 2009, the Treasury and U.S. Department of Housing and Urban Development (HUD) announced (TG-315) a new milestone of more than 500,000 trial loan modifications in progress under the Making Home Affordable (MHA) program under the Home Affordable Modification Program (HAMP), beating the November 2009 deadline. It was reported that 500,000 represents about 40% of those eligible (CNBC 10/8/09). That would leave some 60% of the eligible homeowners not engaged in a HAMP solution to save their homes. However, the Obama Administration’s Making Home Affordable (MHA) program (including HAMP and HARP) is slated to **offer assistance to as many as 7 to 9 million homeowners** making a good-faith effort to make their mortgage payments. That goal would result in **4 to 5 million** homeowners with new access to refinancing under the Home Affordable Refinance Program (**HARP**) program, and **3 to 4 million under the HAMP** mortgage modification program. With 500,000 modifications offered under HAMP, 2,500,000 (16.67%) to 3,500,000 (12.5%) remain as a HAMP policy goal, and most of the **4 to 5 million as a HARP** policy goal.

The press release also stated that: Senior Treasury and HUD officials held the next in a series of meetings with servicers this afternoon, with discussion focused on improving servicer *efficiency and responsiveness to borrowers* during the modification process. They also released its *servicer performance report* through the month of September – ending September 30, 2009.

Also, with little fanfare, the Treasury released its **Supplemental Directive 09-07** which in part moves to standardize the borrower’s evaluation forms and process, and requires the Servicer to respond to the borrower within 10 days from receipt of the borrower submission of the required information. It also requires the Servicer to complete its evaluation of borrower eligibility and notify the borrower of its determination within 30 days. If the Servicer determines that the borrower cannot be approved for a trial period plan, the Servicer must send written notice of same, and “consider the borrower for another foreclosure prevention alternative.”

Servicer Performance Report, COB 9-30-09

The new Servicer Report indicates that some 2.48 million requests for financial information were sent to borrowers; 757,955 trial period plan offers were extended to borrowers on a cumulative basis, and 487,081 trial and permanent modifications as of September 30, against a **3,100,305** Estimated Eligible 60 Day+ Delinquency. That results in 24.4% (757,955) Trial Plan Offers as a Share of Estimated Eligible 60 Day+ Delinquency and 15.7% or 16% (487,081) Trial Modifications as a Share of Estimated Eligible 60+ Day Delinquencies. This is a big jump in total numbers from the previous report. However, the Trial Modification Tracker: Trial Modifications as a Share of Estimated Eligible 60+ Day Delinquencies indicates **highly non-uniform results**. Saxon leads with 41% along with the other top 6 leaders above 20% ranging from 26%-33%. The 20 other servicers range from 0% to Wells Fargo with 20%. To be fair, some servicers with low percentages are newer to the program. Without speculating as to why some servicers are performing far differently than others, and as to the function of time, it is clear that more uniform results are warranted on program policy grounds alone.

Observation:

Whether its 40% or merely 12.5%-16.67% (or 24%) under HAMP, and most of 4 to 5 million under HARP, there is sufficient evidence that we *must fashion an equally fair, fast, efficient and effective loss mitigation and communication process* to handle the massive defaults, foreclosures, and REO property sales facing society today, tomorrow and in the foreseeable future. It is also obvious that the results are **highly non-uniform** and uniformity of results is critical to reach the maximum potential of the MHA/HAMP program.

The question must be asked and answered: Can we do better? Can the industry, the courts, and the homeowner come together and reach the MHA policy goals in full? The answer is **Yes We Can -but** - it will take a systemic change in the communication processes and systems that we currently use, supported by *objectively obtainable standards* in law and official guidelines. We must consult and serve all diverse and self-conflicting interests in creating a sustainable and fair solution. ***The solution must be an Effective, Efficient, Equally Fair & Transparent (“EET”) Communication Process.***

The Treasury Secretary also warned that **rising foreclosures** may be a source of weakness to the broader economy. The Financial Stability website warns us that:

The deep contraction in the economy and in the housing market has created devastating consequences for homeowners and communities throughout the country. Millions of responsible families who make their monthly payments and fulfill their obligations have seen their property values fall, and are now unable to refinance to lower mortgage rates. Meanwhile, millions of workers have lost their jobs or had their hours cut, and are now struggling to stay current on their mortgage payments. As a result, as many as **6 million families** are expected to face foreclosure in the next several years, with millions more struggling to stay

current on their payments. The present crisis is real, but temporary. As home prices fall, demand for housing will increase, and conditions will ultimately find a new balance. Yet in the absence of decisive action, we risk an intensifying spiral in which lenders foreclose, pushing area home prices still lower, reducing the value of household savings, and making it harder for all families to refinance. In some studies, foreclosure on a home has been found to reduce the prices of nearby homes by as much as 9%.

However, the Center for Responsible Lending (Fact Sheet 9/25/09) states “**13 million projected foreclosures on all types of loans during the next 5 years**” may occur.

Observation:

Whether its *6 million* over 3 years or *13 million* over 5 years, more or less, with substantial court budget shortfalls, the courts and the related foreclosure and bankruptcy systems, will soon face debilitating backlogs not solvable through the current systems and processes.

Although the industry has successfully ramped up its efforts to process HAMP modifications to reach the program’s November goal, there remains a huge bottleneck and backlog of loss mitigation evaluations and offers, foreclosures, and new foreclosure mediations, and a highly skewed non-uniformity of results, revealing the painful truth that the present systems do not have the capacity to effectively or efficiently fulfill the MHA/HAMP policy demands of the President and the law, let alone HARP, H4H and NON-HAMP demands. However, with time, the servicers do perform better, but is it enough to reach the goals of the program and the needs of society. New solutions and systems must be coordinated with new laws and state and federal guidelines to enhance the effectiveness and efficiency of these programs or processes. Conflicts in state, local and federal law, and conflicts in official regulations, guidelines and best practices, must be reconciled to avoid compounding inefficiency, confusion, delay, and unnecessary disputes.

HAMP & NON-HAMP LOAN MODIFICATION EFFORTS MUST BE STANDARDIZED, REFINED & SUPER-SIZED

A. Problems:

Inefficiency of process, lack of sufficient capacity, non-uniformity of results, and deficient communication processes must be corrected and reconciled before we can realize *en masse* loss mitigation or optimize the policy goals of President Obama. There is every expectation that the demand for *en masse* loss mitigation and modification solutions outweigh the actual solutions available, the eligibility parameters of the federal programs, and the capacity of the legacy banks, lenders and servicers to meet the President’s (HAMP, HARP and H4H) program goals.

To fashion solutions for non-uniform results and problems in communication and process, a list of the problems must be first enunciated, and then associated with its solution. The problem with identifying a list of problems is the data is not readily available from one source. However, through an unofficial accumulation of complaints, the following list, whether perceived or actual, and without judgment is used as an unofficial survey of problems, complaints, issues or arguments by consumers, consumer groups, HUD-Counselors, and some industry experts:

1. There is an **unequal and unfair bargaining position** between the borrower and the servicer [Borrowers are generally frightened, uninformed, ill prepared and demoralized. Borrowers complain that Servicers are holding all the cards and only disclosing partial information to borrower incrementally from first contact, intake, decisioning, options, etc. For example, how is Net Present Value (NPV), Hardship, or Imminent Default defined from Servicer to Servicer? Is either consistent among the servicers? What form is sent to borrower informing borrower of the criteria for NPV, Hardship, or Imminent Default? On the other hand, Servicers argue that to disclose to borrowers all information upfront would allow borrowers to ‘game the system’; borrowers argue that keeping borrowers in the dark acts to create a coercive take-it-or-leave-it bargain that results in wrongful denials and or higher re-defaults because the borrowers true ‘ability to pay’ is not being addressed, etc.]
2. Servicers are **not sending notices of WHAT documents or information is needed, received or missing** during the process or incrementally; so the borrower is always in the kept-in-the-dark as to his/her pending evaluation status; impeding his/her ability to comply and causing wasteful or unfair treatment. The documents and information the borrower sent may not be the same documents or information the servicer is relying upon to make this life-changing important decision. This may be the case for completely innocent reasons, for reasons that the servicer, misplaced documents, transposed information verbally over the phone, etc. Unless the borrower can see and verify the information, wrongful denials can go undetected.
3. Servicers are **not sending a written notice with an explanation of WHY a borrower was denied** [This is information necessary for the borrower to make an independent determination of whether there was a mistake, numeric transposition, error, wrongful denial or whether to request a correction of an error, reconsideration or to file an appeal [third party computer systems are being developed and or upgraded at this time which have the capabilities to map data to form Check-The-Box letter notices with personal borrower or loan level information. Manually mapping personal data will not be practical.]
4. Servicer representatives are **lacking authority** to effectively assist or approve borrowers; causing delays causing further borrower financial weakness
5. **Servicers complain that borrowers are failing to gather and deliver documents within time deadlines**, necessary to make eligibility determinations; leading to endless open-ended evaluation periods, loss and delay,
6. **Borrowers claim Servicers are losing borrower documents** over and over again, requiring borrowers to resend same to different fax numbers and different reps
7. **Servicers are denying borrowers on inaccurate grounds**; based upon lack of response or lack of documentation when in fact borrowers faxed documents and called the servicer numerous times [borrower is then shut out of the system and many are forced to seek an attorney enhancing litigation risks]
8. Servicers are denying modifications or not accepting applications if the borrower is **current or not yet in default** but the Supplemental Directive requires the following:

- a. **Supplemental Directive 01-09 states at page 3 states:** “A borrower that is current or less than 60 days delinquent who contacts the servicer for a modification, **appears potentially eligible** for a modification, and **claims a hardship** must be screened **for imminent default**. The servicer must make a determination as to whether a payment default is imminent based on the servicer’s standards for imminent default and consistent with applicable contractual agreements and accounting standards. If the servicer determines that default is imminent, the servicer must apply the Net Present Value test.”
9. **Servicers are passing borrowers** from one representative to another – all of whom have **no authority** to make decisions
10. Servicers are **demanding payments** before reviewing modification requests
11. **Servicers are initiating foreclosures** before reviewing or completing the modification process [DS News July 28, 2009]
12. Servicers are continuing the foreclosure process during the loss mitigation process or evaluation process; amounting to **economic coercion to accept whatever deal is offered creating a fundamentally unfair bargaining position** (even if borrower believes the deal is not completely within his/her ability to pay); causing emotional distress
13. Some Servicers are **requiring that the borrower contact the foreclosure attorney directly**, and the foreclosure attorney, sale-trustee or 3rd party service are requiring borrower to fill out its forms and submit confidential financial information to it at the same time as the servicer is requiring the borrower to fill out its *different forms* and submit same to the servicer overburdening the borrower with **multiple sets of different financial forms with varying imposed short trigger deadlines**; both acting as debt collectors coached as ‘partners’ in seeking a loss mitigation/modification solution for the borrower; **conflicts, confusion, overshadowing and FDCPA/FTC issues abound**; fundamental fairness has been lost
14. **The process takes too long**; borrowers are placed on ‘hold’ and have to repeat the same information over and over again; **foreclosure sale or actual sale is instituted before servicer responds to modification or the refinance application**;
15. Financial, employment, and medical circumstances change during the long delayed process requiring the solution to be varied but **servicer systems are not receptive to changes in circumstances**
16. Servicers are requiring borrowers to verbally commit to income, expense and debt information on the first phone call even if called a verbal estimate; but **denying the borrower based upon deviations** to actual numbers later obtained and delivered by borrower [borrowers don’t have all their numbers at that finger tips and do need time to gather same]
17. HUD Certified Counselors and non-profits are necessary and critical for household budget and financial counseling, but they are not set up with the necessary computerization to run program/modification eligibility decisionings or to meet the high volume demand or to resolve high back end debt issues
18. Servicer systems generally do **not recognize the Borrower’s Professional Representative** as prepared industry professionals that can enhance the efficiency of the process. They are placed in the general queue with no priority precluding enhancement of the communication process; also servicers continue to ignore the Borrower’s Professional Representative’s contact and mailing information and generally only send communications or notices to the borrower even after approving written representation authorization. This is generally also the case even when the Borrower’s Professional Representative is a licensed attorney acting under written

attorney client authorization. This creates violations of the attorney client rules and causes unnecessary duplication of information, and has the affect of informing the borrower that the servicer is not effectively recognizing the Borrower's Professional Representative.

19. There is a need for **Senior Level Authority - Dedicated Professional-to-Professional Approval Contacts**, for example:

Dedicated Professional to Professional Approval Contacts - HAMP Servicers will identify a senior level point of contact to communicate by phone, fax, and e-mail and who is authorized to grant approval of loss mitigation/modification proposals submitted under HAMP by any of (i) a HUD-certified housing counseling representative, (ii) the borrower's licensed attorney or (iii) the borrower's registered real estate broker (each, a "Borrower Third Party Professional Representative"). Servicer will supply "Borrower Third Party Professional Representative" a denial with explanation, approval, or request for more specifically identified information or documents, within 30 days from completed and submitted loss mitigation/modification proposal.

B. Poor Economic Indicators, Rising Foreclosures & the Threat of Negative Equity

Moreover, serious issues remain in the housing sector, including rising delinquencies, the backlog of foreclosures and insufficient capacity to process loss mitigation "alternatives to foreclosure" solutions, including the implementation of new court mediation or monitor programs. Increases in troubled homeowners, defaults, and foreclosures are likely or probable in part due to:

- Ø unemployment reaching 9.8 percent in September
- Ø bulging consumer debt loads, seriously weakened consumer spending;
- Ø consumer credit falling 12 billion in August [The Federal Reserve reported yesterday that U.S. consumer credit fell in August for a seventh straight month as banks maintained restrictive terms and job losses made households reluctant to borrow] (ABI)
- Ø 1,400,000 bankruptcies expected by end of 2009 [Over 1 Million bankruptcies filed so far in 2009; 124,790 consumer bankruptcies filed in September; By *MortgageDaily.com* Oct. 2, 2009 (ABI)
- Ø over 1 million default notices filed by Q3 alone,
- Ø soft home prices continue with over 33% to 48% or 16 million to 25 million homes under water with negative equity
- Ø the swelling second wave of defaults through resetting Option Arms on Alt-A and Prime borrowers,
- Ø the yet-to-be-processed post moratorium foreclosures,
- Ø a "disturbing" rate of seriously delinquent Freddie Mac and Fannie Mae loans;
- Ø GSE loan losses of some \$165 billion over 2 years;
- Ø commercial loan defaults on the rise with strip mall vacancies at a 17 year high, and regional mall vacancies at the highest level on record (of 8 percent) [Diana Olick, CNBC]

Whether it's over 33% to 48%, or 16 million to 25 million homes underwater with negative equity, the issue is serious as it can cause or perpetuate additional or continuing defaults or foreclosures, blight, and price declines. To lower re-default rates and to incentivize the borrower's intent to Stay & Pay, **greater monthly cash payment reductions** and **reduced loan balances** (or higher hopes for **real equity**) must occur. Limitations in the HAMP eligibility or guidelines will limit the number of successful loan workouts, unless principal reduction or forgiveness methods are employed, or more aggressive NON-HAMP loss mitigation methods are instituted.

Almost half (50%) of U.S. homeowners with a mortgage owe more than their properties are worth. [Deutsche Bank AG, Aug. 5 (Bloomberg)]. The percentage of "underwater" loans may rise to **48 percent**, or **25 million homes**, as prices drop through the first quarter of 2011. The percentage of underwater loans may rise to **90%** in the fastest appreciation states like California, Florida and Nevada. [Karen Weaver, Ying Shen, analysts in New York at Deutsche Bank; Jody Sheen, Bloomberg].

According to the WSJ (Aug. 5, 2009), "Nearly 10% of owner-occupied homes now have mortgage debt with loan-to-value ratios of at least 125%, and roughly half of those homes have mortgage debt with loan-to-value ratios of 150% or more. The rising share of homeowners without equity and the foreclosure crisis continues to be the biggest storm cloud facing any possible economic recovery, says Mark Zandi, chief economist at Moody's Economy.com. "That such a high proportion of homeowners are underwater is testimony to the severity of the foreclosure crisis and the risk that it still poses to the broader economy," he said. To date, most foreclosure-rescue efforts have focused on lowering monthly payments by reducing interest rates, in part because the housing crisis began with mortgages that were resetting to higher payments. But the looming negative-equity problem could put more pressure on policymakers to come up with a modification plan that includes reducing loan balances, and not just lowering interest rates. "The modification plans that they have in place ... will become increasingly ineffective as more homeowners fall deeply underwater," says Mr. Zandi. Unsurprisingly, the negative equity issue remains most severe in the sand states. Some 40% of owner-occupied homes in Nevada are underwater, followed by Arizona (37%), California (33%), and Colorado (31%)."

According to the "Summary of Second Quarter 2009 Negative Equity Data from First American CoreLogic, August 13, 2009, nearly one-third of all mortgages are underwater or more than \$3 Trillion of property is at risk of default. The report also indicated that "More than 15.2 million U.S. mortgages, or 32.2 percent of all mortgaged properties, were in negative equity position as of June 30, 2009." **By state, the report revealed that California has 2,937,160 in Negative Equity Mortgages (42.0%), and 3,197,670 in Near Negative Equity Mortgages (45.7%).** The report summary also stated that:

The aggregate property value for loans in a negative equity position was \$3.4 trillion, which represents the total property value at risk of default. **In California, the aggregate value of homes that are in negative equity was \$969 billion**, followed by Florida (\$432 billion), New Jersey (\$146 billion), Illinois (\$146 billion) and Arizona (\$140 billion). **Los Angeles had over \$310 billion in**

aggregate property value in a negative equity position, followed by New York (\$183 billion), Miami (\$152 billion), Washington, DC (\$149 billion) and Chicago (\$134 billion). (emphasis added)

The top five states' negative equity share was 47 percent, compared to 25 percent for the remaining states. In numerical terms, **California (2.9 million)** and Florida (2.3 million) had the largest number of negative equity mortgages, accounting for 5.2 million or 35 percent of all negative equity loans. Ohio (862,000), Texas (777,000) and Arizona (706,000) were also ranked among the top five states with the highest number of negative equity loans. "Negative equity continues to be the dominant driver of the mortgage market because it leads to foreclosures in the event a borrower experiences some kind of economic shock such as a job loss, illness or other adverse situation. Given that negative equity did not increase this quarter and home prices declines are moderating or flattening, we may be at the peak of the negative equity cycle. However, until negative equity recedes and unemployment declines, mortgage risk will continue to be very elevated," said Mark Fleming, chief economist for First American CoreLogic.

New Court Mediation or Monitor Programs:

New court mediation or monitor programs can play a crucial role in reaching alternatives to foreclosure. The programs must be standardized in order to reach uniformity of results. Additionally, the programs must present an equally fair framework in which all interested parties to the mortgage workout can be represented. The standards set by the programs must be objectively obtainable to avoid unfairness, and unnecessary confusion and disagreements. Intelligent information and document processing as well as loss mitigation decisioning, must be done prior to costly court hearings. This will empower the parties to quickly resolve the vast majority of the cases without expensive and time consuming court intervention. However, the court must supply the fast track forum for matters that fail to resolve itself. Funding for court processing must be supplied by state and federal incentive programs, and by the parties to the mortgage, mediation, or litigation.

Part 2 of this Article will explore the problems and solutions to Court Foreclosure Mediation Programs, and new proposed Court Monitor Programs.

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