

# AT A CROSSROADS

LESSONS FROM THE HOME AFFORDABLE  
MODIFICATION PROGRAM (HAMP)



January 2013

**NCLC**<sup>®</sup>  
NATIONAL  
CONSUMER  
LAW  
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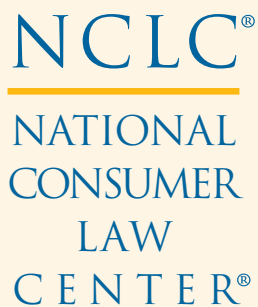
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## ABOUT THE NATIONAL CONSUMER LAW CENTER

Since 1969, the nonprofit National Consumer Law Center® (NCLC®) has used its expertise in consumer law and energy policy to work for consumer justice and economic security for low-income and other disadvantaged people, including older adults, in the United States. NCLC's expertise includes policy analysis and advocacy; consumer law and energy publications; litigation; expert witness services, and training and advice for advocates. NCLC works with nonprofit and legal services organizations, private attorneys, policymakers, and federal and state government and courts across the nation to stop exploitive practices, help financially stressed families build and retain wealth, and advance economic fairness.

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## EXECUTIVE SUMMARY

We stand, as a country, at a crossroads. We are beginning to emerge from the worst foreclosure crisis we have ever experienced. Multiple programs—federal, state, and private—have been adopted to address the crisis. More proposals are pending. In 2013, we will make decisions as a country about the direction we will take and the lessons we will learn.

The government's Home Affordable Modification Program (HAMP) is our starting point. HAMP has reached more homeowners, and successfully modified more home loans, than any program in history. Created by the federal government in early 2009 as a temporary program in response to the foreclosure crisis, HAMP provided additional financial incentives to servicers and investors to modify mortgages at risk of ending in foreclosure. The result has been affordable, sustainable loan modifications that keep borrowers in their homes and maximize returns to investors. But HAMP fell short of its goals, which were inadequate to the scope of the crisis. HAMP has been justly criticized for its lack of transparency and its failure to provide for effective enforcement.

This National Consumer Law Center report draws on available quantitative data and on the experience of attorneys and housing counselors around the country who have spent the last four years assisting homeowners struggling to access HAMP. The successes, failures, and missed opportunities of HAMP provide a roadmap for national loan modification standards, a key component of effective national mortgage servicing standards.

For most of the last four years, the foreclosure rate has been more than three times what it was in 1933, at the height of the Great Depression. And, by many estimates, we are not yet halfway through the devastation of lost homes, displaced families, and gutted neighborhoods. As of May 2012, nearly four million foreclosures had been completed since the beginning of the crisis five years ago in 2007. As many as another ten million homes are estimated to be at high risk. In addition to the economic and emotional toll on homeowners—particularly in communities of color and low-income communities—the loss to investors may reach more than two trillion dollars. Meanwhile, municipal budgets are strained by high numbers of abandoned properties and foreclosures weaken the housing market and overall economy.

In many cases, a modification of the terms of the mortgage is beneficial to homeowners and investors: a performing loan with affordable payments is often more profitable than a foreclosure. Nevertheless, many modifications that would benefit both homeowners and investors are never offered because mortgage servicers have financial incentives that discourage modification. Preventable foreclosures put unnecessary downward pressure on the housing market and the broader economic recovery.

A number of government entities have made efforts recently to reform and improve servicing, loss mitigation, and loan modification practices. A piecemeal process involving multiple agencies threatens to result in rules that represent the least common denominator. We need uniform, strong mortgage servicing standards that put the entire industry

on equal footing and give qualified homeowners access to efficient and enforceable mortgage servicing rules to save their homes. The content of these standards, regardless of which agency or agencies first adopts them, must be informed by the lessons of the last several years of loss mitigation efforts, particularly HAMP. By examining the HAMP experience, policymakers can shape servicing standards that will build on the program's successes and avoid its failures.

The key positive lesson of HAMP is that 'win-win' loan modifications are possible. Before HAMP, nearly half of all loan modifications failed. By contrast, over 80% of HAMP-compliant modifications are still performing a year after they have been made, and have substantially lower re-default and foreclosure rates than non-HAMP modifications. At the same time, HAMP protects investors' interests by requiring every potential modification to pass the net present value test. The test compares likely cash flow to investors from modifying the mortgage and from leaving the mortgage unchanged, taking into account the probability and cost of default under each scenario. Only modifications that are likely to save investors money satisfy the net present value test.

Yet, despite the benefits to homeowners and investors (and to the broader economy), servicers have failed to provide HAMP modifications to millions of eligible borrowers. In fact, the number of HAMP modifications started each month is actually *declining*, despite continued need for the program.

Although HAMP never covered the entire mortgage marketplace, HAMP's failure to reach its intended scale has one root cause: massive servicer noncompliance. Almost every official evaluation of HAMP has noted widespread servicer noncompliance and the concurrent failure of the U.S. Department of the Treasury (Treasury) to engage in meaningful enforcement. Of particular concern, servicers often fail to follow HAMP limitations on dual track servicing, the simultaneous pursuit of foreclosure and loan modification efforts. In consequence, servicers wrongfully conduct foreclosures and wrongfully sell homes before fully evaluating homeowners for modifications. Other examples of servicer noncompliance include mistakenly or falsely claiming investor restrictions as a reason for denying a loan modification and failing to provide required notices, leaving borrowers in costly uncertainty for months.

National loan modification standards should incorporate the successes of HAMP, which provided for increased access to sustainable modifications for many homeowners. But national loan modification standards must not fall into the same trap that HAMP did. Without strong mandates and real consequences for noncompliance, servicers will continue to implement modifications haphazardly or not at all, leaving the economy in a tailspin. Eligible homeowners must be able to rely directly on national servicing standards to save their homes from avoidable foreclosures.

Drawing on the lessons of HAMP, this report identifies five core principles for effective national loan modification standards: efficiency, affordability, accessibility, accountability, and enforceability (see page 6). These core principles for national loan modification standards will protect all market participants.

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While the current period of historically high foreclosure rates will ebb, the crisis has exposed systemic faults in our mortgage markets generally and in mortgage servicing in particular that were hidden during the “good” days of rapid property appreciation and mortgage product innovation. National loan modification standards can directly address these failures in the market, can save millions of homes in the near future, and can reduce losses to investors, homeowners, and communities for decades to come.

With up to ten million homes at high risk for foreclosure in the next several years, we need uniform, strong, enforceable national mortgage standards now. The delay has cost trillions of dollars. But we can still seize the moment to transform the system of mortgage servicing from the chaos that currently reigns. We can protect both homeowners and investors. But the government must act now.

National loan modification standards can directly address failures in the mortgage market, save millions of homes in the near future, and reduce losses to investors, homeowners, and communities for decades to come. But the government must act now.

## Five Principles for National Loan Modification Mortgage Standards

- 1. Efficiency: Loan modification evaluations should be standardized, universally applicable to all loans and servicers, and mandatory for all loans before the foreclosure process can go forward.**

Loan modifications must be mandated for qualified homeowners facing hardship where the modification also produces more income for the investor than foreclosure. Outreach to homeowners and loan modification evaluation should be completed before any steps are taken toward foreclosure. Where homeowners seek assistance only after initiation of a judicial or non-judicial foreclosure, the foreclosure should be paused until a full loan modification evaluation has been completed. This generally can be achieved without the servicer needing to start the foreclosure process over.
- 2. Affordability: Loan modification terms must be affordable, fair, and sustainable.**

HAMP has proved its worth by dramatically reducing re-default rates. National standards should follow HAMP's template by requiring affordable monthly payments and prioritizing interest rate reduction and principal forgiveness for long-term sustainability.
- 3. Accessibility: Hardship must be defined to reflect the range of challenges homeowners face.**

HAMP has put up barriers to access for many homeowners, including those with second mortgage debt, extended unemployment, subsequent hardships after modification and those who succeed to the mortgage after death or divorce. The morass at servicers restricts access to HAMP for all homeowners, but particularly those with limited English proficiency. Reaching homeowners in need requires expansive eligibility rules and additional assistance for certain populations.
- 4. Accountability: Transparency and accountability throughout the loan modification process are essential.**

National loan modification standards must require transparency of all aspects of the modification process, from application through review and approval or denial. Servicers must be held to account for what they do and when they do it. The public must be given sufficient information in order to evaluate independently servicers' compliance.
- 5. Enforceability: Homeowners must be protected from servicers' noncompliance. Good rules on paper are not enough.**

National loan modification standards will only be effective if they are followed. In addition to rigorous enforcement by regulators and inclusion of a review of servicing practices in regular supervisory exams, homeowners must have the ability to appeal modification decisions and obtain independent review of their loan modification applications. To prevent unnecessary foreclosure, homeowners must be able to raise the failure to comply with any loan modification requirements as a defense to judicial or non-judicial foreclosure are reduced.



## I. INTRODUCTION: THE NEED FOR NATIONAL SERVICING STANDARDS THAT INCLUDE MANDATORY LOAN MODIFICATION

The foreclosure crisis is the worst the United States has ever experienced, both in duration and in depth. For most of the last four years, the foreclosure rate<sup>1</sup> has been more than three times what it was in 1933, at the height of the Great Depression.<sup>2</sup> And, by many estimates, we are not yet halfway through the devastation of lost homes, displaced families, and gutted neighborhoods. As of May 2012, nearly four million foreclosures had been completed since the beginning of the crisis in 2007.<sup>3</sup> As many as another ten million homes are estimated to be at high risk.<sup>4</sup>

Homeowners, neighborhoods, and cities across the country face the economic and emotional toll occasioned by soaring rates of vacant and abandoned properties. Losses from the crisis mount into the trillions of dollars.<sup>5</sup> Communities of color and low-income communities face disproportionately high rates of foreclosure and ensuing vacancies.<sup>6</sup> Municipal budgets are strained by high numbers of abandoned properties. Grassroots organizers have turned the growing anger and frustration on banks in defending foreclosure-related evictions.<sup>7</sup>

Losses on foreclosures have cost investors, as well as communities. For example, Fannie Mae experienced losses in excess of \$20 billion in 2011-2012 alone.<sup>8</sup> Investors have pushed for refinancing, for more loan modifications, and for principal reductions.<sup>9</sup> Foreclosures weaken the housing market and overall economy.<sup>10</sup> Yet the foreclosures have continued. Why?

In between the investors who lose money and the homeowners who lose their homes are the mortgage servicers. Despite the hundreds of pages of guidance issued under the Obama administration's Home Affordable Modification Program (HAMP),<sup>11</sup> servicers have not made modifications in the time, manner, or scale demanded by the crisis.

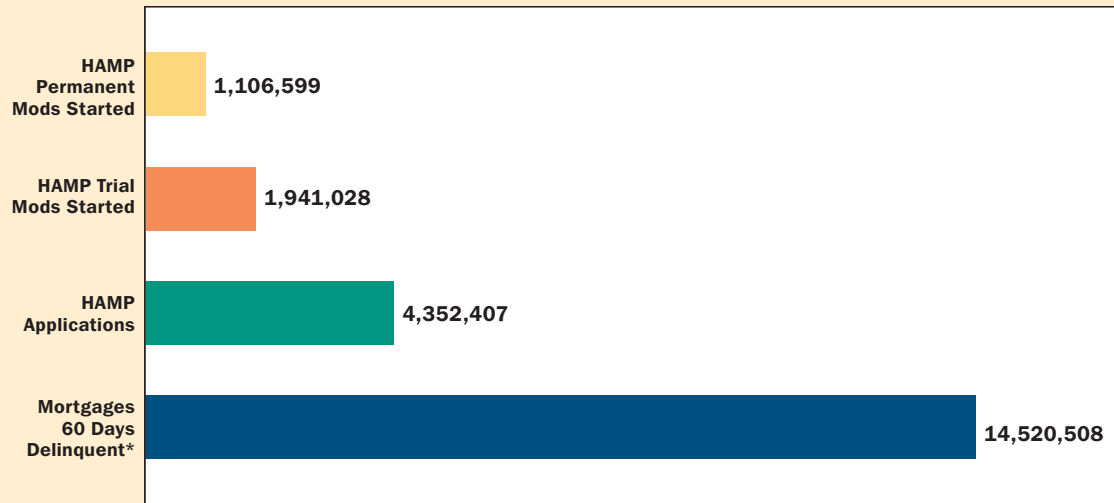
Servicers, unlike investors and homeowners, may gain from foreclosures. Modifications that would save homes cost servicers money due to the lost opportunity to assess additional foreclosure-related fees.<sup>12</sup> And servicers are simply not set up to modify loans.<sup>13</sup>

Neither investors nor homeowners have the leverage necessary to change the system. Homeowners have no control over which company services their loan, so they cannot vote with their feet when servicers are not responsive. Investors also face an uphill battle when they seek to challenge the actions of the servicer.<sup>14</sup>

HAMP, implemented under the aegis of the U.S. Department of the Treasury, has done more than any other program to stabilize the housing market.<sup>15</sup> HAMP both required participating servicers to make modifications that benefited investors and provided significant incentives to servicers to do so.<sup>16</sup> But many loans are still modified outside of HAMP and HAMP is set to sunset at the end of 2013.

A number of government entities have made efforts to reform and improve servicing and loss mitigation practices. The Federal Housing Finance Agency (FHFA) has moved to align and strengthen the Fannie Mae and Freddie Mac servicing guidelines, which

**CHART 1: Mortgage Delinquencies and HAMP Modifications, 2009–2012**



\*Based on quarterly data from the National Delinquency Survey.

Sources: Oct. 2012 MHA Report, MHA Data File, National Delinquency Survey and OCC Mortgage Metrics Data

previously diverged from each other.<sup>17</sup> The Office of the Comptroller of the Currency (OCC) and the Federal Reserve Board (FRB) entered into consent orders with the 14 largest servicers to address weaknesses in the foreclosure process, including the failure to offer or honor loan modifications.<sup>18</sup> The Department of Justice and the Attorneys General from 49 states implemented servicing standards (largely based on HAMP and the work of the FHFA) as part of a settlement with the five largest servicers.<sup>19</sup> Staff from the OCC, FRB, Federal Deposit Insurance Corporation (FDIC), Consumer Financial Protection Bureau (CFPB), and other agencies are working to develop national standards.<sup>20</sup> Several bills have been introduced in Congress.<sup>21</sup>

But none of these actions yet fills the gap. None is strong enough or covers the entire market.<sup>22</sup> The FHFA process, for example, does not cover the rest of the market, promotes loan modifications that are not keyed to affordability, and continues to provide greater incentives for a speedy foreclosure than for completing a modification, even while providing that servicers should generally complete an evaluation for a loan modification before initiating foreclosure proceedings. The consent orders and federal-Attorney General settlement are both time-limited. None of the new bills appear likely to pass Congress. The minor improvements to mortgage servicing in the Dodd-Frank Wall Street Reform and Consumer Protection Act<sup>23</sup> leave servicers free to continue to ignore the need for loan modifications.

The CFPB could use its authority under the Truth in Lending Act and the Real Estate Settlement Procedures Act to establish vigorous, sensible national mortgage servicing standards that put the entire industry on equal footing and give qualified homeowners access to efficient and enforceable mortgage servicing rules to save their homes. But the proposed rules issued by the CFPB<sup>24</sup> are wholly inadequate.<sup>25</sup>

If the CFPB fails to act aggressively enough, we must look to either individual states to promote servicing reform, state by state, as California has done,<sup>26</sup> or the federal interagency process. The current federal interagency process does not look promising. Any interagency rulemaking is likely to result in rules that represent the least common denominator. And any state-by-state process is, however strong the results may be in individual states like California and New York, by necessity a patchwork approach, with attendant increased compliance costs.

The federal agencies—either through interagency rulemaking or via the CFPB’s use of its independent authority—could still seize the moment to transform the system of mortgage servicing. We could still choose to have a system of efficiency, accountability, accessibility, affordability, and enforceability instead of the chaos that currently reigns. We could promote responsible homeownership and affordable lending. But the federal government agencies must act, and act now. We need enforceable national servicing standards that protect both homeowners and investors. We need national servicing standards that mandate loan modifications. Our delay has cost us trillions of dollars. The agencies should pick up their fire hoses.

The rest of this report will focus on a key component of national servicing standards: loan modification standards. An appendix lists our full recommendations for national servicing standards.

The U.S. could still choose to have a system of efficiency, accountability, accessibility, affordability, and enforceability instead of the chaos that currently reigns. We could promote responsible homeownership and sustainable mortgage servicing. But government agencies must act, and act now.

## II LOAN MODIFICATION STANDARDS ARE A CORNERSTONE OF EFFECTIVE NATIONAL SERVICING STANDARDS

### A. *The Lack of Loan Modification Standards Has Hampered the National Economy*

The failure to modify loans has exacerbated the crisis. The burgeoning housing inventory, with the foreclosure overhang, has delayed the recovery of the housing market and suppressed consumer confidence.<sup>27</sup> Modifications could have stabilized the economy before now, but modifications did not happen.<sup>28</sup>

Confusion reigns in the mortgage servicing industry with respect to loan modifications. Some servicers and some mortgages are covered by the government’s flagship modification program, HAMP; some are not.<sup>29</sup> Other mortgages are covered by rules promulgated by Fannie Mae, Freddie Mac, the Department of Housing and Urban Development

(HUD), or the Department of Veterans Affairs.<sup>30</sup> Some mortgages have no federal rules applying to them whatsoever. States' actions to protect their homeowners and to encourage loss mitigation have run into federal preemption challenges, with the result that state servicing laws apply to some servicers, but not others, or apply in some courtrooms but not others.<sup>31</sup> Servicers, even when the mortgage is covered by other rules, may push their own proprietary modifications, with little or no disclosure or accountability.<sup>32</sup> Government and industry efforts to align the various programs and alternatives have fallen short. The result of the current patchwork approach is chaos. The lack of uniformity and absence of certainty thwarts homeowners who attempt to navigate the available programs and protections designed to help them stay in their homes.

Homeowners, servicers, and investors all would be served well by national standards that bring efficiency, affordability, accessibility, accountability, and enforceability to the loan modification process. Had the standards developed under HAMP been applied to the entire market, we would likely have reduced foreclosures and investor losses and brought greater efficiency to mortgage servicing. The failure to mandate appropriate modifications under national standards has left servicers to their own devices. And servicers, left to their own devices, largely lack the motivation to make modifications.<sup>33</sup>

National loan modification standards can directly address systemic faults exposed in the housing market that were hidden during the “good” days of rapid property appreciation and mortgage product innovation, save millions of homes in the near future, and reduce losses to investors and homeowners for decades to come.

### *B. HAMP Should Serve as the Starting Point for Developing National Loan Modification Standards*

The federal government's primary loan modification program is the Home Affordable Modification Program (HAMP). Servicers who agreed to participate in HAMP signed contracts with the Department of the Treasury. In exchange for incentive payments, participating servicers agreed to modify all eligible loans in their servicing portfolios according to uniform rules. HAMP has reached more homeowners, and successfully modified more home loans, than any program in history.<sup>34</sup>

HAMP was set up as a temporary program to address the immediate crisis. Only loans originated before January 1, 2009, are eligible for modification, leaving homeowners with more recent loans without protection in the event of unemployment, death, or disability. Moreover, modification applications, even of these relatively old loans (many of which have already been foreclosed on<sup>35</sup>) must be completed by the end of 2013.<sup>36</sup> With more than 11 million homeowners owing more on their loans than their homes are worth<sup>37</sup> and as many as 10 million more foreclosures predicted in the next coming years,<sup>38</sup> there is no question that the need for high-volume, effective loan modifications continues to be urgent.

The current period of historically high foreclosure rates<sup>39</sup> will ebb, but future banking and foreclosure crises are certain. The crisis has exposed systemic faults in our mortgage markets that were hidden during the “good” days of rapid property appreciation and mortgage product innovation. National loan modification standards can directly address

these gaps in the market, save millions of homes in the near future, and reduce losses to investors and homeowners for decades to come.

HAMP provides perspective on how to reduce foreclosures while balancing the needs of distressed homeowners, investors, and mortgage servicers. HAMP has demonstrated that sustainable loan modifications are both possible and desirable from the perspective of the vast majority of market participants. Although HAMP was designed to be a temporary solution to an epic crisis, HAMP's lessons provide the framework for responsible servicing going forward.

National servicing standards should incorporate the many successes of HAMP, which provided for increased access to sustainable modifications for many homeowners. When one looks honestly at the successes of HAMP, and the many ways in which HAMP moved the ball forward for both homeowners and investors, it seems clear that modifications like those under HAMP should continue to be available. Modifications like those under HAMP provide protection for homeowners facing foreclosure and for investors risking their savings on residential mortgages. HAMP's net present value test ensures that the modified loan produces more income for the investors than could be expected from a foreclosure. An objective and standard net present value test like HAMP's can give investors confidence and remove concerns about the protection of private property interests. Minimal subsidies, such as those available under HAMP, are helpful in increasing the scale of the program<sup>40</sup> by boosting the number of modifications that return a net present positive value to the investor, but are not strictly necessary; even without subsidies, many modifications will still benefit the investors more than doing nothing.

Among HAMP's lessons, however, are also its shortcomings. HAMP has been justly criticized for its limited reach, its lack of transparency, and the failure to provide for effective enforcement. HAMP was supposed to induce servicers to modify three to four million loans.<sup>41</sup> It will likely help only a third of that number.<sup>42</sup> HAMP failed to help many eligible homeowners. Many of its initiatives fell short of their promise because of servicers' shoddy implementation.<sup>43</sup>

Treasury provided cover for this shoddy implementation by resisting efforts to make public even basic assumptions in HAMP, such as details of the critical net present value test.<sup>44</sup> Treasury failed to implement basic compliance checks until well into the program, and then redacted all information about servicers' failures to comply when the press requested the compliance records.<sup>45</sup> Homeowners still lack a thorough and effective avenue of appeal for servicer non-compliance.<sup>46</sup>

National servicing standards must not fall into the same trap that HAMP did. National servicing standards must mandate robust disclosure and transparency throughout the loan modification process and rigorous compliance mechanisms. All eligible homeowners must be offered modifications. Loan modifications must be mandatory, not discretionary. Homeowners must be able to exercise enforcement options; the government must exercise oversight.

Unlike HAMP, national servicing standards must mandate robust disclosure and transparency throughout the loan modification process and rigorous compliance mechanisms.

## Five Principles for National Loan Modification Mortgage Standards

- 1. Efficiency: Loan modification evaluations should be standardized, universally applicable to all loans and servicers, and mandatory for all loans before the foreclosure process can go forward.** Loan modifications must be mandated for qualified homeowners facing hardship where the modification also produces more income for the investor than foreclosure. Outreach to homeowners and loan modification evaluation should be completed before any steps are taken toward foreclosure. Where homeowners seek assistance only after initiation of a judicial or non-judicial foreclosure, the foreclosure should be paused until a full loan modification evaluation has been completed. This generally can be achieved without the servicer needing to start the foreclosure process over, thus preserving efficiency and minimizing the waste of resources.
- 2. Affordability: Loan modification terms must be affordable, fair, and sustainable.** Long-term affordability is the key to success for any loan modification. Loans that are not affordable end in re-default, a costly result for both homeowners and investors. HAMP has proved its worth by dramatically reducing re-default rates.<sup>47</sup> National standards should follow HAMP's template by requiring affordable monthly payments and prioritizing interest rate reduction and principal forgiveness for long-term sustainability.
- 3. Accessibility: Hardship must be defined to reflect the range of challenges homeowners face.** HAMP has put up barriers to access for many homeowners, including those with second mortgage debt, extended unemployment, limited residual income, subsequent hardships after modification, and those who succeed to the mortgage after death or divorce. The morass at servicers restricts access to HAMP for all homeowners, but particularly those with limited English proficiency. Reaching homeowners in need requires expansive eligibility rules and additional assistance for certain populations.<sup>48</sup>
- 4. Accountability: Transparency and accountability throughout the loan modification process are essential.** National loan modification standards must require transparency of all aspects of the modification process, from application through review and approval or denial. Servicers must be held to account for what they do and when they do it. The public must be given sufficient information in order to evaluate independently servicers' compliance.
- 5. Enforceability: Homeowners must be protected from servicers' noncompliance. Good rules on paper are not enough.** National loan modification standards will only be effective if they are followed. In addition to rigorous enforcement by regulators and inclusion of a review of servicing practices in regular supervisory exams, homeowners must have the ability to appeal modification decisions and obtain independent review of their loan modification applications. To prevent unnecessary foreclosure, homeowners must be able to raise the failure to comply with any loan modification requirements as a defense to judicial or non-judicial foreclosure.

This is not to suggest that a national loan modification program should be run by the government. There is no reason to think that an arm of the government would be better at providing default servicing than private companies are. Instead, what is needed is clear direction from the federal government as to the standards required, coupled with strong oversight and mechanisms for real enforcement by agencies and individual homeowners.

### *C. Core Principles for National Loan Modification Standards Will Protect All Market Participants*

The critical features of effective national loan modification standards are synthesized into five core principles: efficiency, affordability, accessibility, accountability, and enforceability. These principles, and the standards that flow from them, are discussed in detail (see pages 53–65)

## III. LESSONS LEARNED FROM HAMP

### *A. Without HAMP, There Was Nothing: Why We Need Permanent Standards That Mandate Affordable Loan Modifications*

HAMP, as we discuss (see pages 26–41), was hampered in its execution by Treasury’s cowardice and servicers’ rampant noncompliance. But we should remember how rare, and hard fought, any loan modifications were before HAMP.<sup>49</sup> Without HAMP, the vast majority of homeowners who found themselves unable to afford their mortgages lost their homes. Before HAMP, there was, in many cases, nothing to be done for homeowners with conventional mortgages who lost a job, had a death in the family, or exhausted their savings with unexpected medical bills or other expenses. Before HAMP, the rare modifications offered homeowners typically increased payments and resulted in rapid re-default.<sup>50</sup> HAMP changed all of that for the better.

Contracts between servicers and investors have long given servicers discretion to work with homeowners in default or at risk of default. Prior to HAMP, servicers had a number of loan workout options they could employ to address default and potential defaults, including temporary forbearances (permitting homeowners to skip some payments), repayment plans (allowing homeowners to repay arrearages over the course of a few months), and recasting arrearages (capitalizing overdue amounts as unpaid principal and re-amortizing the loan).<sup>51</sup> Servicers could change the terms of the loan, by freezing or reducing interest rates and reducing principal, but very rarely offered these options to homeowners. Despite this panoply of workout options available, few homeowners got loan modifications absent litigation, even when doing so would have saved investors money.<sup>52</sup>

Data from HOPE NOW, a coalition of mortgage servicers and counselors, show that during the pre-HAMP period at the start of the crisis—from July 2007 through January 2008—73% of the loan workouts that member servicers offered to homeowners were repayment plans, which required homeowners in default to make additional catch-up

payments on top of regular payments, rather than permanent changes to the repayment terms of their loans.<sup>53</sup> In the relatively rare instances when servicers modified loans and permanently changed the repayment terms, they almost always increased the payment or left it flat, and only rarely reduced the monthly payment for the struggling homeowner.<sup>54</sup>

A more detailed analysis of a select number of pools of securitized subprime loans revealed that most loan modifications from July 2007 through June 2008 resulted in higher principal balances. Nearly one-quarter of all modifications resulted in higher monthly payments.<sup>55</sup> Many modifications simply froze the interest rate on adjustable rate mortgages, leaving payment amounts unchanged.<sup>56</sup> Less than one percent of the

4,342 loan modifications in the sample involved any significant principal reduction.<sup>57</sup> At the same time that servicers were offering these paltry modifications, they were initiating and completing foreclosures—more than twice as many foreclosures were completed in the study period as executed loan modifications—and the average loss to investors on each foreclosure exceeded one third of the unpaid principal loan balance.<sup>58</sup>

These early modifications had other problems. Many required large payments to be made before the servicer would even evaluate the homeowner for a modification.<sup>59</sup> Some of these payments were tens of thousands of dollars.<sup>60</sup> Before HAMP, it was also standard practice to demand that homeowners waive all future rights in order to qualify for a loan modification.<sup>61</sup>

HAMP changed the way the industry worked. HAMP set a model for who should receive loan modifications, how loan modifications should be processed, and what the terms of the loan modifications should be. HAMP also created a uniform process for evaluating homeowners' requests for loan modification and standardized the net present value test. Because HAMP modifications are affordable,<sup>62</sup>

based on verified income,<sup>63</sup> and require, in most cases, payment reduction,<sup>64</sup> homeowners with HAMP modifications are more likely to stay in their homes and less likely to re-default when compared to homeowners with non-HAMP modifications,<sup>65</sup> a benefit to all parties. HAMP has resulted in more affordable, sustainable loan modifications that keep homeowners in their homes and maximize returns to the investors. More surely needs to be done, but HAMP showed the path towards stabilizing the mortgage market.

HAMP is scheduled to sunset at the end of 2013. Once HAMP sunsets, the pressure brought to bear on servicers will fade. Servicers will return to their old habits of delay and deny when confronted with legitimate requests to modify loans for distressed borrowers. National servicing standards that incorporate HAMP's successes and improve on its weaknesses must be in place before HAMP's sunset.

HAMP is scheduled to sunset at the end of 2013, at which point the pressure on servicers will fade. National servicing standards that incorporate HAMP's successes and improve on its weaknesses must be in place before HAMP's sunset.



## B. HAMP Modifications Work for Investors and Homeowners

### 1. HAMP Modifications Protect Investors' Interests

#### a. HAMP Modifications Guard against Moral Hazard on the Part of Borrowers

HAMP has demonstrated that modifications can be made without encouraging widespread default by borrowers who have the means to pay. The tax code and the pooling and servicing agreements have permitted modifications of loans in default or at imminent risk of default for decades. Similarly, the industry leaders, Fannie Mae and Freddie Mac, have generally permitted modifications, including modifications of loans at imminent risk of default,<sup>66</sup> without triggering a cascade of voluntary default. But, as previously discussed,<sup>67</sup> prior to HAMP, few loan modifications were actually made.

Historically, investors have been concerned that servicers would favor select homeowners by offering modifications that were not necessary or that benefited servicers at the expense of investors.<sup>68</sup> More recently, some commentators have argued that borrowers will choose to default in order to get more favorable loan terms.<sup>69</sup> HAMP shows that program design can further minimize the already slim incentives for most homeowners to voluntarily default.<sup>70</sup>

HAMP's program design guards against moral hazard on the part of borrowers. Homeowners can only receive a HAMP modification if they are objectively in financial distress, fill out detailed financial reporting forms, and provide copies of tax returns and pay stubs. HAMP measures objective financial distress with two separate criteria: the homeowner must be in default or at imminent risk of default and the homeowner's current payment must exceed 31% of the homeowner's gross monthly income.<sup>71</sup>

Homeowners meeting these criteria are unlikely to be able to cure their delinquencies without a modification. The data from the HAMP temporary modifications support this conclusion: only 11% of the homeowners whose trial modifications are canceled, for any reason, manage to become current again.<sup>72</sup> Homeowners who make it through the needle's eye to get a HAMP modification need it. Few, if any, homeowners with the means to avoid a foreclosure receive a HAMP modification. Indeed, HAMP's screening for moral hazard may, in fact, result in qualified homeowners being denied and thus reduce HAMP's efficiency and efficacy.<sup>73</sup>

Nor have we seen a dramatic increase in voluntary default in the wake of HAMP.<sup>74</sup> If the availability of modifications were overwhelmingly attractive, we would expect to see increasing numbers of voluntary defaults. Instead, fewer people are defaulting, even as the number and size of principal reduction modifications increase.<sup>75</sup>

Moreover, those who default voluntarily are borrowers with more assets, higher credit scores, and greater financial sophistication than those who receive HAMP modifications.<sup>76</sup> HAMP borrowers are financially stressed, low- to moderate-income households, with significantly impaired credit. The median income for a household receiving a

One lesson learned from HAMP is that moral hazard on the part of borrowers can be screened out through program design.

HAMP modification is less than \$3,800 a month,<sup>77</sup> and the vast majority of homeowners who get a HAMP modification have credit scores less than 620 (the maximum credit score is 850).<sup>78</sup> As the *New York Times* headlined, “Biggest Defaulters on Mortgages Are the Rich.”<sup>79</sup> The rich are not well-represented among those eligible for or receiving HAMP modifications.

Homeowners with fewer resources are less likely to voluntarily default in part because both the economic and emotional costs of default rise for them.

- A wealthier homeowner may have a second home to move to, but poorer homeowners may not even have a relative with a spare bedroom.
- Homeowners with higher credit scores and more assets can manage the hit to their credit score from a default with greater ease than those with marginal credit scores,<sup>80</sup> who may be more dependent on credit and who may already have constrained access to credit.

HAMP’s program design has screened out most voluntary defaulters and minimized any possible moral hazard on the part of borrowers.<sup>81</sup> Because of HAMP, we can see clearly that concerns about modifications creating moral hazard in borrowers were always overstated.

#### *b. HAMP Modifications Guard against Moral Hazard on the Part of Servicers*

With limited oversight, and a disjoint between their interests and the interests of the investors, servicers may be tempted to make only those loan modifications that benefit the servicer, without regard to the benefit of the investors.<sup>82</sup> HAMP’s standard net present value (NPV) test and the requirement that servicers offer modifications whenever the NPV results are positive ensure that investors’ interests are protected and limit servicers’ moral hazard.

Every potential HAMP modification is evaluated using the NPV formula developed by Treasury. The formula predicts the future cash flows associated with modifying the mortgage and the future cash flows associated with leaving the mortgage unchanged. It takes into account a number of factors, including property value, the loan-to-value ratio, the estimated probability of default with and without a loan modification, and the costs of foreclosure compared to the costs of modifying the loan. Under the NPV test, the projected losses of doing nothing (including the possibility that the homeowner may cure) are compared to the projected losses of modifying the loan (including the possibility of re-default). While any future calculus is necessarily uncertain, the HAMP NPV test has the benefit of being standard and comparatively transparent.

Servicers participating in HAMP are required to modify loans if the predicted value to investors of the modified loan is greater than the original loan. Before these objective, and at least partially public, criteria were adopted, investors were forced to trust servicers to make appropriate modifications. Because foreclosures are so costly to investors (as of May of 2011, foreclosed properties that were liquidated experienced losses of 64.97%),<sup>83</sup> the protections afforded by the NPV test are extremely important.

HAMP created a model for providing transparency and protection to investors from servicer manipulation of modifications.

### *c. HAMP Modifications Perform Better than Proprietary Modifications*

One of the great fears of investors is that servicers would game the system via serial modifications. Serial modifications delay foreclosures while running up fees for servicers, fees that come off the top in any eventual foreclosure.<sup>84</sup> While a loan modification may result in payments to the investor, if the loan modification quickly results in re-default and a new foreclosure, the investor is unlikely to have recouped much of the costs of the first foreclosure before the second begins. Lower re-defaults, therefore, mean greater profits for investors and better predictability. HAMP created modifications that provide greater returns with increased certainty to investors.

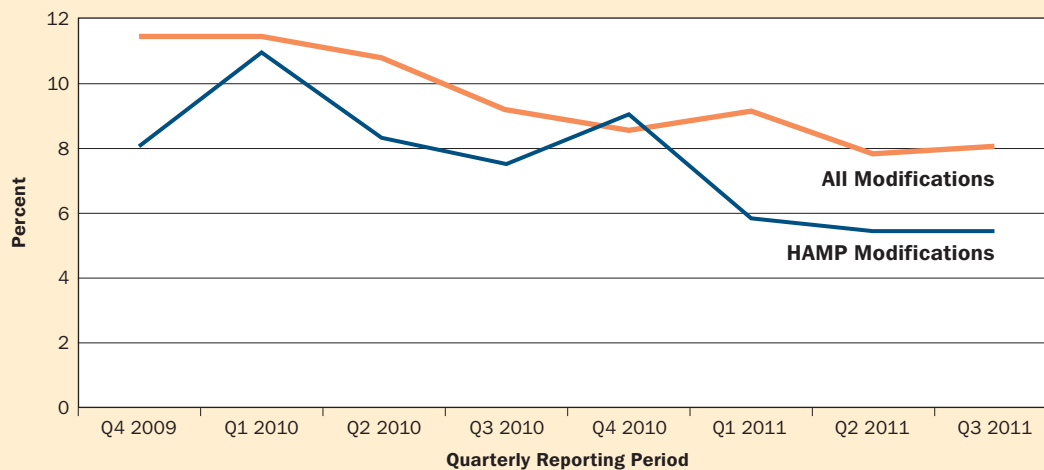
Pre-HAMP loan modifications often re-defaulted at rates as high as 60%-70% within the first year of the modification.<sup>85</sup> Even post-HAMP, servicers' non-HAMP proprietary modifications re-default within the first year at rates in excess of 35%.<sup>86</sup> These numbers make modifying loans look risky and unattractive to many investors: the chance that fees will eat up any margin between the outstanding principal balance and the value of the home at a foreclosure sale increases the more times the home is put in foreclosure and the longer the foreclosure takes.

But HAMP modifications, by contrast with the servicers' proprietary modifications, have historically low re-default rates (despite being made to severely financially stressed homeowners during a period of historically high unemployment). The re-default rates on HAMP modifications are as much as 75% lower than pre-HAMP modifications.<sup>87</sup> Homeowners who receive HAMP modifications are less than half as likely to lose their homes to foreclosure as homeowners who receive non-HAMP modifications.<sup>88</sup> In 2011, only 19% of homeowners with permanent HAMP modifications were 60+ days delinquent after 12 months.<sup>89</sup>

As chart 2 (see next page) shows, HAMP-compliant permanent modifications have lower re-default rates than non-HAMP modifications.<sup>90</sup> These figures understate the superior performance of HAMP modifications because the re-default rate for all modifications is lowered by the inclusion of HAMP modifications.

The superior performance of HAMP modifications, as compared to proprietary modifications, holds true controlling for the monthly payment reduction,<sup>91</sup> the interest rate, and term extension.<sup>92</sup> One likely reason is that HAMP requires that payments, including insurance and taxes, be no more than 31% of gross income.<sup>93</sup> By contrast, there is no requirement that the payment required by a non-HAMP modification be affordable. Even a modification with a large payment reduction may still remain unaffordable. Another possible reason is that some common features of proprietary modifications, like large up-front payments, may have a long-term impact on sustainability.<sup>94</sup>

**CHART 2: HAMP vs. Proprietary Modifications**  
*Re-default Rates 3 Months after Modification, 2009–2011*



Source: OCC Mortgage Metrics Report.

The lesson is clear: HAMP, by reducing payments, requiring affordability, and protecting homeowners from the grossest forms of abuse, provides sustainable modifications that serve the interests of investors. Future standards should build on HAMP’s success in this area.

## 2. HAMP Modifications Help Homeowners

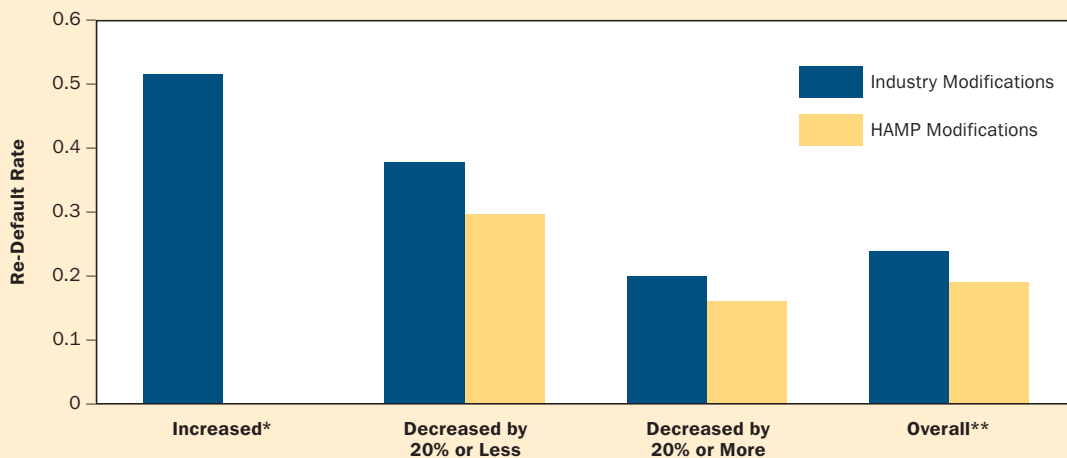
### a. HAMP Modifications Provide Affordability via Monthly Payment Reduction

HAMP’s insistence on affordability resulted in meaningful reductions in monthly payment amounts, a significant departure from prior industry practice.<sup>95</sup> In consequence, hundreds of thousands of families remain in their homes, paying on their mortgages.<sup>96</sup>

Monthly payment reduction is one of the best predictors that a loan modification will be successful—that is, that the homeowner will not re-default. The greater the reduction in the monthly payment amount, the greater the likelihood that the homeowner will remain current after the modification.<sup>97</sup> Thus, for loans modified in 2010, more than twice as many homeowners whose payments were reduced less than 10% became 60+ days delinquent within a year than homeowners whose payments were reduced by 20% or more.<sup>98</sup> Payment reduction has a similar effect on foreclosure rates; for mortgages modified in 2008-2011, 9.8% of homeowners whose payments were reduced by less than 10% ultimately lost their homes in foreclosure, compared to only 3.5% of homeowners whose payments were reduced by more than 10%.<sup>99</sup>

HAMP encourages servicers to reduce payments by at least 10%.<sup>100</sup> But HAMP’s focus on affordability has generally resulted in much larger payment reductions. The median HAMP permanent modification has resulted in a 37% payment reduction.<sup>101</sup> Industry

**CHART 3: Re-Default Rates by Payment Reduction, 2009–2011**



The data is aggregated and weighted based on the OCC Mortgage Metrics report from Q1 2010 through Q2 2011 and the June 2012 MHA Program Performance Report. These reports cover modifications originated between 2009 and June 2011.

\*The HAMP rules will only rarely result in an increased monthly payment for modifications.

\*\*The overall default rate is based on modifications granted by June 2011 that have aged at least 12 months.

modifications still lag HAMP: in the fourth quarter of 2011 payment reductions for proprietary modifications were less than half those offered in HAMP, only 14.7%.<sup>102</sup>

Unfortunately, modification programs adopted after the HAMP launch, including the HAMP Tier II modification and the standard loan modification program promulgated by Fannie Mae and Freddie Mac under the Servicing Alignment Initiative, move away from these lessons.<sup>103</sup> For example, the current modification interest rate for the GSE standard modification is 4.25%,<sup>104</sup> more than twice the HAMP floor and considerably above current prime market rates.<sup>105</sup> Similarly, while the HAMP Tier II and the GSE standard modifications require a minimum amount of payment reduction, they permit payments as high as 55% of the borrower's income. This is far in excess of the 31% ratio that has led to HAMP loan modifications with low re-default rates.<sup>106</sup>

Future loan modification programs must pay attention to the affordability features that made HAMP modifications successful. Payment reductions must be deep and they must be linked to the actual affordability of the payments. Payment reductions untethered to long-term affordability are not enough: payments must be affordable and permit homeowners to recover equity in their homes.

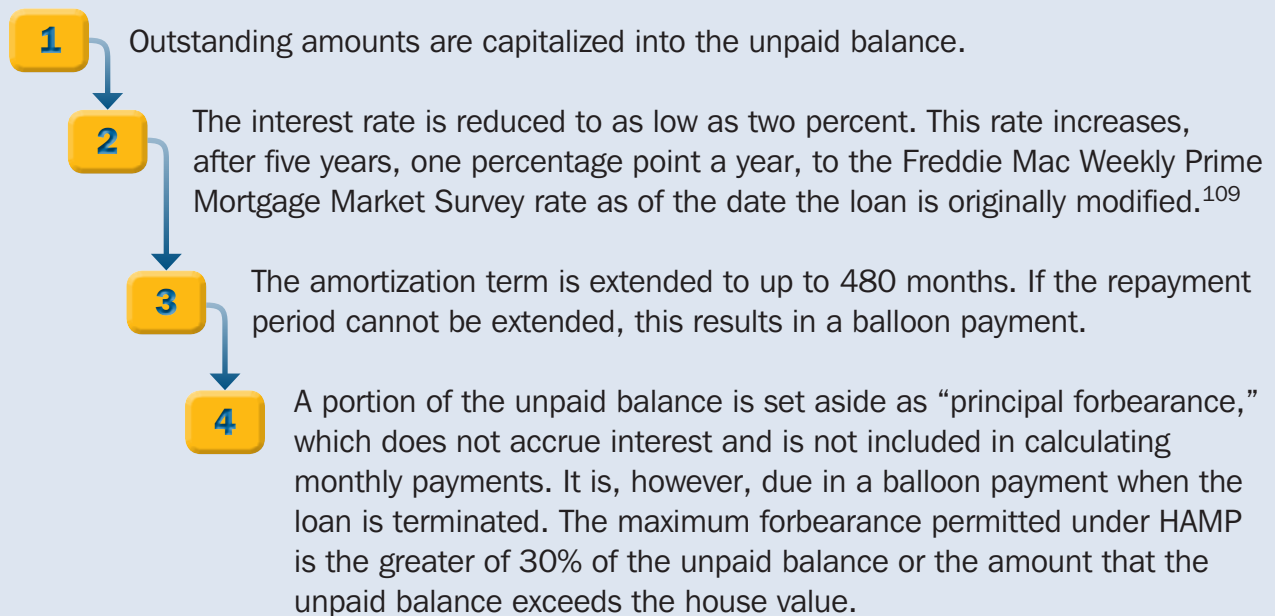
#### *b. Standardization of the Loan Modification Process Eases Applications and Protects Homeowners from Abuse*

Standardization of the loan modification process serves many goals. It streamlines the application process for both servicers and homeowners, allowing for savings of time, money, and staff. It permits homeowners to assess their own eligibility for a loan

## The HAMP “Waterfall”

The goal of a HAMP modification is to reduce the homeowner’s total monthly payment to 31% of gross monthly income. In order to do this, servicers follow a series of steps called “the waterfall.” The servicer moves to the next step only if the target payment has not yet been reached, or if the investor prohibits that particular step. If the payment is still too high after all steps of the waterfall are completed, the homeowner is denied a HAMP modification. (Homeowners can be denied for many other reasons, as well, including failure to meet HAMP’s basic eligibility criteria).

The steps in the waterfall are:



modification, without relying as heavily on either a servicer’s representations or the specialized expertise of housing counselors or attorneys. It promotes transparency and fairness. It allows for review and oversight by third parties.

HAMP brought some level of standardization to the loan modification process. It created a set of measurable criteria and a tool to evaluate offered modifications. If HAMP had been enforced more consistently and had applied more broadly, the benefits of standardization would have been more fully achieved. Instead, once HAMP became the industry standard, lenders created their own copy-cat versions of it, but they copied only some elements of it. The result was a multiplicity of HAMP-like programs with varying, often invisible standards. Some proprietary modifications have names that seem designed to mislead homeowners; Chase, for example, calls its HAMP-lite modifications CHAMP modifications. In other cases, servicers insist that homeowners fill out the proprietary

## The Waterfall Applied: An Example

The Browns took out a 30-year loan in 2008. Six months ago, Mr. Brown was laid off from his job; the family now has income of \$50,000 per year. The family is four months behind in paying their mortgage.

Original Loan Amount:	\$250,000	Current Principal Balance:	\$242,566.50
Original Interest Rate:	7.0%	Arrearages and Fees:	\$10,000
Original Principal and Interest Payment:	\$1,663.26	Current Monthly Gross Income:	\$4,166.67
Taxes and Insurance:	\$550	Current Value of Home:	\$230,000

HAMP requires that their monthly payment, including taxes and insurance, be no more than 31% of their income. For the Browns, their monthly principal and interest payment can be no more than \$741.67.

To get to that payment, the mortgage servicer restructures their loan as follows:

- 1 **Step One** (Capitalization of Arrearages and Fees):  
 $\$242,566.50 + \$10,000 = \$252,566.50$
- 2 **Step Two** (Interest Rate Reduction):  
 Reducing the interest rate all the way to 2% drops the monthly payment to \$1,009.48. This is higher than the target of \$741.67, so the servicer continues to the next step.
- 3 **Step Three** (Extension of Amortization Term):  
 Extending the amortization term to the maximum of 480 months drops the payment to \$764.84. This is still too high, so the servicer continues to the next step.
- 4 **Step Four** (Forbearance):  
 The servicer reduces the interest-bearing principal amount to 244,916.51. When the mortgage is paid off, the Browns will have a balloon payment of \$7,649.99, but their monthly payment is now \$741.67.

### COMPARISON

	<i>Pre-Modification</i>	<i>Post-Modification</i>
Principal Balance:	\$242,567	\$244,917
Interest Rate:	7.0%	2.0%
Remaining Term of Loan:	27 Years	40 Years
Principal and Interest Payment (Monthly):	\$1,663	\$742
Balloon Payment:	None	\$7,650

modification application forms instead of the standard HAMP modification form, and thus evade the requirement to evaluate homeowners for HAMP before HAMP-lite.

Treasury has touted the HAMP-lite modifications offered by servicers as a measure of the program's success.<sup>107</sup> But because there is no regulation of these proprietary modifications, while they look like HAMP modifications at first glance, they fail to perform like HAMP modifications, with much higher re-default rates than HAMP modifications.<sup>108</sup>

One problem with the HAMP-lite modifications is that they do not follow all of the steps HAMP specifies to get to an affordable payment. HAMP promotes affordability both by requiring a payment at 31% of the homeowner's income (which drives payment reductions) and by specifying how that payment reduction is achieved. The terms of a HAMP modification are established by the "waterfall" (see pages 20–21). The HAMP waterfall prioritizes interest rate reductions above term extensions or forbearance with the result that homeowners can pay down their mortgages and rebuild equity faster. Chase's proprietary "CHAMP" modifications, by contrast, invert the waterfall, and extend the term first. The result can be tens of thousands of dollars paid in increased interest and years more before equity is restored. Other proprietary modifications may not reduce the interest as deeply as a HAMP modification or may not reduce it permanently.

The HAMP-lite modifications also often contain clauses waiving some or all of a homeowner's rights. Servicers may also require up-front payments (forbidden by HAMP)<sup>110</sup> or charge fees that would be limited or waived in a HAMP modification,<sup>111</sup> adding thousands of dollars to a homeowner's debt.

The standard loan modification promulgated by HAMP generated the most sincere form of flattery, imitation. HAMP's failure was in failing to see that its standardized loan modification was carried through the industry. Servicers were allowed to substitute their own inferior and often dangerous modifications. HAMP's basic assumption that loan modifications should be standardized, with public eligibility criteria, was correct. Future programs must carry the standard loan modification throughout the industry to prevent abuse and misrepresentation.

### *c. Principal Reduction for Underwater Homeowners Is Critical*

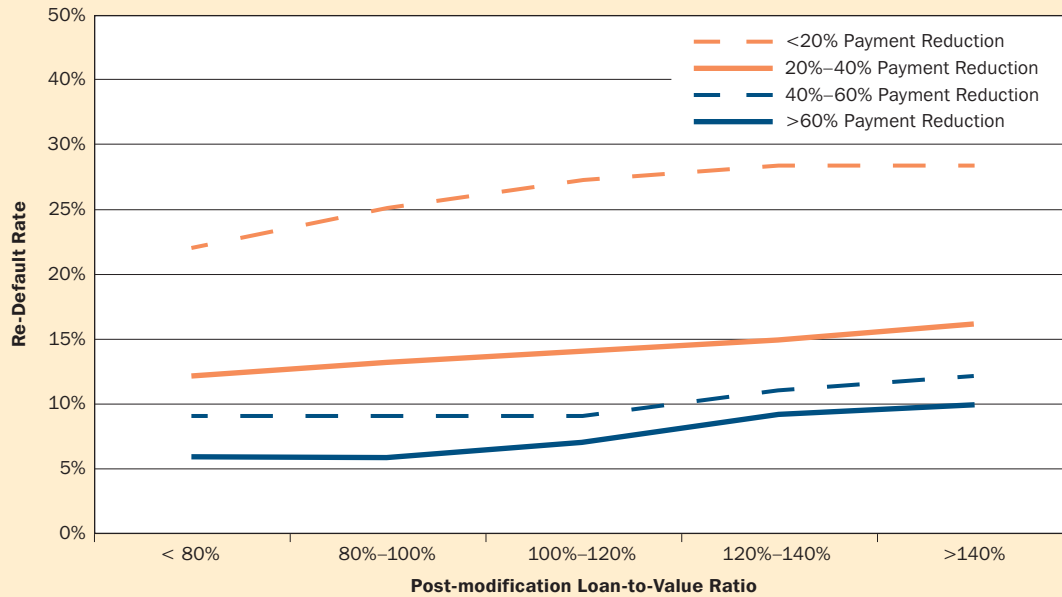
Modifications with principal reduction, both inside and outside of HAMP, outperform modifications without principal reduction.<sup>112</sup> HAMP modifications with principal reduction have an even lower re-default rate than regular HAMP modifications.<sup>113</sup> Principal reduction is a critical component in making successful loan modifications. While payment reduction may be more important than principal reduction in creating sustainable modifications, the post-modification LTV matters as well. As chart 4 shows, combining payment reduction and principal reduction results in the lowest re-default rates.<sup>114</sup>

By some estimates, over 11 million households, almost one out of four, are underwater, with mortgage debt that exceeds the value of their homes.<sup>115</sup> Since loan-to-value ratio (LTV) is a strong predictor of the likelihood that a loan that has never been modified will default, these homeowners are in great danger of default.<sup>116</sup> They are likely to need



#### CHART 4: Principal Reductions and Payment Reductions

Combining payment reduction and principal reduction results in the lowest re-default rates



Source: Moody's, January 2012.

modifications. Those loan modifications will perform better if they include substantial principal reduction.

Substituting forbearance for principal reduction achieves affordable payments, but leaves the overall loan-to-value ratio high. Homeowners with forbearance instead of principal reduction cannot sell or refinance to meet a needed expense, such as roof repair or college tuition. Loan modifications that leave the homeowner underwater set both the homeowner and the loan modification up for future failure.

Unfortunately, principal reduction is not a required feature of the HAMP modification waterfall. HAMP permits principal reductions, but does not mandate them, even where they produce a superior NPV return to investors than modifications without principal reductions. As a result, only a small fraction of the HAMP modifications involve principal reductions, even though most HAMP homeowners are underwater.<sup>120</sup> Nearly three times as many permanent HAMP modifications involve principal forbearance (which is mandated) as principal reduction.<sup>121</sup>

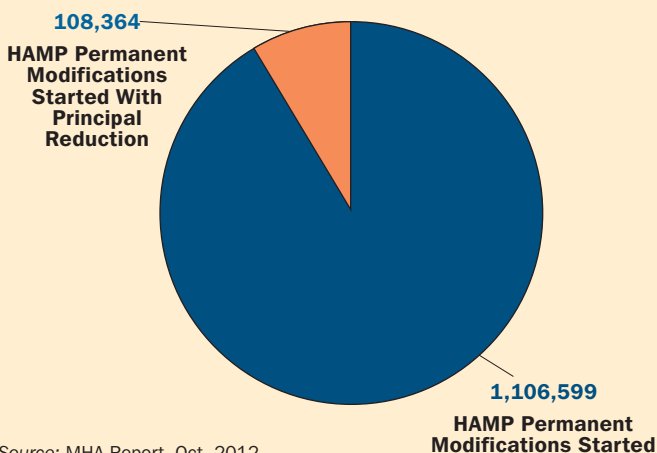
More than 11 million households, almost one out of four, are underwater, with mortgage debt that exceeds the value of their homes, and are in great danger of default.

## The Principal Reduction Alternative (PRA)

Servicers have always had the option of forgiving principal in addition to or instead of taking the other steps of the HAMP waterfall, but reduction of the loan principal is not required under HAMP. Treasury, under the Principal Reduction Alternative (PRA), starting in October 2010, did require a second waterfall for loans with a current LTV of 115% or greater.<sup>117</sup> Under PRA, the second step of the waterfall is to reduce principal until either the target payment is reached, or the loan-to-value ratio equals 115%. The servicer then proceeds with the other steps of the waterfall (interest rate reduction, term extension and forbearance) as necessary to reach the target payment and compares the PRA modification terms to the

unmodified loan in the NPV test. Although the rules require that servicers evaluate the PRA modification option, there is no requirement that servicers offer it to homeowners in place of the regular HAMP modification, even if the NPV result with PRA is better than without it. Treasury still leaves it to the servicer's discretion whether to include principal reduction in the loan modification. Perhaps reflecting the importance of the investor incentive payments<sup>118</sup> made under the HAMP PRA program, the HAMP modifications with principal reduction under the HAMP PRA plan have much larger percentages of forgiven debt than HAMP modifications with principal reduction that do not meet the HAMP PRA criteria.<sup>119</sup>

**CHART 5: Principal Reductions and HAMP Modifications**



Source: MHA Report, Oct. 2012.

The low number of loan modifications that include principal reduction reflects missteps in program design and implementation. The Principal Reduction Alternative (PRA) program was rolled out over a year into the HAMP program, after over two million HAMP modification applications had already been received and processed.<sup>122</sup> For many homeowners, particularly in states such as Nevada where many homeowners owe multiples of what their homes are worth, HAMP PRA came too late. Some of those homeowners are now defaulting on their HAMP modifications and accepting foreclosure as the price of moving forward with their lives. Even after the implementation of PRA, servicers were not required to

implement principal reductions, even when doing so would save investors money. Servicers almost always stand to lose on principal reductions, because they reduce the servicer's main source of income. As a result, leaving principal reductions to the servicer's discretion invites a low rate of reduction.<sup>123</sup>

Nor did Treasury address the inter-relationship of principal reduction and taxable income. HAMP principal reductions are spread over three years, which greatly complicates the tax accounting for homeowners. Debt forgiveness is generally considered income for tax purposes in the year in which the debt is forgiven. Thus, a HAMP modification with principal reduction potentially results in taxable income to a homeowner each year for three years into the future. These tax consequences can have spillover effects: the income reported on a tax return attributable to a principal reduction may disqualify a homeowner for Medicaid or college financial aid. Even without such corollary consequences, homeowners currently face confusing and overlapping reporting requirements in the event of a modification. The potentially devastating tax liability can undermine the sustainability of a loan modification. Some attorneys have gone so far as to advise their clients to decline a principal reduction modification under HAMP because of the uncertain tax consequences.

Of even greater significance, the acting director of the Federal Housing Finance Agency (FHFA) has so far refused to allow principal forgiveness as part of modifications of loans held or guaranteed by Fannie Mae and Freddie Mac, even when a loan modification with principal reduction might pass the NPV test.<sup>124</sup> Since Fannie and Freddie account for the majority of outstanding mortgage debt,<sup>125</sup> and an even larger share of the HAMP modifications,<sup>126</sup> this refusal presents a huge barrier to reducing the burden of negative equity on American homeowners.<sup>127</sup> Treasury's increase in incentive payments for principal reduction has not changed FHFA's position on the benefits of allowing principal reduction.<sup>128</sup> The (FHFA) has also rejected a proposal to allow no-interest periods in Chapter 13 bankruptcy payment plans, which would have the effect of providing principal reductions for some homeowners in bankruptcy.<sup>129</sup>

Without a mandate and without cooperation from FHFA, HAMP failed to provide sufficient principal reduction modifications, by any rational economic measure.<sup>130</sup> Nonetheless, HAMP's incentive structure has, after a rocky start, led to HAMP modifications including principal reductions at nearly twice the rate of all modifications.<sup>131</sup>

HAMP has promoted principal reduction modifications that benefit both investors and homeowners, without large infusions of taxpayer funds or encouraging borrowers to default on their loans in any measurable scale. Future programs should build on these results and mandate principal reductions where the result is NPV positive.

## C. Servicer Compliance Is Necessary to Bring a Loan Modification Program to Scale

### 1. HAMP Modifications Reach Too Few Homeowners

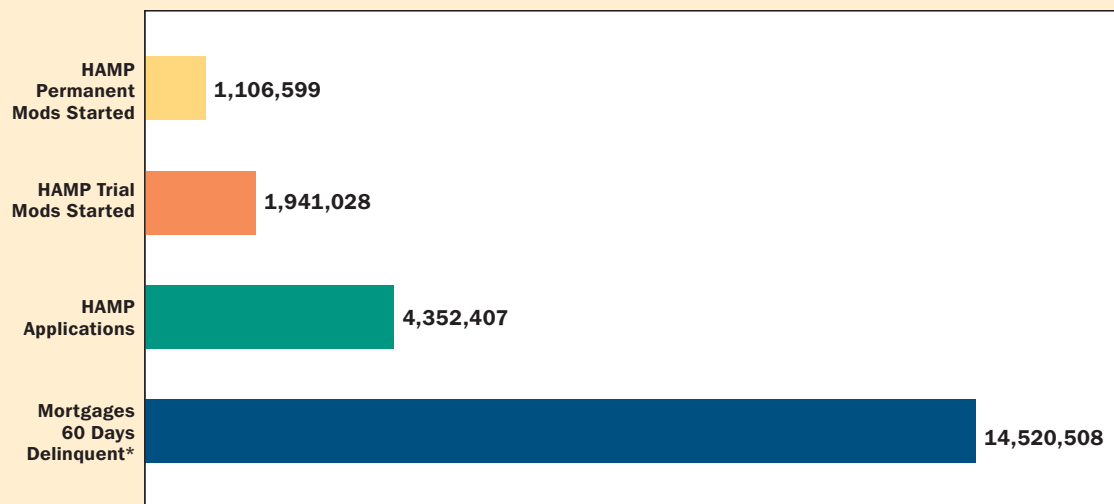
#### a. The Total Number and Pace of HAMP Modifications Is Disappointing

HAMP works well when it is implemented, but it is implemented for far too few homeowners. HAMP's limited reach underscores the need for loan modification programs to reach scale.

When HAMP was rolled out in February of 2008, Treasury officials predicted that three to four million loans would be modified.<sup>132</sup> By 2010, it was clear that fewer than two million loans would be modified under HAMP, despite the urgent need for more modifications.<sup>133</sup> As of August 2012, only 831,661 loans had been permanently modified.<sup>134</sup> The number of outstanding HAMP trial modifications has steadily declined.<sup>135</sup> Less than a third of all homeowners who have applied for HAMP have received permanent modifications. Meanwhile, since September of 2008, almost four million homes have been foreclosed on, and, as of May 2012, over one million homes are in some stage of the foreclosure process.<sup>136</sup> Current projections for the remaining scale of the crisis suggest ten million more homes may be lost to foreclosure.<sup>137</sup> As chart 6 shows, HAMP has reached only a small fraction of the homes entering foreclosure.

Future programs must bring loan modifications to scale. HAMP allowed too many homeowners who would have been good candidates for loan modifications to lose their

**CHART 6: Mortgage Delinquencies and HAMP Modifications, 2009–2012**



\*Based on quarterly data from the National Delinquency Survey.

Sources: Oct. 2012 MHA Report, MHA Data File, National Delinquency Survey and OCC Mortgage Metrics Data

homes, at a staggering cost to the society at large.<sup>138</sup> The following sections discuss the key reasons for HAMP's disappointing performance. Fundamentally, future loan modification programs must ensure that eligible homeowners receive timely offers of modification, and that servicers honor those offers. We cannot recover the lost equity and lost neighborhoods vaporized in this crisis.

### *b. HAMP Does Not Apply to All Servicers or All Loans*

HAMP's limited success demonstrates the importance of universal market participation. With some servicers covered by HAMP and some not, and some loans at the same servicer covered and some not, confusion often reigns. Some servicers, including HSBC, never elected to join on to HAMP. At other companies, some divisions participated in HAMP while others did not. Perhaps the most notorious example of the latter was widespread confusion as to which of the CitiFinancial companies were covered: CitiFinancial, which serviced many subprime loans at high risk of foreclosure, never signed a HAMP Servicer Participation Agreement, but its sister company, CitiMortgage, with a larger prime portfolio, did.<sup>139</sup>

Because of these gaps in coverage, HAMP has repeatedly struggled with what happens when servicing on a loan is transferred. Multiple Supplemental Directives have addressed these issues, and elaborate accounting regimes have been implemented.<sup>140</sup> All of this would be obviated by standards that apply to all servicers, big and small, state-chartered entities, federally-chartered entities and non-banks.

Loans guaranteed or held by Fannie Mae or Freddie Mac have their own rules.<sup>141</sup> Figuring out if a loan is covered by the Fannie or Freddie rules is not easy. Until recently, both Fannie and Freddie required foreclosures to be initiated in the servicer's name, not in the name of Fannie or Freddie.<sup>142</sup> While Fannie and Freddie have both created internet "loan lookup" tools, servicers sometimes dispute the results of these.

If a loan is guaranteed or held by Fannie or Freddie, homeowners and their representatives cannot rely on Treasury's HAMP Handbook, but must navigate the servicing guide for the appropriate GSE. Significantly, the GSE HAMP rules lag behind HAMP in four areas:

1. Principal reductions are not available;
2. GSE servicers have tight timelines, enforced with monetary sanctions, for initiating and processing foreclosures, and the solicitation standards require much less outreach by servicers before initiating foreclosure;

### **Limbo for Washington Homeowner: GSE (Fannie Mae) or Not GSE?**

A couple in Washington State fell behind on their mortgage after the primary breadwinner was laid off. Although one of them found new employment quickly, it did not pay enough to keep up with their bills. They have a Fannie Mae loan, serviced by HomeStreet Bank. Their loan appears in Fannie Mae's loan lookup tool, and they have received confirmation from Fannie Mae that it has owned their loan at least since 2006. Nevertheless, HomeStreet claims to be the holder of the note, not merely the servicer, and relying on this claim, has refused to participate in Washington's mandatory pre-foreclosure mediation program. Fannie Mae is clearly covered by the Washington law. However, a small lender, like Homestreet, is exempted if it is the holder and conducts less than 250 foreclosures per year.

3. There is no appeals process; and
4. Homeowners in bankruptcy face hurdles.<sup>143</sup>

Because Fannie and Freddie now account for over 50% of outstanding mortgage debt, these defects affect large numbers of homeowners.<sup>144</sup>

Even for loans unequivocally covered by non-GSE HAMP, Treasury has permitted variations based on investor restrictions, discussed in pages 31–33, and, more critically, has allowed servicers to tamper with a key variable of the net present value test, the discount rate. HAMP discounts future payments with the Freddie Mac prime weekly survey rate. This is the same rate used by the FDIC in their earlier version of the NPV test.<sup>145</sup> But Treasury permits servicers to add up to 250 basis points to the Freddie Mac prime weekly survey rate. Even small shifts in the discount rate (of one basis point) can have a major impact on whether homeowners pass the NPV test and qualify for a HAMP modification or not.<sup>146</sup> Only eleven servicers ever used an add-on discount rate, and only four still do.<sup>147</sup> But homeowners have no way of knowing whether the servicer uses an add-on, or if so how much. Allowing even the possibility of variations in the discount rate clouds the loan modification process: other reasons for differentials in servicer denial rates can be concealed behind potential differences in the discount rate.

Creditors and servicers who receive government funding on government-insured loans using taxpayer subsidies must be held to a higher standard than those operating purely in the private market.

In addition to GSE loans, the federal government has programs to encourage lending for certain market segments. These loans—made or insured by the Federal Housing Administration (FHA), the Department of Veterans Affairs (VA), and the Rural Housing Services (RHS)—are by and large made to vulnerable populations, who may have restricted access to conventional credit. A review of the abuses in the origination and servicing of these loans is beyond the scope of this paper. However, such abuses are, unfortunately, not unknown.<sup>148</sup> These government-insured loan programs have not adopted effective loan modification programs equal to the modification available under HAMP for non-government insured loans, despite the fact that they have an explicit mission of providing affordable housing, and, prior to the crisis, had more rigorous loan modification standards in place than available under conventional loans.

As a result of all of these variations in coverage, figuring out whether a homeowner qualifies for HAMP is complicated. The administration of HAMP would be simplified by universal coverage and standard rules. HAMP shows that a program where servicers can choose whether to participate or not, and with some loans in and some out, too often produces confusion and permits evasion instead of loan modification.

Nonetheless, a higher-standard is appropriate for government-insured loans such as VA loans and FHA loans that are made to vulnerable populations using taxpayer subsidies. Thus, national servicing standards must be a floor and not a ceiling: creditors and servicers who receive government funding must be held to a higher standard than those operating purely in the private market.

### c. Document Verification Has Posed Hurdles

The challenges posed by document verification under HAMP clearly illustrate the need for simplified, streamlined, and standardized document submission and verification.

HAMP requires more underwriting than most of the defaulting loans received at origination. For one thing, when loans are underwritten at origination, they are usually underwritten once. But the delay in processing HAMP modifications, sometimes for years and often for months, has meant that servicers have requested homeowners to resubmit income documentation repeatedly. Servicers have used inconsistencies in the documents, supplied months apart while homeowners wait for the servicer to process the modification, as an excuse to deny modifications.

The lack of uniformity among servicers has hampered HAMP. Servicers have been allowed to decide what constitutes proof of income for self-employed borrowers, how much documentation of debt must be provided, and whether to include the income of non-homeowner household members. Standards for demonstrating imminent default have varied widely among servicers.

Treasury has made various attempts at addressing the document morass: requiring document verification before the trial period, listing what documents servicers may require of self-employed homeowners (not, for example, audited profit and loss statements), and specifying percentages allowed for rental income, for example. But in other areas, Treasury has continued to allow servicers to use their own business judgment.<sup>150</sup>

Clear rules in this context help. For example, the rate at which homeowners in trial modifications were approved for permanent modifications improved dramatically after servicers were required to verify income up front, rather than waiting until the trial plan had started.<sup>151</sup>

Standard and streamlined rules are necessary. Without them, homeowners languish waiting for servicers to process documents and are subjected to repeated demands by servicers for yet more documents. HAMP's saga of paperwork woes teaches us that document verification requirements must be clear and consistent.

#### **Ohio Family Is Stymied by the Servicer's Documentation Bungling**

In 2009, the Kisers, an Ohio family, began making payments on an oral HAMP trial modification. After the Kisers had made seven payments, CitiMortgage instituted foreclosure proceedings, because the Kisers had never returned the information packet. The Kisers protested that they had never received the packet, and CitiMortgage agreed to send a second information packet. The Kisers received and returned the second information packet in August 2010. In September 2010, CitiMortgage sent the Kisers a third information packet, saying they had not received the second one. The Kisers returned it in October 2010. In November 2010, CitiMortgage requested a copy of a tax form and information about a non-existent bank account. The Kisers provided the tax return, and noted that the bank account did not exist. In January 2011, CitiMortgage said that it had never received the third information packet, and then rejected the Kisers for a loan modification—because of their income. The Kisers gave up their house, after nearly two years of struggling with the modification process, in despair.<sup>149</sup>

## 2. Servicers Do Not Follow the Rules

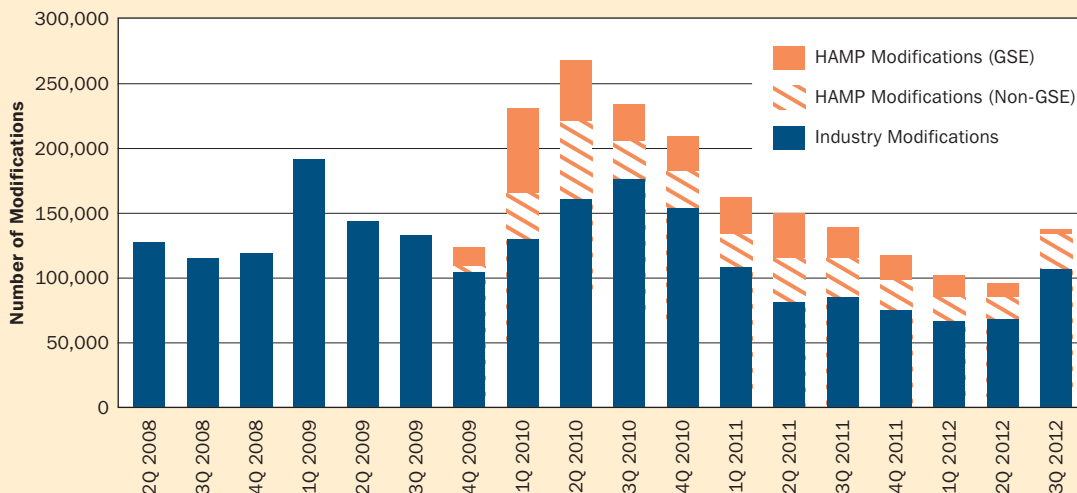
### a. Noncompliance Is Widespread

Beyond all of the technical challenges posed by HAMP's structure, there is one root cause of HAMP's failure to reach its intended scale: massive servicer noncompliance. Despite all of its progress, HAMP did not achieve its goals because homeowners have been unable and Treasury unwilling to hold servicers accountable for performance or compliance with the program's rules.<sup>152</sup> Although incremental improvements to HAMP have addressed some of these issues, their partial implementation continues to impede large-scale modifications.<sup>153</sup>

As the chart below shows, servicers have continued to prefer proprietary modifications to HAMP modifications. Both HAMP and proprietary modifications have increased primarily in response to the occasional threats of enforcement: the roll-out of the HAMP program in early 2009, when many industry observers were concerned that the Obama administration would mandate compliance and impose standards, the lead-up to the OCC and FRB settlements in early 2011, which had the potential to impose devastating economic consequences on the major servicers, and, finally, the implementation of the national mortgage settlement, which, for the first time ever, mandated modifications. But, as chart 7 shows, once the immediate threat subsided, the numbers of modifications return largely to earlier levels.

Almost every official evaluation of HAMP has noted poor servicer compliance.<sup>154</sup> Judges reviewing servicer behavior in individual cases have been scathing.<sup>155</sup> Future programs cannot take servicer compliance for granted, but must build in meaningful public and private enforcement mechanisms.

**CHART 7: Permanent Modifications, 2008–2012**



Source: OCC Mortgage Metrics Report, 2008-2012.



### *b. Servicers Fail to Complete Routine Tasks Correctly*

Under HAMP, we have learned—again and again—that servicers cannot process paperwork. Servicers fail to correctly deliver even basic, mandated form documents. Letters are mailed to the wrong address, or not sent at all.<sup>156</sup> Denials based on the failure of homeowners to submit documents—the largest single category for denials<sup>157</sup>—are often not based on the homeowners’ failure, but the servicers’ failure to correctly process documents.<sup>158</sup> Servicers routinely fail to provide correct and complete denial notices.<sup>159</sup> Employees complain that they lack access to basic tools needed to process paperwork—like fax machines.<sup>160</sup>

Servicers routinely misenter information and miscalculate information, with profound consequences for both homeowners and investors. For example, in 2011, Treasury penalized both JPMorgan and Bank of America by withholding incentive payments in large part because Treasury’s own reviews showed that these servicers were frequently failing to calculate income correctly.<sup>161</sup> Treasury, it should be noted, was only looking at whether JPMorgan Chase and Bank of America, two of the largest and most powerful financial institutions in the world, were correctly performing arithmetic operations on the numbers in their files: Treasury did not check whether the banks were obtaining and entering the correct data, only whether the numbers in the file added up. But reviews of servicers’ records by Special Inspector General for the Troubled Asset Relief Program (SIGTARP) show that a majority of the time servicers fail to enter the correct data into their systems, even when they have the correct data on documents submitted by the homeowner.<sup>162</sup> As a result, hundreds of thousands of homeowners have been wrongfully denied or have given up on obtaining a loan modification.

This is costly for both investors and homeowners. One estimate of the cost to investors of denials based on failure to process the paperwork puts the losses to investors over \$2.4 billion, just through the end of 2010.<sup>163</sup>

Large financial institutions have no excuse for errors of arithmetic.<sup>164</sup> The pervasive data entry errors SIGTARP found are shocking. Specifying the forms, and the data to be collected or distributed on those forms, as HAMP has done, is not enough. There must be enforcement mechanisms that motivate servicers to comply and ensure that documents can be received from homeowners, are received, and are properly entered in the servicer’s system.

### *c. Investor Restrictions Are Falsely Invoked*

Problems with investor restrictions have plagued HAMP.<sup>165</sup> HAMP permits servicers to decline to modify a loan when an investor agreement forbids the HAMP modification. These agreements will almost always be contained exclusively in the pooling and servicing agreements, which prohibit modifications only rarely.<sup>166</sup> Yet HAMP,

Denials of loan modifications based on failure to process servicer paperwork puts the losses to investors at an estimated \$2.4 billion, just through the end of 2010.

## Servicers Invoke False Restrictions in Denying Loan Modifications

**California:** A homeowner's attorney was told that the investor contract forbade all modifications. The servicer, Bank of America, provided what purported to be a copy of the restriction. On examination of the actual contract, however, it was clear that the document provided had been altered, by changing a comma to a period and omitting the following clause. In fact, loan modifications were generally allowed for mortgages in default or at imminent risk of default.<sup>168</sup>

**Maine:** After months of litigation, JPMorgan Chase produced an internal document summarizing the investor restrictions applicable to a pool. Upon review of the document, it was clear that the internal summary document, relied on by line-level staff in determining whether homeowners are eligible for a modification, misstated the interest

rate restrictions in the pooling and servicing document. This mistake resulted in many homeowners being erroneously denied for a modification.<sup>169</sup>

**New York:** A homeowner has tried to get a loan modification through the court-mandated foreclosure settlement conference program since August 2010. BAC Home Loans Servicing (now Bank of America) has insisted that the loan cannot be modified because of an alleged investor restriction, but has not provided a Pooling and Servicing Agreement or any other proof of the existence of the restriction or that it has sought a waiver, despite repeated orders from the court to do so. BAC doesn't seem to actually know who the owner is—in statements made to the court, it has reversed itself twice as to whether the loan is owned by Fannie Mae or another entity.

characteristically, allows servicers to determine whether or not there is an investor restriction prohibiting the modification.

HAMP requires servicers to make an attempt to obtain a waiver from investors, when agreements with the investors prevent a HAMP modification. But HAMP only requires servicers to make a single attempt per trust, however half-hearted, to obtain a waiver. Nor must servicers provide homeowners with evidence of even this basic step. And servicers need not provide homeowners with any information about the trust or the basis of the investor restriction, leaving homeowners to comb through hundreds of pages of public filings to attempt to find the putative restriction. Attorneys who contact the HAMP Solutions Center, discussed in pages 40–41, regarding investor denials find that representatives typically rely on the servicer's characterization of the restrictions.<sup>167</sup> The result of this weak oversight is confusion and misdirection.

Whether through incompetence or malice, servicers routinely falsely represent the extent of investor restrictions and fail to seek waiver of those restrictions.<sup>170</sup> Future programs

cannot rely on servicers to do the right thing. Homeowners must be given basic information about the basis of any alleged investor restrictions—the name of the trust, the language in the trust documents prohibiting the modification, and documentation of the servicer’s attempts at waiver—in order to verify that the restrictions are real. Requiring documentation will encourage servicers to better implement investor agreements.

*d. Despite Rules Requiring Homeowners to Be Evaluated for a Modification before Foreclosure, Servicers Continue to Dual Track Homeowners and Wrongfully Foreclose*

Dual track servicing is the simultaneous pursuit of foreclosure and loan modification efforts by the servicer, often by entirely different personnel. Without restrictions on dual track treatment of loans, it becomes much harder to modify loans successfully because foreclosure-related costs, such as attorney fees, court costs, and inspection fees begin to mount up.<sup>171</sup> These added amounts make it more difficult for homeowners to pay back arrearages or otherwise qualify for a modification. Servicers have strong incentives to pursue dual tracking because they can charge fees throughout the foreclosure process,<sup>172</sup> which are ultimately recouped from the trust in a foreclosure, or from the homeowner in a modification.

Even where servicers decide to halt the foreclosure process, lack of communication between different departments or between the servicer and its attorneys may result in foreclosure sales going forward mistakenly. Homeowners often naively rely on assurances by the servicer’s employees that the sale has been cancelled, sometimes with disastrous results.<sup>174</sup>

The scheduling of foreclosure sales while a loan modification application is pending presents additional logistical hurdles for a homeowner who is focused on modification. Homeowners must monitor the sale schedule, sometimes on a week-to-week basis, to make sure their home is not sold accidentally. One California homeowner reports that although she entered into a loan modification in February 2012, the foreclosure sale of her home, scheduled before she entered into the trial modification, continues in December 2012 to be rolled over from one month to the next.<sup>175</sup>

Nor are there bright lines between when the foreclosure is started and when there was a loan modification application: many of the homeowners foreclosed upon while undergoing a loan modification review were placed by servicers in multiple trial modifications. Thus, their second or third modification application may have been received after the foreclosure was started, but the original modification request was received before a foreclosure was started. Or the servicer may have initiated the foreclosure process contemporaneously with the homeowner’s mailing of the modification application. Rules that rely on when the modification was received with respect to when the foreclosure started

**Dual-Tracking Costs Kentucky Widow \$6,500**

A 76-year-old widow in rural Kentucky racked up foreclosure fees of over \$6,500, more than 15% of her modest loan balance, while waiting for the servicer to process her loan modification. Because the foreclosure fees and arrearages are now so high, the widow’s HAMP eligibility is threatened.<sup>173</sup>

to determine whether the servicer may proceed with a foreclosure introduce complexity and uncertainty into the process.

HAMP and the standards created by the GSEs require that a loan modification review be conducted before a foreclosure is initiated and that foreclosures not be pursued against homeowners making payments under modification agreements. But these rules are often breached.<sup>178</sup> The result is countless unnecessary foreclosures, sometimes accompanied by the loss of the home.

### **Servicers Evade Dual-Tracking Restrictions by Cancelling Performing Loan Modifications**

California homeowners who entered into a modification with Bank of America in September 2010 were told in February 2012, when they called to inquire about a scheduled foreclosure sale date, that their modification had been “reversed” in October 2010 and “cancelled” in February 2011.<sup>176</sup>

A Texas homeowner was pulled from a performing loan modification in April 2010 and then placed into foreclosure. Multiple new loan modification applications followed throughout the summer of 2010, with the homeowner submitting a final packet on September 1, 2010, only to have the house sold at foreclosure on September 7, 2010, six days later.<sup>177</sup>

Moreover, neither HAMP nor the GSE rules generally require that a foreclosure process, once initiated, be stayed during the loan modification review, although sale of the property itself is to be postponed under limited circumstances. At the same time, however, the GSE servicing guidelines impose strict foreclosure timelines on servicers, and the GSEs charge fines of \$30 per day for failure to meet the deadlines, even if the homeowner has requested a modification.<sup>180</sup> Neither HAMP nor the GSE rules require the crucial step of a general stop to foreclosures already initiated when a modification is being reviewed.<sup>181</sup>

Certainly, if servicers are able to complete the loan modification review before the foreclosure is initiated that is best for homeowners and investors. The incentives should weigh in that direction. But often, the need for a loan modification becomes apparent only after the foreclosure is initiated. Not infrequently, for example, homeowners at the time of foreclosure believe that they are current or have brought their loans current recently.<sup>182</sup> Receipt of a

foreclosure complaint or notice of sale may also be the reason the homeowner first seeks assistance from a lawyer or housing counselor, and first receives unbiased information about potential eligibility for a modification. Pausing the foreclosure process is a necessary part of making loan modification a viable possibility for these homeowners.

The servicing industry has argued that a pause in the foreclosure process, once initiated, would be costly. Usually, industry gestures towards the costs of the foreclosure process itself, such as advertising and publication fees, and fees for service of process. These costs, when incurred, are generally added into the arrearages in a modification or recovered from the foreclosure proceeds, in any ultimate foreclosure.

But even if the servicers did not recoup these costs, industry has often overstated their magnitude. In judicial foreclosures, mandated in nearly half the states for residential

## **Servicers Foreclose on Homeowners Making Trial Modification Payments**

A homeowner in New York received a foreclosure summons and complaint in June 2012 two weeks after timely submitting her first trial period plan payment.

A California homeowner who entered into a permanent loan modification with Bank of America in February 2012 received a Notice of Default on her mortgage in August, even though she had continued to make all payments required under the modification.<sup>179</sup>

foreclosures, there is generally no extra cost to a pause in the proceedings. A 30-day pause, as would be required for a review and potential appeal of a denial, is common in litigation. Even in non-judicial foreclosures, where servicers may need to re-advertise if the foreclosure is delayed, such costs are relatively minimal and do not outweigh the important public and economic benefits served by encouraging modifications, even after a servicer has commenced foreclosure. In most states, the foreclosure timeline itself does not need to be restarted.

The other costs correlated with a pause to review the loan modification application—the accrued and unpaid interest and the servicer’s cost to finance the homeowner’s unpaid payments—are no different from those incurred in any modification and largely within the servicer’s control.

Servicers have multiple incentives to put homeowners on a dual track, and few counterbalances.

Pressure to foreclose quickly and the availability of foreclosure-related fees naturally incline servicers to pursue foreclosure and modification simultaneously. Weighed against that are no consequences or costs (absent successful borrower litigation) for pursuing dual track, even against existing guidelines. Loan modifications should not be jeopardized by the continuation of the foreclosure process, even if the borrower has not responded to a loan modification solicitation until after the foreclosure is initiated (or even if the servicer has not recognized the homeowner’s request for a loan modification until after the foreclosure is initiated). Servicers can minimize any delay (and should be encouraged to do so) by expediting the review. By allowing servicers to continue with a foreclosure once started, the HAMP rules and the GSEs essentially provide a get-out-of-jail free card for servicers who ignore the rules.

In order to stop wrongful foreclosures, the dual tracking rules must require servicers to stop any foreclosure proceeding for the duration of a loan modification review, whether the review is initiated before or after the servicer has “referred” the loan to foreclosure. The non-existent enforcement of the rule against dual tracking, and the exception allowing the servicer to proceed with the foreclosure as long as the foreclosure sale does not occur, leads to abuse by servicers. The foreclosure process, once initiated, takes on a life of its own. Bright-line rules are needed to prevent wrongful foreclosures.

Servicers have multiple incentives to put homeowners on a dual track of pursuing a foreclosure, while a homeowner seeks a modification, and few counterbalances. HAMP rules allow servicers to do so, essentially providing a get-out-of-jail free card for servicers who ignore the rules.

### 3. *Homeowners and the Public at Large Lack Mechanisms for Holding Servicers Accountable*

#### *a. Treasury Has Failed to Provide Oversight of or Information about Servicers*

The experience with HAMP suggests that government agencies may not be able to provide effective oversight of loan modification programs and that other compliance mechanisms must also be implemented.

Servicers have been left to their own devices in implementing HAMP. Almost every official evaluation of HAMP has noted lack of enforcement by the Department of the Treasury and its agents.<sup>183</sup> In early litigation challenging the implementation of HAMP, Treasury, through its lawyers in the Department of Justice, sided with the servicers and argued that compliance with HAMP rules was discretionary.<sup>184</sup> The Department of Justice thus effectively sabotaged judicial enforcement of HAMP from the very beginning, setting the tone for the industry's response to any effort by homeowners to enforce HAMP rules.

Obtaining basic information about the program has not been easy. Treasury has not made public the results of its audits of servicers.<sup>185</sup> Nor has it released the certificates of compliance servicers were required to submit.<sup>186</sup> Even after Congress passed legislation requiring Treasury to make the key loan modification eligibility test (the net present value test) public, it took Treasury ten months to make a version of the test publicly available, and Treasury hedged that release with significant caveats.<sup>187</sup> Even courts have difficulty extracting accurate information from servicers.<sup>188</sup>

Treasury lacked the courage of its convictions and pulled its punches. For example, reporting by the Special Inspector General for the Troubled Asset Relief Program (SIG TARP) indicates that Treasury may have dropped sanctions against JPMorgan Chase in exchange for Chase's participation in the federal-state settlement for violations of servicing practices.<sup>189</sup> Servicers are encouraged and requested to comply with HAMP's guidance, but are never required to do so when they fall short. The result is a program that did not deliver on its promise. Future loan modification programs cannot rely entirely on enforcement by a single agency.

#### *b. Greater Transparency Is Needed*

##### **1. A Fully-functional, Fully-public Net Present Value Test Is Critical**

HAMP's failure to make the NPV test fully public hampered its reach. Although HAMP has demonstrated the utility of a standard NPV test, it has also shown that that utility is limited when key information is concealed from the public at large.

A critical piece of the evaluation process for any modification protocol is the NPV test. Homeowners and their advocates need an objective measure; judges and mediators need an objective measure; investors and servicers need an objective measure.

HAMP built on the work of the FDIC in creating a standardized net present value test. The FDIC test was published early on as an Excel spreadsheet that anyone could

download and take for a test drive: its assumptions were fully transparent and the underlying programming accessible.<sup>190</sup>

In contrast, the HAMP NPV test was long held as a closely guarded secret. A lengthy white paper explaining the algorithms was published, but the test itself was not made available to the public in any accessible format. Only servicers are allowed to see the actual numbers underlying the assumptions. It took an act of Congress to persuade Treasury that servicers should provide homeowners with the numbers used in the NPV test and that everyone—homeowners, judges, and mediators—should have access to a version of the NPV test.<sup>191</sup> And it then took Treasury ten months to make a version of the NPV test publicly available.<sup>192</sup>

By the time Treasury made the test available via the web portal CheckMyNPV, an estimated 150,000 homeowners were denied HAMP modifications based on the NPV test.<sup>193</sup> Likely, many of those denials were erroneous. Servicers routinely fail to use the correct inputs for the NPV (SIG TARP found correct and complete NPV inputs in only two out of the 149 files it reviewed).<sup>194</sup> One academic reviewing the HAMP data found that approximately 12% of all NPV denials actually had a positive NPV value.<sup>195</sup> Treasury's delay had real and painful consequences for homeowners and investors.

Housing counselors and attorneys all across the country use CheckMyNPV in screening clients for loan modifications and pushing for sustainable modifications that save all parties money. Judges and mediators refer to its results in assessing the candor of servicers appearing before them. But persistent problems plague the implementation of CheckMyNPV.

There are numerous operational problems with the CheckMyNPV. The web interface times out; if a homeowner is in the middle of completing the questionnaire and is called away to answer the door or tend to a child (or even takes too long finding a relevant piece of information in the documents or calculating, for example, the number of months remaining in the loan's amortization term or the current unpaid principal balance plus accrued interest and fees), the homeowner will return to find that none of the data is saved and the homeowner must re-start the process of completing CheckMyNPV. The results returned are often confusing; again, unlike the FDIC NPV test, which returns a clear "pass" or "fail," CheckMyNPV will sometimes return error codes (e.g., "Error Code 69") with no explanation. Because the entries are not saved, and because there is no downloadable form, if a homeowner encounters one of those error codes, the homeowner must resort to trial and error, re-entering and changing all of the dozens of distinct data inputs. While the glossary provided is helpful, there are few calculators or other tools to help homeowners do the math. In short, CheckMyNPV remains a clunky tool, with only limited transparency.

By the time Treasury made the HAMP net present value (NPV) test available in April 2011, an estimated 150,000 homeowners had been denied HAMP modifications based on the NPV test. One reviewer of the HAMP data found that approximately 12% of all NPV denials actually had a positive NPV value.

Treasury has also undercut the utility of CheckMyNPV by hedging it with legal disclaimers. We are told that this is not the actual NPV, but only an “estimate,” and that homeowners should discuss differences with their servicers.<sup>196</sup> Again, Treasury has pulled back from requiring and implementing a truly standard program and deferred unduly to servicers.

Nor is the test fully public; unlike the FDIC’s NPV test, homeowners and their advocates cannot access the underlying programming or formula or review the underlying assumptions. For example, Treasury has allowed the discount rate that servicers are permitted to add on to the Freddie Mac prime weekly survey rate in determining the present value of the proposed loan modification to remain a secret.<sup>197</sup> This undermines the standard, universal application of the HAMP rules. Homeowners have no way of finding out if their servicer uses a discount rate, and if so, how large it is. Even small shifts in the discount rate (of one basis point) can have a major impact on the pass or fail rates.<sup>198</sup>

The lack of transparency in the NPV test has undermined HAMP’s reach and its fairness. Indeed, as SIG TARP has noted, the overall lack of transparency in the application and evaluation process, of which the NPV test is a key component, has enabled foreclosure rescue scams to flourish.<sup>199</sup> As demonstrated by HAMP’s history with the NPV test, full transparency as to the application process and criteria for eligibility is necessary for a successful loan modification regime.

## 2. HAMP’s Data Reporting Permits Only Partial Accountability

HAMP’s data reporting has helped inform the public debate over loan modifications. But Treasury has failed to collect enough data, to ensure that the data it collects is reliable, and to make public the relevant information. Future programs should expand on the limited data made available under HAMP.

From the beginning of HAMP, Treasury has made public some aggregate data on HAMP. But the data Treasury published do not illuminate the core questions as to why so few modifications have been offered and accepted: do homeowners not apply, do homeowners not qualify, or do servicers fail to process eligible homeowners? Nor do the data tell us much about who gets modifications: Homeowners with housing counselors? Homeowners in bankruptcy? Are there differences by age, race, gender, or national origin that would implicate fair housing or fair lending concerns?<sup>200</sup> Were homeowners who failed to get modifications NPV positive (i.e., is the failure to offer modifications costing investors money as well as communities and individual homeowners)? Answering these questions, and providing related data, could improve future loan modification programs.

The data gaps are particularly stark for information by servicer. Treasury publishes quarterly statistics on HAMP performance, by servicer.<sup>201</sup> These data, for example, confirm that Bank of America and JPMorgan Chase have problems with HAMP compliance that are even disproportionate to their size.<sup>202</sup> Some servicers clearly perform better than others.<sup>203</sup> But the available data does not tell us why some servicers perform better than



others, or whether the modifications offered vary by servicer, key questions in assessing program design and servicer compliance.

One key question, for example, is whether servicers properly calculate arrearages, particularly when the servicer has delayed a conversion from a temporary modification to a permanent modification. Under HAMP, when there is a delay in conversion of a trial period modification to a permanent modification, servicers are required to waive the difference between the interest accrued under the pre-modified terms and the interest accrued under post-modified terms. (Failure to waive the accrued interest can result in lost home equity, high out-of-pocket fees for homeowners, and erroneously denied loan modifications). While there is general reporting about conversion rates, there is no way to verify that servicers are waiving the excess interest accrued, or if some servicers are doing a better job in complying with this provision of HAMP than others.<sup>204</sup>

Treasury's data is also statistically suspect. Servicers often fail to complete fields and may make mistakes in the fields they do complete. It is unclear whether there is any meaningful review by Treasury of the data submitted. Certainly, failure to complete the data reporting requirements accurately has not made it onto Treasury's list of reasons servicers may be sanctioned. By providing its sister agencies with limited data of dubious quality, Treasury has tied the hands of the government agencies charged with enforcing fair lending and consumer protection laws.

Policymakers and regulators must be able to determine if the program is being implemented appropriately. The public wants to know whether individual companies are following the rules and whether borrowers, as a whole, are being treated fairly. Investors want to know if servicers are making sound business decisions with their money.<sup>205</sup> With the data Treasury currently collects and makes public, neither the public at large nor investors nor policymakers can answer any of these questions. In the absence of adequate data collection, policymakers are left to rely on anecdote in setting rules that regulate the marketplace.

Greater transparency as to the performance of individual servicers would increase public confidence in the integrity of any loan modification program. It would also increase public accountability for servicers. Without transparency and detailed data, there is no meaningful deterrent to lax policies and practices in loan modification. One lesson of HAMP is the need for rigorous transparency and meaningful data collection.

The data Treasury has made available does not tell us whether the modifications offered vary by servicer, a key question in assessing program design and servicer compliance.

### *c. Homeowners Need an Effective Third-Party Appeals Process*

HAMP has modeled the beginnings of a third party appeals system. HAMP's history shows the need for a more rigorous process than that available under HAMP.

Homeowners have no control over which company services their loan, so they cannot vote with their feet in response to servicer mistake or malfeasance. There is no market pressure on servicers to give homeowners complete information or to respond when homeowners claim the servicer has made a mistake.

For most loan modifications, short of litigation, there is also no appeals process. If a servicer denies a modification, homeowners face foreclosure without any review. For GSE loans, homeowners or the housing counselors or attorneys who work with them can call a general toll-free number at either Fannie or Freddie if they encounter problems in accessing an appropriate loan modification.<sup>206</sup> Counselors and attorneys calling on behalf of homeowners report that the staff answering the phone cannot help and often seem unaware of any method for handling review of complaints about the loan modification process. Homeowners and the housing counselors and attorneys who assist them rely on individual contacts within the GSEs to intervene; there is no effective appeals process.<sup>207</sup>

Treasury created a weak appeals process for non-GSE loans, the HAMP Solutions Center, which fields calls from housing counselors and fields calls from housing counselors and attorneys.<sup>208</sup> It may be that servicers, who depend on servicing contracts with Fannie for much of their business, are inclined to respond well to the Fannie Mae employees who staff the HSC under Fannie Mae's contract with Treasury as HAMP's program administrator. In any event, the HSC process provides a bully pulpit to get the servicer's attention. Sometimes, servicers will respond to an HSC inquiry with more information than the servicer was willing to give the homeowner.<sup>209</sup> Or they may agree to review a case internally that they had been ignoring. Many advocates report having used the appeals process to obtain modifications for clients who were initially denied. Attorneys and counselors working with homeowners who have Fannie Mae or Freddie Mac loans sometimes try to use the third-party appeals process Treasury created for non-GSE HAMP-eligible loans.<sup>210</sup> The limited appeals process built into HAMP is better than the nothing that exists elsewhere.

But the appeals process built into HAMP is limited. Homeowners who are unrepresented cannot access the HSC. Attorneys are sometimes told that they cannot access the HSC, particularly if they do not work for a nonprofit.<sup>211</sup> Treasury apparently created these rules to protect homeowners from loan modification scammers; of course, anyone who is advocating for a homeowner with HSC is already providing more service to a homeowner than most scammers can be bothered with. It is the very absence of enforcement and transparency that creates the fertile ground for scammers.<sup>212</sup> Advocates circulate lists of tips to get better results in dealing with HSC: if you get an email response and the response is not helpful, clearing the subject line will ensure that the email goes to a different person at HSC; asking for the supervisor of the HSC by name will often give you a different answer, even though you never talk to the supervisor; putting

“Foreclosure Sale Scheduled” in the subject line may get you a response in less than a week’s time.

HSC representatives are often reluctant or unable to challenge a servicer’s response.<sup>213</sup> At one point, Treasury opined that servicers could elect not to respond to HSC if there was any active litigation involving the homeowner<sup>214</sup>—effectively excluding from the appeals process all the homeowners in the 20 states that only have judicial foreclosure, where every foreclosure involves litigation between the servicer and the homeowner.<sup>215</sup> Often, even in cases where the HSC representative agrees that the servicer violated the rules, the HSC will close the case if the servicer refuses to change its position. A summary prepared by the Connecticut Fair Housing Center found that HSC was helpful in getting the servicer to provide a denial notice, for example.<sup>216</sup> But, HSC had never been helpful in getting a servicer to move a homeowner stuck in a trial modification into a permanent modification.<sup>217</sup> HSC fails to provide the most needed relief—access to loan modifications that homeowners are eligible for—while rubber stamping too many decisions.

The experience with HAMP’s limited appeals process demonstrates the need for a rigorous, independent review process for all borrowers in order to improve access for qualified homeowners to loan modifications.

#### *D. Getting the Details Right Matters*

##### *1. A Single Point of Contact Can Streamline the Loan Modification Process When Implemented Correctly*

Servicers have long consigned homeowners and their advocates to a recurring phone tree nightmare.<sup>218</sup> A single point of contact can help cut through this morass.<sup>219</sup> The experience under HAMP with a single point of contact demonstrates the promises and pitfalls of this approach to improving access and accountability for homeowners.

In practice, the HAMP single point of contact<sup>220</sup> has helped some homeowners and streamlined the modification process. If the designated single point of contact is available and knowledgeable, the loan modification process is expedited. But homeowners who are assigned an incompetent, overwhelmed, or unavailable single point of contact are no better off. Phone systems at the major servicers automatically route callers to their designated single point of contact once the loan number is entered. Homeowners whose phone calls and emails are never returned cannot seek help from a supervisor or alternative case-manager: as soon as they tell the operator or new case manager what the loan number is, they are returned to the same dead-end voicemail box.<sup>221</sup>

Advocates report that even sympathetic supervisors are unable to break the death grip of a single point of contact. One Brooklyn homeowner had three separate single points of contact assigned in two months, none of whom returned phone calls. When her attorney tried to escalate the matter at the servicer, the attorney was sent back to the voice mail of the single point of contact—even though she had told the escalations team that she was calling to complain about the failure of the single point of contact to return phone calls.<sup>222</sup>

Having a single point of contact without an appeals process, review, or meaningful enforcement of minimum standards consigns homeowners to the whims of fate and the unfettered discretion of relatively low-level employees at the servicer. As with every-

thing else about HAMP, good intentions are undone by misplaced reliance on servicers' voluntary and competent execution of the program. We can build more effective and flexible models for single point of contact.

## Loan Modifications and Bankruptcy Issues

Bankruptcy provides a mechanism for families to address all of their debts at once, in an orderly fashion. In both chapter 7 and chapter 13 cases, homeowners discharge most of their unsecured debts (credit cards, medical bills). They emerge from bankruptcy with an enhanced capacity to pay secured debts, such as mortgage loans. A mortgage loan modification is more likely to succeed—benefiting homeowners and lenders—if the homeowner's overall debt burden is reduced.

Bankruptcy can be particularly important when the home is also subject to one or more junior liens because bankruptcy allows the junior liens to be reduced, leaving more money available for payments on the first lien, and reduces the junior lien contemporaneously with the modification of the first lien mortgage, instead of after the fact, as happens with modifications outside of bankruptcy. Moreover, bankruptcy ensures that the junior liens get reduced in order of their priority, reducing the potential for junior lien holders to profit at the expense of senior lien holders. When servicers fail to process loan modifications for homeowners in bankruptcy, they undermine both the bankruptcy process and the loan modification process.

### 2. *Access to Modifications in Bankruptcy Can Help Homeowners Address Their Full Financial Picture*

HAMP has shown that allowing homeowners in bankruptcy to access modifications on the same terms as other homeowners is critical for the program's success, but that more than explicit rules are needed. For the bankruptcy rules as for all else under HAMP, servicers have undermined well-intentioned and detailed rules through their noncompliance.

The HAMP guidelines address several specific circumstances that often arise for homeowners in bankruptcy, including:<sup>223</sup>

- Homeowners who receive a chapter 7 discharge are not required to reaffirm the mortgage debt in order to qualify for HAMP.
- Servicers must not object to confirmation of a homeowner's plan, move for relief from the automatic stay, or move for dismissal of the chapter 13 case on the basis that the homeowner is making reduced payments under a HAMP trial period plan.
- If approval of the modification by the bankruptcy court is necessary, the servicer must work with the homeowner or homeowner's counsel to obtain the court's approval and must extend the trial period plan for up to an additional two months, if necessary to obtain the court's approval.

This general policy, permitting modifications for homeowners in bankruptcy, is in accord with HAMP's general prohibition on clauses requiring waivers of legal rights and its explicit protection for homeowners in litigation.<sup>224</sup>

Despite the HAMP rules, servicers have been reluctant to do loan modifications in bankruptcy. In part, servicers rely on, and are sometimes genuinely confused by, the fact that the GSEs have continued to allow servicer discretion when the borrower is in bankruptcy. Freddie Mac has largely brought its guidance into line with the standard HAMP guidance, with one exception,<sup>225</sup> but Fannie Mae has not. The current Fannie Mae servicing guide still allows servicers to refuse to consider homeowners for GSE-HAMP if the homeowner files bankruptcy prior to the trial modification.<sup>226</sup>

Some servicers have refused to do modifications unless the homeowner reaffirms the mortgage debt, even though Congress explicitly permitted mortgages to be serviced in bankruptcy without a reaffirmation in amendments to the bankruptcy code in 2005,<sup>227</sup> and even though many bankruptcy judges will not approve reaffirmations.<sup>228</sup> HAMP explicitly provides that reaffirmations are not required,<sup>229</sup> but servicers continue to demand them.

Servicers have also refused to do loan modifications for homeowners in bankruptcy, citing a fear of violating the automatic stay.<sup>230</sup> This fear is a phantom. There is no evidence that any court has found a servicer in violation of the automatic stay rule by offering a homeowner a loan modification. HUD, in guidance to FHA servicers, has explicitly recognized that offering a loan modification does not violate the automatic stay or a discharge order.<sup>231</sup> Servicers have relied on this pretext in ignoring HAMP's clear directives to provide modifications to borrowers in bankruptcy.<sup>232</sup>

Treasury has exacerbated the compliance problems by permitting servicers to ignore escalations if the homeowner has filed bankruptcy.<sup>233</sup> A servicer need only say that the homeowner has filed bankruptcy to be excused absolutely from the escalations process, even if the complaint raised by the homeowner in escalations is the failure to comply with the HAMP rules regarding bankruptcy.

HAMP's explicit rules regarding bankruptcy are sensible and appropriate. The failure of the GSEs to adopt similar rules, and the lack of enforcement of HAMP's rules, have barred many borrowers in bankruptcy from needed and appropriate modifications. Future rules must provide both for equal access to modifications for borrowers in bankruptcy and for enforcement of those rules.

### ***3. Payments on Junior Mortgages and Mortgage Insurance Should Be Included in Assessing Affordability***

HAMP ignored some of its own lessons on loan modification affordability by ignoring the impact of payments for mortgage insurance and for junior mortgages. Future programs should learn from those limitations of HAMP.

Because the affordability analysis does not include second liens or mortgage insurance (which were both, often, key ways to push homeowners into borrowing more than they could afford or was sensible), the median monthly housing debt-to-income ratio for homeowners who receive HAMP modifications is still 53.3%, after the modifications.<sup>234</sup> Additionally, because second liens were not included in HAMP's affordability analysis,

many homeowners whose total mortgage payment was unaffordable and well in excess of 31% were excluded from consideration for a HAMP modification because their first mortgage payment alone was less than that.<sup>235</sup> Homeowners with mortgage insurance may also be excluded from consideration for HAMP modifications because their mortgage

payments look affordable, even though the payments, when combined with mortgage insurance, are not.

## Death Traps

Homeowners, struggling with their grief after the death of a spouse or parent, often face Herculean tasks in order to obtain a modification. For example, a South Brooklyn, New York woman whose husband died in 1999 has been attempting to negotiate a loan modification with Wells Fargo since 2008. Wells, however, refuses to discuss a modification because only her husband was on the original note.

In another example, Bank of America sent a deceased Indiana homeowner a letter denying a loan modification because it had received no documents from her (unsurprising, since she had been dead for over two years at that point). However, her long-time partner and co-owner of the home had submitted a complete loan modification packet and a death certificate numerous times. Worse, a representative of Bank of America appeared at the home one day and demanded repeatedly to talk with the deceased homeowner and refused to talk to the remaining co-owner, despite her repeated explanation that she was the surviving joint tenant and a signatory to the note.<sup>238</sup>

Affordability assessments should include all of the mortgage debt service, as well as insurance and taxes. HAMP's reach and success in reducing payments to affordable levels were undercut by HAMP's failure to include all mortgage debt service in affordability assessments. Future loan modification programs should not make this mistake.

## 4. *Widows, Orphans, and Divorcees Need Streamlined Access to Loan Modifications*

Homeowners who have the means to pay a modified mortgage payment are routinely denied modifications after the death or divorce of the obligor on the note.<sup>236</sup> In September of 2011,<sup>237</sup> Treasury adopted some protections, but failed to bring servicers into compliance with federal law. HAMP shows that servicers need explicit guidance if widows, orphans, and divorcees are to receive loan modifications. Even with the limited guidance provided by Treasury, servicers continue to deny loan modifications on principal residences to homeowners who succeed to the note after the death or divorce of the original borrower.

Servicers will usually not recognize the authority of a homeowner who is not on the note to modify a mortgage. This is the case even where there is a divorce decree or probate court order transferring responsibility for the mortgage to the homeowner who remains in the house. Until the homeowner has assumed the note and its responsibilities, servicers refuse to allow a modification. But, in a classic Catch-22, servicers will not allow assumption of the note

while the mortgage is in default—and the only way to bring the mortgage out of default is via a loan modification. The result is often unnecessary and expensive foreclosures, at a loss to the investors as well as the homeowners.

The federal Garn-St. Germain Act forbids this conduct.<sup>239</sup> But only homeowners with tenacious attorneys are able to compel modifications after the death or divorce of the original obligor. The lack of intelligent and humane oversight of servicers leaves vulnerable homeowners without an attorney facing foreclosure in situations in which no sane person would think a foreclosure was warranted.

We cannot rely on servicers to exercise good judgment. Clear and explicit guidance, in full conformity with existing law, must be given to protect the rights of vulnerable.

### **5. Trial Modifications Penalize Homeowners and Lead to Conversion Problems**

Trial modifications are a failed HAMP innovation. The two-step process under HAMP—a trial modification followed by conversion to a permanent modification—has given rise to a great deal of litigation.<sup>240</sup> In theory, the trial modification period should produce higher numbers of permanent modifications by reducing the re-default rate, and thus increasing the number of homeowners who pass the NPV test. In practice, the two-step process has led to needless delay and expense.

During the trial period, interest and fees continue to accrue, at least until the effective date of the permanent modification. When there is a delay in conversion, servicers are required to waive the difference between the interest accrued under the pre-modified terms and the interest accrued under post-modified terms, but there is no evidence that servicers actually do this. The interest that accrues during a delay can be significant. For instance, a homeowner with a \$200,000 mortgage at 6.5% interest and who makes all of the trial modification payments as agreed will end up owing an additional \$1,574.69 in interest during a three-month trial modification, even if there is no delay in converting the trial modification to a permanent modification.

Homeowners are also penalized by the credit reporting mandated by HAMP. Under the HAMP requirements, a homeowner who enters a trial modification delinquent on her mortgage continues to be reported to the credit bureaus as delinquent for the duration of the trial modification, even if she is making every trial modification payment as agreed.<sup>241</sup> The penalty is worse for homeowners who are current at the time of the modification: while they are reported as current, they are also reported as making payments under a plan,<sup>242</sup> which can result in a hefty downgrade to their credit.<sup>243</sup>

These consequences multiply for homeowners when a conversion is delayed, as many are. As of October 2012, there were nearly 12,000 HAMP trial modifications that had

#### **Massachusetts Homeowners: Multiple, Costly Trial Plans**

A Massachusetts couple was approved for a Trial Period Plan by their servicer, Litton. After the homeowners made all three payments, Litton sent them a demand for over \$7,000 in arrearages and fees and a foreclosure notice. The couple used retirement savings to pay the arrearages (and paid a tax penalty for early withdrawal from a retirement plan). Litton then sent the couple a new Trial Period Plan agreement with a slightly different monthly payment amount. Only when the couple hired a lawyer, did Litton agree to recalculate a year's worth of payments and remove the excess interest charged.

lasted six months or more, twice the length dictated by HAMP guidelines.<sup>244</sup> With HAMP's high rates of success, and low rates of re-default, there is really no reason for a two-step process, if the trial modification is based on actual, documented income, as the HAMP modifications are.

HAMP's two-step process enables persistent servicer misbehavior.<sup>245</sup> Servicers demand repeated submissions of documents, even after the trial plan, and discover new investor restrictions months into the trial plan. Servicers routinely place homeowners into multiple, sometimes overlapping, trial plans.

Treasury has continued to allow servicers to sign the permanent modification agreements after homeowners. The result is that many servicers never sign and return to the homeowner the permanent modification agreement. Some servicer representatives have told homeowners that they never sign permanent

modifications. Servicers then use their failure to return to the homeowner a countersigned copy of the HAMP modification as evidence that there never was a permanent agreement. Homeowners who make every payment required by the trial period plan in full and on time have had to resort to litigation to get permanent modifications or have servicers recognize the permanent modification.<sup>246</sup> Homeowners without representation are left facing foreclosure in these situations.

In theory, the trial modification period should improve access: the re-default rate on permanent modifications, entered into after three months of timely payments, is surely lower than for permanent modifications entered into without a trial period, and lower re-default rates tip the scales toward an

NPV positive result. But the problems in practice with conversion far outweigh marginal improvements in the re-default rate.

As a result, trial modifications have become a barrier to obtaining permanent loan modifications. Trial modifications were not common before HAMP. Trial modifications are a failed innovation and should be abandoned.

As of April 2012, there were still over 12,000 HAMP trial modifications that had lasted six months or more, twice the length dictated by HAMP guidelines.

### No Permanent Modification, No Home

A New York homeowner who entered into a trial modification with Chase in January 2012 made monthly trial modification payments of \$1,247.93 through October, when Chase rejected his payment. Chase never returned any permanent modification agreements and has initiated foreclosure without explanation.



## 6. *Companion Programs to HAMP Are Important for Reaching Homeowners for Whom a HAMP Modification Is Not Appropriate*

### a. *Overview*

HAMP helped many people and could have helped more, but no loan modification program can help everyone. The Obama administration has introduced various programs to fill gaps in HAMP. These companion programs show first steps toward the holistic approach needed to address foreclosures.

There are limits to the homeowners that can be helped under any loan modification program modeled on HAMP. Homeowners with significant equity in their homes are unlikely to pass the NPV test. Unless those homeowners can refinance, they will face foreclosure, even though the foreclosure is costly and questionable as a matter of public policy. Because unemployment income is excluded from the income calculation under HAMP, homeowners experiencing short-term unemployment will not qualify for HAMP. (Of course, if the unemployment is in fact short term, what homeowners need is not a permanent modification of their loan terms but a temporary forbearance followed by a modification based on their income upon re-employment). Some homeowners will be unable to make the mortgage payments even after a HAMP modification because of subsequent life events, such as death or divorce that reduce household income. Other homeowners are not willing or able to remain homeowners and so a modification does not make sense.

All of the programs introduced to fill these gaps have potential, but none of these approaches, on its own, is an adequate response to the crisis or even for foreclosures in ordinary times. The gaps in the coverage offered by HAMP demonstrate what we need, beyond modifications, for an effective response to foreclosures.

### b. *Homeowners with Equity*

HAMP is particularly limited in the relief it can give to borrowers with equity in their homes. Our experience with HAMP and the Home Affordable Refinance Program (HARP) shows that other models for high-equity homeowners must be developed. Seniors, in particular, who have fallen into default should have options available to them other than selling their homes.

HARP allows servicers to offer current homeowners a streamlined refinance. It can work well for homeowners who have equity in their homes. However, HARP has had a limited reach. Refinancing is limited to homeowners who are current, which means homeowners who most need a lower payment (or who have defaulted on their servicer's instructions) are excluded.<sup>247</sup> HARP also does not by its terms ensure affordability of payments. The risk is that even after the benefit of a term extension and rate reduction achieved through refinancing, the payment (usually based on a larger principal balance, which includes the refinancing costs) may, in fact, not be sustainable for a homeowner just scraping by.

The most fundamental flaw in HARP, however, is the same as HAMP's fundamental flaw: the refinancing decision is left to the servicers. If the servicers would rather foreclose than refinance, they are free to do so.

Homeowners are left to the mercy of servicers in HARP as surely as they are in HAMP, and the result has been unnecessary foreclosures. Seniors are hardest hit by this gap in the administration's response to the crisis, because they are the ones most likely to have equity in their homes.

This result is inequitable and short-sighted. Future programs must close this gap.

### *c. Unemployed Homeowners*

HAMP's failure to deal equitably and adequately with unemployed borrowers serves as a cautionary tale for future programs.

HAMP initially allowed unemployed homeowners to be considered for modifications, but then forced all homeowners into short-term forbearance plans.<sup>248</sup> HAMP's companion Unemployment Program (UP) evolved to offer a long-term forbearance, but still failed to address the substantial accumulated arrearages for homeowners.

Forbearance is an ineffective approach on its own. Homeowners who find new work after prolonged unemployment generally do so at lower wages than they made before the unemployment, not the higher wages necessary to resume regular payments and pay off the arrearages.<sup>249</sup> Unless forbearance is coupled with other modifications, unemployed homeowners continue to face the prospect of foreclosure for their inability to make large lump sum payments upon re-employment.<sup>250</sup>

In May of 2010, Treasury mandated that homeowners with unemployment income first be evaluated for a forbearance of up to 12 months (originally, the program only required a forbearance of three months to six months, which was less than the median length of unemployment in the country at the time).<sup>251</sup> Homeowners with unemployment income must be evaluated for this forbearance instead of a HAMP modification, even if they have other income (another wage earner in the family or rental income, for example) that would permit payments on a modification and even if their prospects for re-employment are slim.

At the end of the 12-month forbearance period, the homeowner will have amassed substantial arrears in the mortgage payments, plus late fees for each month of the forbearance. Although Treasury requests that servicers enter into payment plans with homeowners for the arrearages,<sup>252</sup> nothing requires that servicers do so. Moreover, if the regular mortgage payment, not including any

extra amount needed to repay the arrears, is less than 31% of the homeowner's income upon reemployment, the homeowner will not be eligible for HAMP. As a result, homeowners who are re-employed, but not making more than they were before they were

The administration's Unemployment Program is a trap for the unemployed. A better model would incorporate low-cost loans to enable unemployed homeowners to repay the arrearages without paying a large lump sum.

unemployed, are likely to face foreclosure based on the arrearages accumulated during the 12-month forbearance. The administration's UP is a trap for the unemployed.

A better model would incorporate low-cost loans to enable unemployed homeowners to repay the arrearages without paying a large lump sum. Such a model has existed in Pennsylvania's Homeowners Emergency Mortgage Assistance Program (HEMAP) for decades. Over the course of its existence, HEMAP has made money for the state while saving thousands of homes.<sup>253</sup> The federal Emergency Homeowners Loan Program<sup>254</sup> was stymied in replicating the success of the HEMAP program through its limited duration, its rushed roll out, and its lack of coordinated outreach.

HAMP has been inadequate to meet the needs of unemployed homeowners. We should learn from this experience to think more boldly about appropriate relief for temporarily unemployed homeowners.

#### *d. Homeowners Who Experience Subsequent Hardship*

HAMP has failed homeowners who experience a subsequent hardship after receiving a modification. The limited response of HAMP to this failure, through HAMP Tier II modifications, acknowledges the problem without answering it. Future programs should, from their inception, build in a plan for addressing fairly and appropriately hardship that occurs after the loan modification is entered into.

The HAMP Tier II modifications allow homeowners who do not qualify for HAMP or who have failed a HAMP modification a second bite at the apple. This is necessary and appropriate. Where there is a positive NPV test and a willing homeowner, it will seldom make economic sense to foreclose. In the many cases where the HAMP failure is caused by the death of a family member or subsequent unemployment, failing to offer a new modification punishes homeowners who have done nothing wrong.

Yet, the HAMP Tier II modifications have even fewer protections for homeowners than regular HAMP modifications. Nothing in the Administration's guidance even requires solicitation of homeowners for HAMP Tier II modifications.<sup>255</sup> This is a further weakening of the already lax oversight under HAMP. Nor are there meaningful protections for affordability: the homeowner's debt-to-income ratio can range as high as 42%.<sup>256</sup> HAMP Tier II's combination of elevated interest rates (compared to HAMP) and forced principal forbearance means that many homeowners will face large balloon payments at the end of their notes or earlier, if they wish to sell or refinance. Homeowners who fail a HAMP modification due to a change in circumstances should be evaluated for another HAMP modification.

Homeowners for whom a HAMP modification is too expensive, whether from the get-go, or after entering into the HAMP modification, should be evaluated for a loan modification with a lower payment, even if this means that the ratio of the modified mortgage payment to the homeowner's income is less than 31%. Homeowners with low incomes are particularly likely to face this problem after incurring substantial medical bills or other back-end debt.<sup>257</sup>

We have learned from HAMP that mainline, standard HAMP modifications are extraordinarily successful. We should extend those lessons even to those homeowners who cannot pay on their modifications due to a subsequent reduction in income. This issue is of particular importance because the HAMP Tier II program was imported from the GSE Standard Loan Modification regime—an approach that will remain as the primary approach to GSE modification after HAMP expires, unless a change is made.

*e. Homeowners for Whom a Modification Is Not Appropriate*

HAMP acknowledges through the Home Affordable Foreclosure Alternatives (HAFA) program that protections are needed even for those homeowners for whom an exit from homeownership makes the most sense.<sup>258</sup> HAFA's limited implementation reflects servicer noncompliance more than fundamental weaknesses in the program.

A loan modification is simply not appropriate for some homeowners. Some homeowners did buy more house than they could afford or have insufficient income or other resources to maintain homeownership. Some homeowners wish to exit homeownership in order to relocate for work or family. These homeowners deserve the opportunity to have a dignified and orderly transition from homeownership.

HAFA is a sensible response to this problem. It provides for short sales or deeds-in-lieu of foreclosure, with small payments to homeowners that may be used to pay down junior lien holders or help with moving expenses. These payments have long been standard in foreclosures, and indeed the payments under HAFA are several thousand dollars lower than what advocates report servicers routinely offered pre-HAFA.

The short sale provisions are helpful, as they require the servicer to identify up front what is an acceptable sales price for the home. This assists homeowners and their realtors in negotiating a sales price, and prevents the chaos engendered by a servicer's refusal to respond to a short sale offer in a timely fashion.<sup>259</sup> HAFA also promotes fundamental fairness by requiring servicers to waive any deficiency judgment against homeowners in exchange for negotiating the short sale or deed-in-lieu of foreclosure. (Again, this waiver of deficiency was standard before the current crisis).

The problem is that there is no enforcement mechanism for HAFA. Advocates report that homeowners are routinely steered out of HAFA into non-HAFA short sales and deeds-in-lieu, where homeowners are forced to negotiate for all of the protections afforded under HAFA. Indeed, non-HAFA short sales and deeds-in-lieu vastly outnumber HAFA short sales and deeds-in-lieu, with nearly as many non-HAFA short sales and deeds-in-lieu being done in a single quarter as HAFA short sales and deeds-in-lieu have been done since its inception.<sup>260</sup>

Future guidelines, again, cannot take servicer compliance for granted and must build in enforcement mechanisms, even for those homeowners who are destined to surrender their homes.

## IV. APPLYING THE LESSONS OF HAMP TO THE FUTURE

### A. *The Federal Agencies Must Act*

This report focuses on HAMP—its successes, its potential, and its pitfalls. HAMP is the most detailed, most recent, and in many ways strongest example from which future servicing rules can be developed. However, it failed to achieve its potential because it relied on servicers' competence and good will. Systemic risk was introduced through this misplaced reliance. Treasury tolerated servicer evasion of HAMP's requirements. Voluntary contracts with minimal oversight left loopholes through which poured billions of dollars of home equity, never to be recovered.

Incentives as the primary tool for servicing compliance have not worked.<sup>261</sup> Mandates are required. HAMP's basic structure—affordable loan modifications available according to a standardized protocol—must be extended to the entire marketplace. Treasury's assumption that servicers, left to their own devices, will do the right thing, cannot serve as the foundation for future policy.

Mortgage servicing that meets the needs of homeowners, communities, and investors—and not simply of the mortgage servicers themselves—will require clear, sensible rules and rigorous enforcement. That requires leadership. A set of rules pegged to the least-common denominator of varied agency positions will fail to deliver needed reform.

To date, all of the federal agencies, not just Treasury, have failed to act aggressively to contain the crisis. The Office of the Comptroller of the Currency has deferred to servicers and their hired consultants to determine where proper corrective action should be taken to remedy unprecedented findings of illegal activity by the servicers.<sup>262</sup> The federal-state Attorney General settlement includes a strong beginning to servicing standards, but it does not have permanent or industry-wide reach and falls short in its treatment of dual tracking during foreclosure and enforcement provisions for homeowners. As of this writing, the Consumer Financial Protection Bureau (CFPB) has issued proposed rules to address servicing failures<sup>263</sup> that are utterly inadequate.<sup>264</sup>

The CFPB is well positioned to issue strong national mortgage servicing standards that apply to the entire market and are enforceable by homeowners. The CFPB's jurisdiction over servicers and its powers of enforcement and rulewriting under the Truth in Lending Act and the Real Estate Settlement Procedures Act (RESPA) provide it with the authority to establish national servicing standards.<sup>265</sup> In fact, Congress recently amended RESPA to explicitly incorporate foreclosure avoidance.<sup>266</sup> The CFPB also has a mandate under the Dodd-Frank Act to prohibit mortgage lenders from making loans that borrowers cannot repay. If it adopts strong rules, there will be fewer loans in the future in need of modification, so the demand for loss mitigation will decrease.

If the CFPB does not move aggressively, other agencies should take the lead. Other agencies could act, either in the interagency process underway or through separate

The CFPB is well positioned to issue strong national mortgage servicing standards that apply to the entire market and are enforceable by homeowners.

guidance covering the servicers they oversee. All of the agencies must move swiftly to incorporate servicing standards in their exams. Regardless of which agency takes the lead, the time for action is now.

## *B. A Roadmap for the Future: Creating a Better Loan Modification Program*

The failures of HAMP have occurred despite the fact that the loan modifications provided under HAMP are helpful. Indeed, as discussed in pages 15–25, HAMP modifications have been astonishingly successful on an individual basis.

HAMP's large failures have been programmatic. They include:

- *Lack of universality*: The market is a patchwork of HAMP, HAMP-lite programs, and non-participants in HAMP;
- *Excessive complexity and inefficiency*: The patchwork of programs contains many loopholes, lacks transparency, and fails to stop foreclosures during consideration of loan modifications; and
- *Reliance on servicers' voluntary operation of the HAMP program*: Enforcement has been lax and homeowners have no direct means to enforce servicer obligations.

These problems are not inherent features of HAMP or any loan modification program. All are correctable if policymakers have the will to do so.

What then, have we learned from HAMP? Strong servicing rules will make the market more efficient while providing access to fair servicing to the broadest swath of homeowners. Servicing in general should be geared toward loan performance and sustained homeownership, not only for the benefit of servicers.

Structural incentives, including how servicers are paid, should serve these ends. Payments to servicers should promote servicing—both before and after default—that results in performing loans, sustainable loan modifications where consistent with investor interests, and the promotion of a fee structure free of abuse and opportunism.

Servicers have demonstrated amply that, without rules and enforcement of those rules, they will put their own interests first, to the detriment of homeowners, investors, and the national economy. The government must set and enforce standards for loan modification, but need not take over the role of the private sector. A loan modification program run by the government would likely be unwieldy. Transferring homeowners in default to a government-run, isolated program could create even worse servicing, as well as multiplying the opportunities for bureaucratic bungling. A similar result has ensued with government-insured Federal Home Administration (FHA) loans, whose modification rates (and results) are far worse than those obtained under HAMP.<sup>267</sup>

While this report and the following recommendations focus on the core servicing task of loss mitigation, reform of other servicer duties, including collection and application of payments and administration of fees and insurance, also are sorely in need of attention. An overview of proposals in these areas is included in the Appendix.

## Five Principles for National Loan Modification Mortgage Standards

1. **Efficiency:** Loan modification evaluations should be standardized, universally applicable to all loans and servicers, and mandatory for all loans before the foreclosure process can go forward.
2. **Affordability:** Loan modification terms must be affordable, fair, and sustainable.
3. **Accessibility:** Hardship must be defined to reflect the range of challenges homeowners face.
4. **Accountability:** Transparency and accountability throughout the loan modification process are essential.
5. **Enforceability:** Homeowners must be protected from servicers' noncompliance.

### *C. The Five Core Principles of Strong National Servicing Standards*

#### *1. Efficiency: Loan Modification Evaluations Should Be Standardized, Universally Applicable to All Loans and Servicers, and Mandatory for All Loans Before the Foreclosure Process Can Go Forward*

##### *a. Universal Rules Simplify Compliance and Improve Transparency*

National servicing rules should apply as a baseline to all loans, regardless of who is the holder, the originator, or the servicer. All homeowners facing hardship should be offered loan modifications, whenever the modification will produce more income for the investor than foreclosure. Requiring all market participants to modify loans, following the same procedures, would obviate needless confusion and delay. Government-insured loans should have as a floor the same standards as all other loans, although additional protections for these loans made to vulnerable populations using taxpayer subsidies are appropriate.

##### *b. Uniform, Standard Rules Promote Cost Savings and Efficiency*

If homeowners can assess, before applying, whether they are likely to qualify for a modification and what the terms of that modification are, the costs of modifications are reduced for everyone: servicers have fewer requests to process, investors are likely to see expedited processing of both modifications and foreclosures, and homeowners can conserve precious time and money through their informed election. But homeowners can only make these assessments if they know in advance what the characteristics and qualifications of a possible modification would be and can evaluate the terms without fear of fine print or other “gotchas.”

If implemented, standardized loan modifications save servicers money. Standardized loan modifications reduce staffing costs (one of servicers' largest costs).<sup>268</sup> Fewer staff with lower levels of training and expertise should be required for standardized loan modifications.

A standardized loan modification process promotes transparency and fairness. Without standardized loan modifications, homeowners remain heavily dependent on skilled and connected advocates, who rely as much on their Rolodexes as on their substantive knowledge in order to obtain results for their clients. A standardized loan modification process also means that homeowners in remote rural areas have the same access to modifications as homeowners in urban areas.

### *c. Loan Modification Reviews Should Be Done Prior to the Initiation of Foreclosure*

Homeowners should be reviewed for a modification prior to the initiation of a foreclosure and before any foreclosure-related fees are incurred. Loan modification review prior to foreclosure reduces fees, expedites processing, and reduces the opportunities for error. Processing loan modifications and foreclosures at the same time inevitably leads to accidental foreclosures and accompanying high financial and emotional tolls on homeowners. Once the foreclosure train leaves the station, even high-level bank officials may not be able to stop it.<sup>269</sup> Additionally, the foreclosure-related fees tacked on as the foreclosure proceeds can disqualify a homeowner from eligibility for a modification.

At a minimum, and in all cases, where investors, homeowners, and society at large all lose money on a foreclosure, servicers must make every attempt to modify rather than foreclose. We tolerate foreclosures as the price of credit, and in the name of protecting investment. Where investors also lose money on the foreclosure, there is no justification for proceeding with them.

This is not an open-ended or indefinite proscription. Servicers need only process loan modification applications diligently in order to be able to process foreclosures expeditiously. Servicers should be free to initiate the foreclosure as soon as they complete the full review, including any attendant request for review from the homeowner. If the national servicing standards provide specific guidance and timelines for outreach, the result should be a faster loan modification application and review process. Servicers should be allowed to initiate foreclosure where outreach has been completed and no modification request is in process.

### *d. Foreclosures in Process Should Be Stayed for Modification Requests*

Dual track servicing, discussed in pages 33–35, results in unnecessary foreclosures at great expense to both investors and homeowners. Stopping a sale alone, as HAMP does for modification requests received after the foreclosure is underway, is insufficient to prevent wrongful foreclosures. Servicers should be encouraged to complete all modification reviews before the initiation of a foreclosure. Where a modification request is received after a foreclosure is initiated, whether the foreclosure is judicial or nonjudicial, servicers must be required to stay the foreclosure proceeding until after the completion of the foreclosure review. Any scheduled foreclosure sale should

be cancelled, with no further sale scheduled until the review process has been completed. The risks associated with dual tracking only increase with the initiation of the foreclosure.



In most cases, the costs of putting a foreclosure on hold are minimal. To the extent there are costs, they create a positive incentive for servicers to do good outreach before foreclosure and to review any subsequent loan modification request expeditiously.

While the settlement reached by the Department of Justice and state Attorneys General with the five largest servicers incorporates key dual-track protections needed for homeowners not yet in foreclosure,<sup>270</sup> national standards should move beyond the settlement's permissive attitude towards foreclosures already in progress at the time the servicer receives the application. Staying all foreclosures and forbidding the scheduling of sales during the pendency of a loan modification review would encourage servicers to expedite their reviews, rather than delaying them, and would provide transparency and fairness to homeowners. Such a rule can be established without requiring servicers to restart foreclosures. California's recent Homeowner Bill of Rights presents an excellent model for approaching this issue.<sup>271</sup>

*e. Modifications Should Be Offered to Homeowners Facing Hardship Whenever It Would Provide a Benefit to the Investor over a Foreclosure*

One of the lessons of HAMP is that investors can reduce losses by modifying loans and that a modification program with a net present value (NPV) test can both increase modifications and protect investors (see pages 16–17). Servicers should be required to offer the loan modifications to qualified homeowners facing hardship whenever the investor will profit more from a loan modification than from foreclosure.

Foreclosures blight entire communities, dragging down home values,<sup>272</sup> increasing crime,<sup>273</sup> and draining municipal coffers. Given the large social cost of foreclosures, and the role of industry overreaching in creating the current crisis, there are strong arguments that loans should be modified even if the modification is not more profitable than foreclosure for the investor. But, at a minimum, and in all cases, where investors, homeowners, and society at large all lose money on a foreclosure, servicers must make every attempt to modify rather than foreclose. We tolerate foreclosures as the price of credit, and in the name of protecting investment. Where investors also lose money on the foreclosure, there is no justification for proceeding with them.

**2. *Affordability: Loan Modifications Must Be Affordable, Fair, And Sustainable***

*a. Loan Modification Payments Must Be Affordable*

HAMP's key innovation has been requiring that all modified payments, including principal, interest, taxes, property insurance, and assessments, be reduced to 31% percent of the homeowner's gross income. The result of HAMP's affordable loan modifications has been dramatically lower re-default rates,<sup>274</sup> which benefit both homeowners and investors. Future loan modification rules should continue this innovation.

*b. Modifications Should Maximize Principal Reduction*

Principal reductions are an important part of any successful foreclosure mitigation program. Re-default rates drop as principal reductions increase.<sup>275</sup> Investors have called

repeatedly for modifications with principal reductions for underwater borrowers.<sup>276</sup> Evaluation for principal reduction should be included in all loan modification evaluations. National servicing standards must mandate principal reduction modifications where they produce a positive NPV for all investors, including Fannie Mae and Freddie Mac. Where they do not, reductions can be encouraged and forbearance should be available.

Part of maximizing principal reduction is maximizing interest rate reductions. The more the interest rate is reduced, the faster the homeowner's payments will reduce the principal. Future loan modification programs should follow HAMP in mandating deep interest rate reductions, and requiring that those interest rate reductions be calculated before term extensions or principal forbearance. Term extension and principal forbearance may provide homeowners with immediate payment relief, but both push those payments out into the future. The result is homeowners who are underwater will remain underwater longer, and the risk of re-default will remain elevated.

### *c. Tax Consequences Should Be Addressed Clearly*

HAMP's system of spreading principal reductions over multiple years complicates tax reporting, obfuscates potential tax liability, and effectively vitiates existing federal law protecting homeowners from tax consequences when they receive a principal reduction on their mortgage.<sup>277</sup>

Future modification rules must take account of tax consequences to homeowners in their design. Homeowners of limited means should be protected from adverse tax consequences and reporting should be simplified for all homeowners.

### *d. Modifications Must Be Permanent*

Modifications based on documented and verified income should be permanent at inception. Trial modifications multiply paperwork and opportunities for error (see pages 45–46). If a homeowner fails to make payments under a modification, then the modification will, of course, be terminated. But homeowners should not be held captive to new and capricious demands by servicers in order to make a trial modification permanent, nor are the administrative challenges servicers face in implementing a two-step process necessary.

Similarly, the terms of a modification should not be subject to later variation. The terms—interest rate, forbearance, principal reduction, and monthly payment—should be fixed and not subject to later market changes. Payment shock was at least part of the current mortgage crisis; it should not be replicated in modifications.<sup>278</sup> Permanent modifications allow all parties to the modification to adjust their financial expectations accordingly. Homeowners need and deserve the stability of fixed and predictable payments. Investors can rely on the NPV test at the time of the original modification to assess their risk without the uncertainty of a new calculation in a few years.

#### *e. Waiver Should Be Forbidden in Modifications*

HAMP rules forbid waivers, but some servicers have continued to insist that entering into a modification waives legal rights.<sup>279</sup> There is no reason to authorize servicers to require a get out of jail free card from homeowners in order to process a loan modification that is in the best financial interests of the investors. Permitting such waivers will encourage abusive servicer behavior and will impede loan modification processing for homeowners sophisticated enough to seek legal counsel.

HAMP's great victory was in creating standard loan modifications that homeowners could, at least in theory, apply for and get on their own, without lawsuits or litigation. Permitting a waiver undermines this system and requires the reintroduction of legal counsel in every loan modification case, with case-by-case negotiations as to the extent of the waiver and the nature of the loan modification. Such a system produces few loan modifications, at great cost to investors, homeowners, and society at large.

### ***3. Accessibility: Hardship Must Be Defined to Reflect the Range of Challenges Homeowners Face***

#### *a. Additional Modifications Should Be Available Whenever the Homeowner Faces Subsequent Hardship*

Even after a loan modification is done successfully and is performing, a homeowner may still become disabled, lose a job, or suffer the death of a spouse. Foreclosing on homes where homeowners have suffered an involuntary drop in income without evaluating the feasibility of a further modification is punitive to homeowners already suffering a loss and does not serve the interests of investors. Some servicers already provide modifications upon re-default as part of their loss mitigation programs. This approach should be standard and mandated.

HAMP Tier II adopts this approach in part, but it does so by funneling homeowners to less desirable and less sustainable modifications, at significantly higher debt-to-income ratios. One of the key lessons of HAMP is that payment reduction and affordability matter.<sup>280</sup> Offering homeowners experiencing hardship through no fault of their own inferior modifications serves neither homeowners nor investors well. Moreover, it undermines one of the central victories of HAMP: standard and comparable loan modifications offered to all eligible homeowners.

#### *b. Bankruptcy Should Not Be a Bar to Modification*

National servicing standards should, like the revised HAMP guidelines, explicitly provide that servicers must evaluate modifications even for homeowners in bankruptcy.

Servicers should be required, upon receipt of notice of a bankruptcy filing, to send information to the homeowner's counsel indicating that a loan modification may be available. Upon request by the homeowner and working through the homeowner's counsel, servicers should offer appropriate loan modifications prior to discharge or dismissal, or at any time during the pendency of a chapter 13 bankruptcy, without requiring relief from

the automatic stay, and, in the case of a chapter 7 bankruptcy, without requiring reaffirmation of the debt. If the homeowner is not represented by counsel, information relating to the availability of a loan modification should be provided to the homeowner with a copy to the bankruptcy trustee.

Additionally, payment rules under national servicing standards should take into account the fact that payments may be passed through the bankruptcy trustee, rather than directly from homeowner to servicer. There is often an initial lag in passing the payments from the bankruptcy trustee to the servicer. Homeowners should not be penalized for a delay over which they have no control and which is occasioned solely by their exercise of their right to file bankruptcy.

Finally, the modification documents should explicitly state that a homeowner in bankruptcy is not reaffirming personal liability for the mortgage debt.

*c. Provisions Must Be Made for Homeowners with Junior Liens and Others for Whom a Thirty-One Percent Monthly Mortgage Payment Is Not Affordable*

HAMP's definition of affordability serves many homeowners well. But for some homeowners, first lien mortgage payments at 31% of their income are not affordable. These homeowners will not qualify for a HAMP modification, but are so burdened by other debt or have so little residual income that they cannot afford the mortgage payment. The other debt may be a junior mortgage or high medical bills. These homeowners still need mortgage modifications even if their existing mortgage payment looks "affordable" in isolation. HAMP's definition of affordability leaves these homeowners without redress and blocks loan modifications that would benefit investors.

Future programs should include second liens in the initial affordability calculation, as HAMP does not, and require a proportional writedown of the second lien, similar to HAMP's provisions for junior lien modifications. The current system relies on servicers to identify and process eligible homeowners for the writedown of junior liens. This system does not work. Homeowners must be able to apply for it; they cannot be left in the blind maw of the servicers' computer systems waiting for an offer.

Additionally, for those homeowners, primarily the disabled or elderly with high medical expenses, for whom payments even at thirty-one percent are not affordable, accommodations must be made. Monthly payments below 31% that are NPV positive should be offered. HAMP Tier II takes a step in this direction by allowing payments to go as low as 25% of gross income, but the payments under HAMP Tier II are not tied to any measure of affordability. While some homeowners may be helped to affordable payments by HAMP Tier II, it is likely to be by accident not design. To match and improve on the success of HAMP Tier I loan modifications, post-modification payments must be affordable.

Some have argued that a broader measure of affordability than the current one would mean that first lien mortgage holders would take the hit for the overreaching lending of junior mortgage holders and other creditors. Requiring contemporaneous and proportional writedowns of junior liens with the modification of the first mortgage mitigates

this tradeoff. But more fundamentally providing for sustainable loan modifications benefits first lien holders. Lower overall debt burden leads to better debt payment.<sup>281</sup> Investors in first lien mortgages will benefit from deeper modifications that ensure affordability.

One of the reasons that HAMP succeeded to the extent that it did is that it provided loan modifications based on economics, not fault. If fault had been the criterion, there would have been plenty to go around, and it would not have fallen just on junior mortgage lenders. The judicial system is available to grant remedies based on the overreaching that left so many homeowners facing foreclosure. Strong prospective rules against irresponsible lending will be far more effective than denial of loan modifications as a means of preventing future overreaching by junior mortgage lenders.

*d. Surviving Family Members and Divorced Spouses Should Have Access to a Modification on the Same Terms as Other Homeowners*

Servicers routinely block modifications when family members seek to assume the mortgage in order to remain in their primary residence.<sup>282</sup> But if a modification in those circumstances passes the NPV test, there is no reason not to allow it. Treasury recognized this in requiring servicers to evaluate homeowners in these circumstances for a modification.<sup>283</sup> Treasury's language stopped short of compliance with existing law, however, which generally provides a right for the surviving family member to assume the mortgage, including any access to a mortgage modification.<sup>284</sup> Common sense dictates that where a homeowner wishes to assume the mortgage and modify the loan, and such modification will provide an NPV positive return to the investor, there is no reason not to allow it.

*e. Unemployed Homeowners Must Have Access to Appropriate Assistance, Whether Loan Modifications, Forbearance, or Bridge Loans with Which to Cure Arrearages*

Government relief for unemployed homeowners, whether through HAMP, HAMP's companion Unemployment Program (UP), which offers only forbearance without close controls on how to count for the run-up in arrears, or the Emergency Homeowner's Loan Program administered by HUD, which had limited participation, failed to take into account the scale and nature of the unemployment crisis in this country. The government's failure to provide adequate assistance to unemployed homeowners exacerbated the crisis, creating a feedback loop that then pushed unemployment higher.<sup>285</sup>

Homeowners facing unemployment or under-employment should be evaluated for a loan modification, taking into consideration their remaining sources of income. Where their other income is adequate to support a loan modification that meets the net present value test, those homeowners should be offered a loan modification before forbearance. In general, unemployment income should be considered, if it is expected to last for at least 12 months. Including unemployment income is a proxy for the possibility that the homeowner will return to work and not need as deep a modification. Including unemployment income will mean more modifications are made, and that investors recover more per modification (because the monthly payments will be higher). Unemployed

homeowners who do not qualify for a loan modification should be offered forbearance coupled with low-interest loans to cure the arrearages.

Any comprehensive approach to preventing unnecessary foreclosures must address assistance for unemployed homeowners, both in obtaining modifications, where appropriate, and providing forbearance and assistance curing arrearages, where modifications are not appropriate.

*f. Document Submission Should Be Simple and Intelligible to All Homeowners, Including Homeowners with Limited Literacy in English*

Any electronic portal available to advocates for homeowners should be available to housing counselors and attorneys. Homeowners themselves also need direct access to document-tracking. In many parts of the United States there are no HUD-approved counseling agencies and even where such agencies exist, there are not enough housing counselors to meet the demand. Electronic document submission and tracking cannot be mandatory for homeowners, however. The digital divide remains real<sup>286</sup> and homeowners

should not be required to cart their sensitive financial records to the local public library, ask for help scanning them (provided such services are available at the public library), and then begin, in a public place, the cumbersome process of uploading documents.

One of the weaknesses of HAMP is in its failure to provide equal access to homeowners whose native language is not English.<sup>287</sup> Official translation services and translated documents would enhance access to loan modifications and reduce the incidence of fraud. Translated documents and translation services should be available to homeowners.

One of the weaknesses of HAMP is in its failure to provide equal access to homeowners whose native language is not English.

*4. Accountability: Transparency and Accountability Throughout the Loan Modification Process Are Essential*

*a. Minimum Standards of Outreach Are Necessary*

Standards for minimally acceptable levels of outreach, akin to the detailed requirements of HAMP, should be set forth. Such requirements protect against the teenager who hits delete on the answering machine and the mail that is not delivered, and provide a buffer for the family dealing with the chaos occasioned by a major illness or unemployment. Such requirements also give the servicer clear guidelines on when a foreclosure can be initiated after adequate loss mitigation outreach.

*b. Homeowners Need an Effective Single Point of Contact*

Federal law should require that mortgage servicers provide homeowners with contact information for a real person with the information and authority to answer questions and fully resolve issues related to loss mitigation activities for the loan. This single point of contact must, however, give the homeowner an out; homeowners need to be able to contact supervisors when something goes wrong and be assured of coverage when their single point of contact is unavailable.

### *c. The Net Present Value Inputs and Outputs Should Be Provided to the Homeowner*

Servicers should use a standard net present value (NPV) test, available to the public. A standardized NPV test ensures that servicers are modifying loans where and when they should. Only by providing baseline standards for the NPV test can policymakers be assured that servicers do not game the system by overvaluing foreclosure. A standardized NPV test provides certainty for homeowners and investors that the servicer is acting as an honest broker.

Public availability of the standard NPV test would enhance accountability and transparency, and make it easier for homeowners to obtain the modifications for which they do qualify. Without it, servicer claims that a homeowner does not qualify for a modification are not verifiable. Several states and localities require that foreclosure mediation programs use the FDIC's Loan Mod in a Box spreadsheet to determine whether a loan modification should occur or not.<sup>288</sup> Housing counselors often use it as well. Access to the actual NPV test would provide more efficient results rather than an approximation. Without access to the actual NPV calculation, homeowners, judges, and mediators are left without any means to resolve eligibility disputes.

Servicers should supply homeowners denied a modification with all of the test inputs as well as the numerical result of the test. Homeowners often find, when the NPV inputs are revealed, that there are gross inaccuracies in the numbers. Revealing the numbers at the time of denial expedites review and reduces unnecessary disputes. Providing output numbers will help homeowners assess whether an error seems likely to change the outcome.

### *d. The Amount of the Unpaid Principal Balance and its Components Must Be Disclosed*

Servicers should be required to disclose the components of the unpaid principal balance, affording homeowners a chance to correct discrepancies. Disputes over the amount included in the capitalization of arrears are legion. Servicers frequently present the homeowner with an unpaid principal balance that is thousands or tens of thousands of dollars more than the homeowner's records indicate it should be. Inflated principal balances line servicers' pockets at the expense of both homeowners and investors.

### *e. Denials Should Include Documentation of Relevant Investor Restrictions*

In the rare cases where pre-existing contracts with investors forbid modifications,<sup>289</sup> servicers should be, as they are under HAMP, required to make efforts to obtain waivers and to document those attempts. Denials based on restrictions imposed by investors should include documentation of the relevant investor contracts and correspondence, including servicer efforts to obtain exceptions. Providing homeowners documentation of the basis of the investor denial will expedite dispute resolution and provide a powerful incentive for servicers to check their facts before issuing a denial based on investor restrictions.

*f. Banking Agencies Should Incorporate Review of the Loan Modification Process, Including Compliance with Timelines, into Regular Exams*

Regular exams have long been used to address safety and soundness concerns. The failure to process loan modifications appropriately is not only a matter of fundamental fairness to homeowners and investors but a safety and soundness concern. Review of servicers' performance under national servicing standards, including timelines for review and response, should be incorporated into regular exams.

*g. Data Collection and Reporting Are Essential*

Despite their central role in the debate over foreclosures, few data are publicly available on the nature or extent of loan modifications, or who receives them. This information should be available by servicer at the census tract level. Loan modifications are too important to leave concealed from public debate.

There are many paths to such public disclosure. Disclosures could either be modeled after, or to some extent included in, the Home Mortgage Disclosure Act, whose parameters for mandated disclosure are currently under review at the CFPB. Both the Department of Housing and Urban Development (HUD) and the CFPB are currently tasked with developing a foreclosure database and should move to implement it quickly.<sup>290</sup> Data on servicer performance are being collected under the settlement between 49 state Attorneys General, the Department of Justice, and five major servicers, and that data set may provide a useful test run for more universal data collection and reporting.

At a minimum, in order to maintain public confidence, support constructive policy making, and promote accountability, the following data are essential:

- Timing as to when homeowners first inquire about loan modifications, where in the foreclosure process homeowners are when they inquire about loan modifications, and when loan modification applications are received, in part to monitor dual track violations
- Actual time to process the loan modification
- Number of times homeowners resubmit documents
- Race, ethnicity, preferred language, age, and gender of homeowners
- Whether loan is held in portfolio or investor owned
- Census tract of loan
- Whether original loan is above or below the Federal Reserve Board's higher-priced mortgage threshold
- Whether the loan had been previously modified, and the terms of those modifications
- Terms of the modified loans, including interest rate, principal forbearance, principal reduction, amortization, and capitalized arrearages and fees
- NPV values for both modified and loans for which a modification was denied



- Principal balance and loan valuation for properties, including whether the valuation was an appraisal or a broker price opinion or produced via an automated valuation method
- Detailed reporting on reasons for denial

Data should be collected and reported both for homeowners who applied and were rejected and homeowners who received temporary or permanent modifications. Data must be reported by servicer and verified for accuracy. Servicers should face consequences for major gaps or errors in reporting.

Collection of this data supports efficiency, by making sure servicers in fact process loan modifications efficiently, accessibility, and affordability, as well as providing necessary tools for accountability and enforceability.

## ***5. Enforceability: Homeowners Must Be Protected from Servicers' Noncompliance***

### ***a. Homeowners Need an Effective Third-Party Appeals Process***

Servicers should conduct independent reviews of modification decisions in-house. In addition, there should be a government-funded appeals process available to homeowners denied modifications, modeled on the federal Taxpayer Advocate Service.<sup>291</sup> The review process should be responsive and speedy. Homeowners should not be foreclosed upon while they are awaiting the results of an appeal.

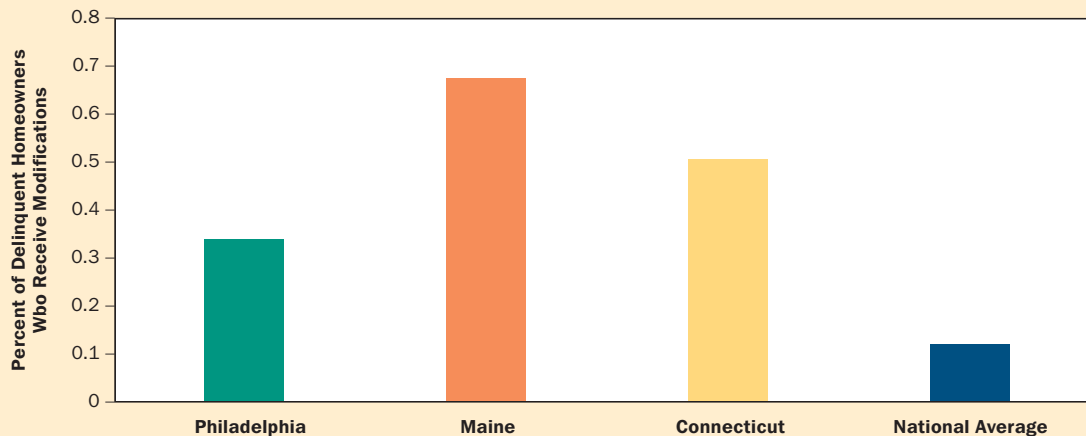
### ***b. A Servicer's Violation of Servicing Standards Should Constitute a Defense to a Foreclosure***

Servicing standards, including rules on loan modifications, must elicit compliance in order to be meaningful. Servicers should not be allowed to routinely violate servicing standards and deprive families of their homes. Rules without enforcement do not change industry practice and can even serve to ratify illegal industry practices.

For example, the failure to enforce HAMP's standards had cascading effects. When the OCC settled with the largest bank servicers, it created a framework for remediation.<sup>292</sup> In setting the terms of compensation, the OCC looked to whether the homeowner would be likely to recover damages in court.<sup>293</sup> Because HAMP is not privately enforceable, the OCC decided that servicers who denied a HAMP modification to an eligible borrower who lost her home in a subsequent foreclosure only needed to pay the former homeowner \$5,000, a small fraction of the \$125,000 servicers were required to pay if they foreclosed after granting a trial modification.<sup>294</sup> Courts could, in turn, rely on the OCC's framework to affirm that the failure to follow HAMP rules is not a compensable injury, making even harder the already hard task of holding servicers to account in court and further rewarding servicers for not following the HAMP rules. HAMP's lax enforcement scheme eroded even attempts to hold servicers accountable for wrongdoing and provide compensation to homeowners.

### CHART 8: Mediation Improves Outcomes

*Rates at which homeowners receive modifications in select jurisdictions with mediation programs versus the national average*



Sources: OCC Mortgage Metrics Report, Philadelphia Residential.

Rules with enforcement do change outcomes. Where homeowners have even a modest ability to challenge the servicer's failure to consider a loan modification before foreclosure, as they do in court-supervised mediation programs, rates of loan modifications increase. (See chart 8 for examples.)

Privately enforceable servicing rules would allow homeowners to raise a violation of servicing standards as a defense to foreclosure, either judicial or nonjudicial. Failure to comply with any loan modification requirement—whether failure to offer a loan modification, offer of a noncompliant loan modification, or institution of a foreclosure while the homeowner is under review for a loan modification—should serve as defense to judicial or nonjudicial foreclosure. Such cases are fact specific and work intensive and would result in reasonable accountability without a surge of litigation. As another lever for enforcement, certification of compliance with the local recorder of deeds office should be required before any foreclosure filing, judicial or nonjudicial.

Servicing standards also should address the deeply problematic situation that arises when a servicer has indisputably foreclosed in clear violation of servicing rules and the house has been sold to a bona fide purchaser before the error can be rectified. In many states, the house cannot be taken back from the bona fide purchaser and restored to its rightful owner. For this reason, federal rules should address appropriate compensation to the homeowner for all financial and other harm. Otherwise, injured homeowners will have no meaningful remedy.

### *c. National Servicing Standards Should Be a Floor, not a Ceiling*

The history of federal regulatory preemption of state efforts to protect homeowners is one reason today's crisis is so severe.<sup>295</sup> States have been productive laboratories for homeowner protections and any federal servicing standard should continue to allow for state innovation.

## V. CONCLUSION

Our nation is at a crossroads. The choice for the federal government is clear: continue to mask serious structural problems in the mortgage industry or transform it through adoption of strong national mortgage servicing standards. Meaningful federal action on loan modifications is still gravely needed. Swift adoption of strong national servicing standards could still save many homes, preserve investments, and transform the servicing industry for the betterment of the market for decades to come.

We know how to do better: we must require efficiency, affordability, accessibility, accountability, and enforceability from those corporations entrusted with servicing mortgage loans. The fate of our communities and our national economy hangs in the balance.

The housing crisis has lumbered on too long. The losses have mounted too high. The time to reform the system, to put ourselves on the straight road to a more stable housing market and a more prosperous economy, is now.

## END NOTES

1. Mortg. Bankers Ass'n, National Delinquency Survey Q4 2011 at 2 (2012) [hereinafter MBA: *National Delinquency Survey Q4 2011*] (reporting that the U.S. foreclosure rate, the percentage of outstanding mortgage loans in foreclosure, at the end of the fourth quarter of 2009 was 4.58%, at the end of the fourth quarter of 2010, 4.64%, and, at the end of the fourth quarter of 2011, 4.38%. The foreclosure inventory dropped during 2012, to 4.07%, still more than twice what the rate was during the Great Depression. Mortg. Bankers Ass'n, National Delinquency Survey Q3 2012 (2012).
2. The foreclosure rate for non-farm mortgages peaked in 1933, below 1.4%. David C. Wheelock, *The Federal Response to Home Mortgage Distress: Lessons from the Great Depression*, 90 Fed. Res. Bank St. Louis Rev. 133, 139 fig.5 (2008), available at <http://research.stlouisfed.org/publications/review/08/05/Wheelock.pdf>.
3. CoreLogic, *CoreLogic Reports 63,000 Completed Foreclosures in May* (June 29, 2012), <http://www.corelogic.com/about-us/news/corelogic-reports-63,000-completed-foreclosures-in-may.aspx> [hereinafter *63,000 Completed Foreclosures in May*] (3.6 million completed foreclosures since September 2008).
4. U.S. Gov't Accountability Office, GAO-12-296, *Foreclosure Mitigation: Agencies Could Improve Effectiveness of Federal Efforts with Additional Data Collection and Analysis* 35 (2012) [hereinafter GAO: *Foreclosure Mitigation*], available at <http://www.gao.gov/assets/600/592028.pdf> (finding 1.9 to 3 million loans at high risk of foreclosure as of June 2011); *New Ideas to Address the Glut of Foreclosed Properties: Hearing Before the Subcomm. on Hous., Transp. and Cmty. Dev. of the S. Comm. on Banking, Hous. and Urban Affairs*, 112th Cong. 2 (2011) (testimony of Laurie S. Goodman, Senior Managing Dir., Amherst Secs. Grp.) [hereinafter Goodman testimony: *Glut of Foreclosed Properties*], available at [http://banking.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore\\_id=dc3d9918-5aca-47b2-9ce4-b9daaef67957](http://banking.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=dc3d9918-5aca-47b2-9ce4-b9daaef67957) (8.3 to 10.4 million additional borrowers will default).
5. See, e.g., Debbie Gruenstein Bocian et al., Ctr. For Responsible Lending, *Collateral Damage: The Spillover Costs of Foreclosures* (2012), <http://responsiblelending.org/mortgage-lending/research-analysis/collateral-damage.pdf>.
6. See, e.g., Debbie Gruenstein Bocian et al., Ctr. For Responsible Lending, *Collateral Damage: The Spillover Costs of Foreclosures 2* (2012), <http://responsiblelending.org/mortgage-lending/research-analysis/collateral-damage.pdf> ("Over one-half of the spillover loss is associated with communities of color."); Debbie Gruenstein Bocian et al., Ctr. for Responsible Lending, *Lost Ground, 2011: Disparities in Mortgage Lending and Foreclosures* (2011), <http://www.responsiblelending.org/mortgage-lending/research-analysis/Lost-Ground-2011.pdf> (reporting that approximately one in four of African-American or Latino homeowners have lost their homes to foreclosure while fewer than one in eight white homeowners have lost their homes). Cf. Yan. Q. Mui, *For Black Americans, Financial Damage from Subprime Implosion Is Likely to Last*, Wash. Post, July 8, 2012, [http://www.washingtonpost.com/business/economy/for-black-americans-financial-damage-from-subprime-implosion-is-likely-to-last/2012/07/08/gJQAwNmzWW\\_story.html](http://www.washingtonpost.com/business/economy/for-black-americans-financial-damage-from-subprime-implosion-is-likely-to-last/2012/07/08/gJQAwNmzWW_story.html) (discussing wealth disparities occasioned by disproportionate subprime lending and foreclosures in minority communities and resultant damaged credit).
7. Justin Elliot, *Occupy's Next Frontier: Foreclosed Homes*, Salon, Nov. 30, 2011, [http://www.salon.com/2011/11/30/occupys\\_next\\_frontier\\_foreclosed\\_homes](http://www.salon.com/2011/11/30/occupys_next_frontier_foreclosed_homes).

8. See Press Release, Fannie Mae, Fannie Mae Reports Net Income of \$1.8 Billion for Third Quarter 2012 at 11 (Nov. 7, 2012), [http://www.fanniemae.com/resources/file/ir/pdf/quarterly-annual-results/2012/q32012\\_release.pdf](http://www.fanniemae.com/resources/file/ir/pdf/quarterly-annual-results/2012/q32012_release.pdf).
9. *Investor Protection: The Need to Protect Investors from the Government: Hearing Before the Subcomm. on Capital Mkts. and Gov't Sponsored Enters. of the H. Comm. on Fin. Servs.*, 112th Cong. 2 (2012) (testimony of Laurie S. Goodman, Senior Managing Dir., Amherst Secs. Grp.) [hereinafter Goodman testimony: *Investor Protection*], available at <http://financialservices.house.gov/UploadedFiles/HHRG-112-BA16-WState-LGoodman-20120607.pdf>.
10. See, e.g., Laurie S. Goodman, et al., Pew Ctr. on the States, *Modification Effectiveness: The Private Label Experience and Their Public Policy Implications* 17 (2012), available at [http://www.pewstates.org/uploadedFiles/PCS\\_Assets/2012/Goodman\\_et\\_al\\_%20Modification\\_Effectiveness.pdf](http://www.pewstates.org/uploadedFiles/PCS_Assets/2012/Goodman_et_al_%20Modification_Effectiveness.pdf). Modification success is critical to the recovery of the housing market.”).
11. See, e.g., U.S. Dep’t of the Treasury, *Making Home Affordable Program: Handbook for Servicers of Non-GSE Mortgages v4.0* (2012) [hereinafter MHA Handbook v4.0], available at [https://www.hmpadmin.com/portal/programs/docs/hamp\\_servicer/mhahandbook\\_40.pdf](https://www.hmpadmin.com/portal/programs/docs/hamp_servicer/mhahandbook_40.pdf).
12. Diane E. Thompson, *Foreclosing Modifications: How Servicer Incentives Discourage Loan Modifications*, 86 Wash. L. Rev. 755 (2011) [hereinafter Thompson, *Foreclosing Modifications*].
13. See, e.g., Binyamin Applebaum, *Cautious Moves on Foreclosures Haunting Obama*, N.Y. Times (Aug. 19, 2012) (“[T]he mortgage industry was set up either to collect payments or to foreclose, and it was not ready to help people.”); Sumit Agarwal, et al., *Policy Intervention in Debt Renegotiation: Evidence from the Home Affordable Modification Program* 28 (Fisher College of Business WP 2012-03-020, Nov. 2012), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2138314](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2138314) (speculating that low servicer uptake of HAMP reflects weakness in servicers’ “organizational capabilities”).
14. See Thompson, *Foreclosing Modifications*, supra note 12, at 768-770. Cf. *Walnut Place LLC v. Countrywide Home Loans, Inc.*, 948 N.Y.S.2d 580 (N.Y.A.D. 2012) (finding that certificate holders have limited ability to bring suit against originators under pooling and servicing agreement, that only the trust has the right to sue).
15. John Gittlesohn & Prashant Gopal, *Foreclosure Wave Averted as Doomsayers Defied: Mortgages*, Bloomberg (Nov. 29, 2012) (quoting Susan Wachter).
16. Press Release, Paul A. Koches, Exec. Vice President, Gen. Counsel and Sec’y, Ocwen Fin. Corp. (Feb. 25, 2010) (noting that the HAMP incentives “are meaningful and revenue-generating.”).
17. Fed. Hous. Fin. Agency, Fannie Mae and Freddie Mac to Align Guidelines for Servicing Delinquent Mortgages (2011), available at <http://www.fhfa.gov/webfiles/21190/SAI42811.pdf>.
18. Office of the Comptroller of the Currency, NR 2011-47, OCC Takes Enforcement Action Against Eight Servicers for Unsafe and Unsound Foreclosure Practices (2011), available at <http://www.occ.gov/news-issuances/news-releases/2011/nr-occ-2011-47.html>; U.S. Dep’t of the Treasury, *HAMP Resolution Matrix*, available at [https://www.hmpadmin.com/portal/programs/docs/hamp\\_servicer/escalated\\_case\\_docs/hampresolutionmatrix.pdf](https://www.hmpadmin.com/portal/programs/docs/hamp_servicer/escalated_case_docs/hampresolutionmatrix.pdf) (last updated May 30, 2012).
19. Philip A. Lehman, *Executive Summary of Multistate/Federal Settlement of Foreclosure Misconduct* (2012), available at <http://nationalmortgagesettlement.com/>.
20. Krista Franks, CFPB, *Other Federal Agencies Developing National Servicing Standards*, DSNews.com (Sept. 20, 2011), <http://www.dsnews.com/articles/cfpb-works-with-other-federal-agencies-on-national-servicing-standards-2011-09-20>.
21. Jon Prior, *Senators Introduce Bill to Establish Mortgage Servicing Standards*, HousingWire (May 13, 2011), <http://www.housingwire.com/news/senators-introduce-bill-establish-mortgage->

- servicing-standards; see Regulation of Mortgage Servicing Act of 2011, S. 967, 112th Cong. (2011); Preserving Homes and Communities Act of 2011, H.R. 1477, 112th Cong. (2011); Preserving Homes and Communities Act of 2011, S. 489, 112th Cong. (2011); Foreclosure Fraud and Homeowner Abuse Prevention Act of 2011, H.R. 1783, 112th Cong. (2011); Foreclosure Fraud and Homeowner Abuse Prevention Act of 2011, S. 824, 112th Cong. (2011); Foreclosure Prevention and Sound Mortgage Servicing Act of 2011, H.R. 1567, 112th Cong. (2011); Regulation of Mortgage Servicing Act of 2012, H.R. 3789, 112th Cong. (2012); Mandatory Foreclosure Mediation Act, H.R. 3595, 112th Cong. (2011).
22. See, e.g., Nat'l Consumer L. Ctr. & Nat'l Ass'n. of Consumer Advocates, Comments to the Consumer Financial Protection Bureau: 12 CFR Part 1026 2012 Truth in Lending Act (Regulation Z) Mortgage Servicing Proposal (2012), [http://www.nclc.org/images/pdf/foreclosure\\_mortgage/mortgage\\_servicing/comments-cfpb-servicing-tila.pdf](http://www.nclc.org/images/pdf/foreclosure_mortgage/mortgage_servicing/comments-cfpb-servicing-tila.pdf) [hereinafter NCLC Regulation Z Comments]; Nat'l Consumer L. Ctr. & Nat'l Ass'n. of Consumer Advocates, Comments to the Consumer Financial Protection Bureau: 12 CFR Part 1024 2012 Real Estate Settlement Procedures Act (Regulation X) Mortgage Servicing Proposal (2012), [http://www.nclc.org/images/pdf/foreclosure\\_mortgage/mortgage\\_servicing/comments-cfpb-servicing-respa.pdf](http://www.nclc.org/images/pdf/foreclosure_mortgage/mortgage_servicing/comments-cfpb-servicing-respa.pdf) [hereinafter NCLC Regulation X Comments] (critiquing the rules proposed by the CFPB for their failure to provide adequate standards).
  23. Pub. L. 111-203, 124 Stat. 1376 (2010).
  24. 2012 Real Estate Settlement Procedures Act (Regulation X), 77 Fed. Reg. 57200 (proposed Sept. 17, 2012)(to be codified at 12 CFR Part 1024); 2012 Truth in Lending Act (Regulation Z), 77 Fed. Reg. 57318 (proposed Sept. 17, 2012)(to be codified at 12 CFR Part 1026).
  25. See NCLC Regulation Z Comments, *supra* note 22; NCLC Regulation X Comments, *supra* note 22.
  26. California Homeowner Bill of Rights, California Assembly Bill 278 (2012), California Senate Bill 900 (2012), *codified at* Cal. Civ. Code §§ 2923.6, 2923.7, 2923.55, 2924(a)(5), 2924.5, 2924.10, 2924.11, 2924.12, 2924.17, 2924.18, and 2924.19.
  27. See, e.g., Ben. S. Bernanke, Bd. of Governors of the Fed. Res. Sys., Speech: The Economic Recovery and Economic Policy (2012) ("A substantial overhang of vacant homes, either for sale or in the foreclosure pipeline, continues to hold down house prices and reduce the need for new construction."), *available at* <http://www.federalreserve.gov/newsevents/speech/bernanke20121120a.htm>.
  28. See Goodman, *supra* note 10, at 2.
  29. HAMP covers 85% of the mortgage servicing market. Tim Massad, *Another Look at the Numbers on HAMP*, U.S. Dep't of the Treasury Notes Blog, Jan. 10, 2012, <http://www.treasury.gov/connect/blog/Pages/Another-Look-at-the-Numbers-on-HAMP.aspx>. See III.C.1.b., *infra* (discussing the patchwork nature of the coverage of HAMP).
  30. See Nat'l Consumer Law Ctr., *Foreclosures* §2.10-2.11 (4th ed. 2012).
  31. See e.g., *In re Ocwen Loan Servicing, LLC Mortg. Servicing Litig.*, 491 F.3d 638 (7th Cir. 2007) (analyzing a number of state statutory and common law claims and determining that some, but not all, were preempted); *Sovereign Bank v. Sturgis*, 863 F. Supp. 2d 75 (D. Mass. 2012) ("basic" state laws governing the foreclosure process not preempted, but state corollary to TILA rescission that provided a longer statute of limitations was preempted); *Wornum v. Aurora Loan Services, Inc.*, C-11-02189 JCS, 2011 WL 3516055 (N.D. Cal. Aug. 11, 2011) (California statutory requirements relating to pre-foreclosure notices were preempted by HOLA).
  32. See III.B.2.b, *infra*.
  33. Thompson, *Foreclosing Modifications*, *supra* note 12. See also Agarwal, *supra* note 13, at 23 (finding that some servicers modify loans at as much as four times the rate of other servicers, a result that cannot be explained by loan characteristics).

34. Our discussion will focus on the HAMP Tier I modifications, which have a longer track record than the HAMP Tier II modifications, which became available in June, 2012. See Home Affordable Modification Program, Supplemental Directive 12-02, Making Home Affordable—MHA Extension and Expansion (March 9, 2012), available at [https://www.hmpadmin.com/portal/programs/docs/hamp\\_servicer/sd1202.pdf](https://www.hmpadmin.com/portal/programs/docs/hamp_servicer/sd1202.pdf). In general, the HAMP Tier II modifications are inferior to the HAMP Tier I modifications. See IVC2a, IIID6d, *infra* (discussing shortcomings of the HAMP Tier II modifications).
35. Total mortgage debt outstanding on one-to-four unit properties has declined from \$11 trillion in the first quarter of 2009 to \$9.9 trillion in the third quarter of 2012. This reduction is a combination of fewer originations and financially distressed borrowers and mortgage defaults. Bd. of Gov. of the Fed. Res. Sys., Mortgage Debt Outstanding (June 2009), available at <http://www.federalreserve.gov/econresdata/releases/mortoutstand/mortoutstand20090630.htm>; Neil Bhutta, Fed. Res. Bd., Paper 2012-14, Mortgage Debt and Household Deleveraging: Accounting for the Decline in Mortgage Debt Using Consumer Credit Record Data (2012).
36. Supplemental Directive 12-02, *supra* note 34.
37. CoreLogic, CoreLogic Reports Negative Equity Increase in Q4 2011 (2012), [http://www.corelogic.com/about-us/news/asset\\_upload\\_file909\\_14436.pdf](http://www.corelogic.com/about-us/news/asset_upload_file909_14436.pdf) [hereinafter *Negative Equity Increase in Q4 2011*] (finding 11.1 million residential mortgages underwater, 22.8% of all mortgaged residential properties); John Kelly, *Zillow Negative Equity Report Shows 1 in 3 Mortgage Holders Underwater*, Zillow Blog (May 24, 2012), <http://www.zillow.com/blog/2012-05-24/zillow-negative-equity-report-shows-1-in-3-mortgage-holders-underwater> (estimating 15.7 million homeowners are underwater).
38. MBA: *National Delinquency Survey Q4 2011*, *supra* note 1, at 10 (reporting that the U.S. foreclosure rate, the percentage of outstanding mortgage loans in foreclosure, at the end of the fourth quarter of 2009 was 4.58%, at the end of the fourth quarter of 2010, 4.64%, and, at the end of the fourth quarter of 2011, 4.38%). The foreclosure inventory dropped at the end of 2012, to 4.07%, still more than twice what the rate was during the Great Depression. Mortg. Bankers Ass’n, *National Delinquency Survey Q3 2012* (2012).
39. The U.S. foreclosure rate (the percentage of outstanding mortgage loans in foreclosure) at the end of the fourth quarter of 2010 was 4.63%. Mortg. Bankers Ass’n, *National Delinquency Survey Q4 2010*, at 2 (2011), available at [http://nationalmortgageprofessional.com/sites/default/files/NDS\\_Q410.pdf](http://nationalmortgageprofessional.com/sites/default/files/NDS_Q410.pdf). The foreclosure rate for non-farm mortgages peaked in 1933, below 1.4%. Wheelock, *supra* note 2. See also GAO: *Foreclosure Mitigation*, *supra* note 4, at 35–37 (1.9-3 million loans at high risk of foreclosure, but that number lower than in 2009 and 2010).
40. See Agarwal, *supra* note 13 (discussing role of incentives in increasing uptake among servicers).
41. See, e.g., U.S. Gov’t Accountability Office, GAO-11-288, *Troubled Asset Relief Program: Treasury Continues to Face Implementation Challenges and Data Weaknesses in its Making Home Affordable Program 47* (2011) [hereinafter GAO: *MHA Implementation Challenges*], available at <http://www.gao.gov/assets/320/316715.pdf> (“While Treasury originally estimated that 3 to 4 million people would be helped by these programs, only 550,000 borrowers had received permanent HAMP first-lien modifications as of November 30, 2010, and the number of borrowers starting trial modifications has been rapidly declining since October 2009).
42. See discussion in III.C.1.a, *infra*.
43. See discussion in III.C.2., *infra*.
44. See discussion in III.C.3.b, *infra*.
45. Paul Kiel, *Secret Documents Show Weak Oversight of Key Foreclosure Program*, ProPublica (Nov. 8, 2012), <http://www.propublica.org/article/secret-documents-show-weak-oversight-of-key-foreclosure-program> [hereinafter Kiel, *Secret Documents Show Weak Oversight*]; Paul Kiel,

*Secret Docs Show Foreclosure Watchdog Doesn't Bark or Bite*, ProPublica, Oct. 4, 2011, available at <http://www.propublica.org/article/secret-docs-on-foreclosure-watchdog/single> [hereinafter Kiel, *Watchdog Doesn't Bark or Bite*].

46. Connecticut Fair Housing Center, *Report on the Efficacy of the HAMP Solution Center* (Sept. 27, 2012) [hereinafter *HAMP Solution Center Report*] (finding that the HAMP escalations program for non-GSE loans can reverse servicer decisions where a homeowner can prove the servicer relied upon incorrect information but does not address problems including noncompliance by GSEs, substantial delays and conversions to permanent modifications, handling of initial inquiries, and the framing of matters based primarily on the servicer's narrative). While GSE compliance is handled directly by the enterprises themselves, those escalations programs tend to provide customer service and resolutions substantially below the level of the HAMP Solution Center.
47. See III.B.1.c, *infra*.
48. See IVC3f (discussing additional assistance needed).
49. See, e.g., Gretchen Morgenson, *Can These Mortgages Be Saved?*, N.Y. Times (Sept. 30, 2007) available at <http://www.nytimes.com/2007/09/30/business/30country.html>; Carolyn Said, *Modified mortgages: Lenders talking, then balking*, S.F. Chronicle (Sept. 12, 2007) available at <http://www.sfgate.com/realestate/article/Modified-mortgages-Lenders-talking-then-balking-2541023.php>.
50. See Office of the Comptroller of the Currency & Office of Thrift Supervision, OCC and OTS Mortgage Metrics Report: Disclosure of National Bank and Federal Thrift Mortgage Loan Data: Fourth Quarter 2008 at 8, 44 (2009) [hereinafter *Mortgage Metrics Q4 2008*], available at <http://www.occ.treas.gov/publications/publications-by-type/other-publications-reports/mortgage-metrics-q4-2008/mortgage-metrics-q4-2008-pdf.pdf> (documenting that, in 2008, before HAMP was implemented, the majority of loan modifications resulted in monthly payments that were unchanged, 26.6%, or higher than before the modification, 31.6%. The re-default rate varied depending on whether the modification resulted in payment reduction, ranging from 26.2% for modifications resulting in a payment reduction 10% or greater, to 53.5% for modifications that resulted in no change in the payment amount). Cf. Goodman, *supra* note 10, at 4 (2012).
51. See Alan M. White, *Rewriting Contracts, Wholesale: Data on Voluntary Mortgage Modifications from 2007 and 2008 Remittance Reports*, 36 Fordham Urb. L.J. 509, 526–27 (2009), available at <http://ssrn.com/abstract=1259538>.
52. Cf. Melanca Clark & Maggie Barron, Brennan Ctr. for Justice, *Foreclosures: A Crisis in Legal Representation 12-17(2009)*, [http://brennan.3cdn.net/a5bf8a685cd0885f72\\_s8m6bevkvx.pdf](http://brennan.3cdn.net/a5bf8a685cd0885f72_s8m6bevkvx.pdf) (reporting that above 80% of all homeowners in foreclosure typically go unrepresented, with as many as 99% of all homeowners unrepresented in some jurisdictions); Nan Heald, Maine Bar Fdn., *Justice for Some, A Report on Unmet Legal Needs in Maine* (2010), <http://www.mbf.org/JusticeforSomeFinalUnmetNeeds3-10.pdf> (reporting that 94% of homeowners facing foreclosure in Maine are unable to access legal representation).
53. HOPE NOW, *Results in Helping Homeowners: July 1, 2007-January 31, 2008* (2008), [http://www.fsround.org/hope\\_now/pdfs/JanuaryDataFS.pdf](http://www.fsround.org/hope_now/pdfs/JanuaryDataFS.pdf).
54. See also *Mortgage Metrics Q4 2008*, *supra* note 50, at 44 (documenting that, in 2008, the majority of loan modifications resulted in monthly payments that were unchanged (26.6%) or even higher than before the modification (31.6%)).
55. White, *supra* note 51, at 526–27.
56. *Id.* at 526.
57. *Id.* Out of the 4,342 loan modifications reported in the sample, only 40 involved principal reductions of more than 10%.



58. *Id.* at 521 (showing loss severities of 38%).
59. *Cf.* Brandon v. Wells Fargo, 2011 WL 6338832, at \*3 (E.D. Tex. Nov. 30, 2011) (servicer post-HAMP demands a downpayment of \$2560 before processing modification).
60. *See, e.g., Preserving Homeownership: Progress Needed to Prevent Foreclosures: Hearing Before the S. Comm. on Banking, Hous. and Urban Affairs*, 111th Cong. 25 (2009) (testimony of Diane E. Thompson, Counsel, Nat'l Consumer Law Ctr.), available at [http://banking.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore\\_id=c11a869f-9606-40e8-aab1-886cfb902829](http://banking.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=c11a869f-9606-40e8-aab1-886cfb902829).
61. *See Are There Government Barriers to the Housing Market Recovery?: Hearing Before the Subcomm. on Ins. Hous. and Cmty. Opportunity of the H. Comm. on Fin. Servs.*, 112th Cong. (2011) (testimony of Julia Gordon, Senior Policy Counsel, Ctr. for Responsible Lending) available at <http://www.responsiblelending.org/mortgage-lending/policy-legislation/congress/Gordon-HFS-Biggert-testimony-final.pdf>.
62. HAMP uses an objective standard that the PITIA (principal, interest, taxes, insurance, and assessments) be 31% of the homeowner's gross monthly income. MHA Handbook v4.0, *supra* note 11, at ch. II §6.1. As we discuss in III.D.3 and IV.C.3.c, *infra*, this standard of 31% is not always affordable for homeowners with other debt or homeowners on very limited incomes, but it nonetheless represented a significant advance over existing modifications.
63. *Id.* at ch. II §5.1.
64. *Id.* at ch. II §6.3.1, 6.3.3, 9.3.7.7. Actual monthly payments may increase due to an increase in the monthly escrow amount or because of the change from a non-amortizing loan to a fully-amortizing loan.
65. *See* III.B.1.c, *infra*.
66. Fannie Mae, *Fannie Mae Single Family 2012 Servicing Guide* (Mar. 14, 2012), at 706-12 (§ 602.02), available at <https://www.efanniemae.com/sf/guides/ssg/svcg/svc031412.pdf>; Freddie Mac, *Single-Family Seller/Servicer Guide, Volume 2* ch. 65.15: Delinquency, default and imminent danger of default (01/01/2012), available at <http://www.freddiemac.com/sell/guide> (follow "AllRegs" hyperlink under "Access the Guide"). The Fannie Mae and Freddie Mac calculus for imminent default leaves much to be desired. It is not transparent, for one, and for another it too narrowly defines financial hardship.
67. *See* III.A., *supra*.
68. *See, e.g., Fed. Deposit Ins. Corp., The Case for Loan Modification*, 1 FDIC Quarterly 22 (2007), available at [http://www.fdic.gov/bank/analytical/quarterly/2007\\_vol1\\_3/FeatureArticle\\_1\\_V1N3\\_Full.pdf](http://www.fdic.gov/bank/analytical/quarterly/2007_vol1_3/FeatureArticle_1_V1N3_Full.pdf).
69. Press Release, Senator Bob Corker, Corker: Government Should Not Encourage Homeowners To Default (Apr. 10, 2012); Julapa Jagtiani & William W. Lang, *Fed. Res. Bank of Philadelphia, Strategic Default on First and Second Lien Mortgages During the Financial Crisis 12-13* (2010), <http://www.philadelphiafed.org/research-and-data/publications/working-papers/2011/wp11-3.pdf>.
70. *See* Agarwal, *supra* note 13 at 19.
71. U.S. Dep't of the Treasury, *Making Home Affordable Handbook*, v. 3.4 ch. II § 1.1(2011), available at [https://www.hmpadmin.com/portal/programs/docs/hamp\\_servicer/mhahandbook\\_34.pdf](https://www.hmpadmin.com/portal/programs/docs/hamp_servicer/mhahandbook_34.pdf).
72. U.S. Dep't. of the Treasury, *Making Home Affordable: Program Performance Report Through April 2012* at 17 (2012) [hereinafter *MHA Performance Report Through April 2012*], available at [http://www.treasury.gov/initiatives/financial-stability/results/MHA-Reports/Documents/April%202012%20MHA%20Report%20WITH%20SERVICER%20ASSESSMENTS\\_FINAL.pdf](http://www.treasury.gov/initiatives/financial-stability/results/MHA-Reports/Documents/April%202012%20MHA%20Report%20WITH%20SERVICER%20ASSESSMENTS_FINAL.pdf) (data from 10 largest servicers; cancelled homeowners include those whose income proved to be too high to qualify, further strengthening the conclusion that HAMP-qualified homeowners are unlikely to cure).
73. *See* Agarwal, *supra* note 13, at 29.

74. Experian-Oliver Wyman Market Intelligence Reports, Strategic default in mortgages: Q2 2011 update, 9 available at <http://www.experian.com/assets/decision-analytics/white-papers/oliver-wyman-strategic-default-2011.pdf> (strategic defaults appear to have peaked in 4th Quarter of 2008). See also Agarwal, *supra* note 13, at 19. Cf. Goodman, *supra* note 10, at 15-16 (quantifying the extent of the modest increase in strategic default post-HAMP).
75. See Experian-Oliver Wyman Market Intelligence Reports, *supra* note 74, at 9.
76. See Experian-Oliver Wyman Market Intelligence Reports, *supra* note 74; Goodman, *supra* note 10, at 15; David Streitfeld, *Biggest Defaulters on Mortgages Are the Rich*, N.Y. Times (July 8, 2010) available at <http://www.nytimes.com/2010/07/09/business/economy/09rich.html>.
77. The median income per month is \$3,758.96. Analysis of the Nat'l Consumer Law Ctr., based on MHA Data File (October 2012), available at [http://www.treasury.gov/initiatives/financial-stability/reports/Pages/mha\\_publicfile.aspx](http://www.treasury.gov/initiatives/financial-stability/reports/Pages/mha_publicfile.aspx) (data downloaded on Dec. 12, 2012).
78. U.S. Dep't. of the Treasury, Making Home Affordable Data File Summary, 6 (January 31, 2011), available at [http://www.treasury.gov/initiatives/financial-stability/reports/Documents/MHA%20Data%20File%20Summary\\_new.pdf](http://www.treasury.gov/initiatives/financial-stability/reports/Documents/MHA%20Data%20File%20Summary_new.pdf).
79. David Streitfeld, *Biggest Defaulters on Mortgages Are the Rich*, N.Y. Times (July 8, 2010) available at <http://www.nytimes.com/2010/07/09/business/economy/09rich.html>.
80. See Lita Epstein, *Should You Consider a 'Strategic Default' on Your Mortgage?*, Daily Finance.com, Feb. 6, 2010, <http://www.dailyfinance.com/2010/02/06/should-you-consider-a-strategic-default-on-your-mortgage/> (reporting drops of 100 to 125 points in the credit score of borrowers who strategically default on their home mortgages).
81. See Agarwal, *supra* note 13, at 19.
82. See Adam J. Levitin & Tara Twomey, *Mortgage Servicing*, 28 Yale J. on Reg. 1 (2011)(discussing principal-agent conflict between mortgage investors and servicers).
83. Alan M. White, *Foreclosures and Modifications – Securitized Mortgage Data through May 25, 2011* (2011), <http://www.valpo.edu/law/about-us/full-time-faculty/alan-m-white/alan-white-data-files>.
84. Thompson, *Foreclosing Modifications*, *supra* note 12, at 771-772.
85. Alan White, *Too Big to Comply*, Credit Slips (June 9, 2011), <http://www.creditslips.org/creditslips/2011/06/too-big-to-comply.html> (re-default rates on proprietary mods made in 2007-2008 were between 60-70% after 12 months).
86. See, e.g., Office of the Comptroller of the Currency & Office of Thrift Supervision, OCC and OTS Mortgage Metrics Report: Disclosure of National Bank and Federal Thrift Mortgage Loan Data: First Quarter 2011 at 37 (2011) [hereinafter Mortgage Metrics Q1 2011], available at <http://www.occ.gov/publications/publications-by-type/other-publications-reports/mortgage-metrics-2011/mortgage-metrics-q1-2011.pdf>. These numbers understate the magnitude of the problem with proprietary modifications because they reflect the re-default rate for all loan modifications, including HAMP modifications, which have a much lower rate.
87. Compare White, *supra* note 85 (re-default rates on proprietary mods made in 2007-2008 were between 60-70% after 12 months) with Office of the Comptroller of the Currency & Office of Thrift Supervision, OCC and OTS Mortgage Metrics Report: Disclosure of National Bank and Federal Thrift Mortgage Loan Data: Fourth Quarter 2011 at 39 (2012) [hereinafter Mortgage Metrics Q4 2011], available at <http://www.occ.gov/publications/publications-by-type/other-publications-reports/mortgage-metrics-2011/mortgage-metrics-q4-2011.pdf> (re-default rate on HAMP modifications made in 4th Quarter 2010 was 17.7% at 12 months). See also Ioan Voicu et al., *Furman Ctr. for Real Estate & Urban Policy, Performance of HAMP Versus Non-HAMP Loan Modifications – Evidence from New York City* (2011), available at [http://furmancenter.org/files/publications/paper\\_mods\\_performance\\_102311\\_1.pdf](http://furmancenter.org/files/publications/paper_mods_performance_102311_1.pdf) (finding that HAMP mods

have lower re-default rates even after controlling for payment reduction, interest rate reduction and term extension).

88. For example, for mortgages modified since the 3rd quarter of 2009, 3.5% of homeowners with non-HAMP modifications have lost their homes to foreclosure despite the modification, compared to only 1.5% of homeowners with HAMP modifications. Mortgage Metrics Q4 2011, *supra* note 87, at 44.
89. U.S. Dep't. of the Treasury, Making Home Affordable: Program Performance Report Through March 2011 (2011), *available at* <http://www.treasury.gov/initiatives/financial-stability/results/MHA-Reports/Documents/March%202011%20MHA%20Report%20FINAL.PDF>.
90. Mortgage Metrics Q1 2011, *supra* note 86, at 37 (for instance, at 12 months, 35.5% of non-HAMP modifications made in the 4th quarter of 2009 were 60+ days delinquent, compared to 17.7% of HAMP modifications made in the same period).
91. U.S. Dep't. of the Treasury, Making Home Affordable: Program Performance Report Through December 2011 4 (2012), *available at* <http://www.treasury.gov/initiatives/financial-stability/results/MHA-Reports/Documents/Dec%202011%20MHA%20Report%20FINAL.PDF>; Mortgage Metrics Q4 2011, *supra* note 87, at 41.
92. *See* Voicu et al., *supra* note 87 (finding that HAMP mods have lower re-default rates even after controlling for payment reduction, interest rate reduction and term extension).
93. MHA Handbook v4.0, *supra* note 11, at ch. II §6.1.
94. *See generally* III.B.2, *infra* (discussing how HAMP modifications provide sustainable modifications for homeowners).
95. *See* III.A, *supra*.
96. U.S. Dep't. of the Treasury, Making Home Affordable: Program Performance Report Through October 2012 at 10 (2012) [hereinafter MHA Performance Report Through October 2012], *available at* <http://www.treasury.gov/initiatives/financial-stability/reports/Documents/October%202012%20MHA%20Report%20Final.pdf> (840,835 active permanent modifications). *See also* Agarwal, *supra* note 13, at 15 (finding that HAMP significantly increased the total number of permanent modifications).
97. Roberto G. Quercia et al., Ctr. for Cmty. Capital, Loan Modifications and Re-default Risk: An Examination of Short-term Impact (2009), *available at* <http://www.huduser.org/portal/periodicals/cityscape/vol11num3/ch8.pdf>; *Modified Current Loans Are Three Times as Likely to Default as Unmodified Current Loans*, Moody's ResiLandscape (Moody's Investors Service), Feb. 1, 2011, at 10; Goodman, *supra* note 10, at 6-7.
98. Mortgage Metrics Q4 2011, *supra* note 87, at 44.
99. *Id.*
100. MHA Handbook v4.0, *supra* note 11, at ch. II §6.3.3.
101. MHA Performance Report Through April 2012, *supra* note 72.
102. Mortgage Metrics Q1 2011, *supra* note 86, at 32.
103. *See* III.D.6.d, III.B.2.a, *infra* (discussing the HAMP Tier II program).
104. Esther Cho, *GSEs Announce Lower Standard Modification Interest Rate*, DSNews.com, Aug. 1, 2012, *available at* <http://www.dsnews.com/articles/gses-announce-lower-standard-modification-interst-rate-2012-08-01>
105. Freddie Mac Weekly Primary Mortgage Market Survey *available at* <http://www.freddiemac.com/pmms/> (rate on December 20, 2012 was 3.3.7%)
106. *See* Fannie Mae, Announcement SVC-2011-08R, Reissuance of the Delinquency Management and Default Prevention Announcement 27-28 ( 2011) , *available at* <https://www.efanniemae.com/sf/guides/ssg/annltrs/pdf/2011/svc1108.pdf>; Freddie Mac, Primary Mortgage Market Survey, <http://www.freddiemac.com> (last visited June 21, 2012).

107. U.S. Dep't of the Treasury, Obama Administration Releases April Housing Scorecard (2012), <http://www.treasury.gov/press-center/press-releases/Pages/tg1569.aspx> ("The Administration's programs continue to encourage improved standards and processes in the industry, with HOPE Now lenders offering families and individuals more than 2.8 million proprietary mortgage modifications through February."). See also Goodman, *supra* note 10, at 17 ("HAMP served to standardize the modification process, creating a blueprint used by most proprietary modification programs.").
108. See generally III.B.1.c, *supra*.
109. As of November 24, 2012, the Freddie Mac Weekly Prime Mortgage Market Survey Rate was 3.31%. Thus, a loan modified under HAMP that had its interest rate reduced to 2% would, after five years, have its rate increased to 3% and then, in year six, increase again to 3.31%. Once the rate increases to 3.31%, the rate is fixed, and will not increase again for the life of the loan. During HAMP's existence the Freddie Mac rate has fluctuated between a low of about 3.3% and a high of about 5.60%. Freddie Mac, Primary Mortgage Market Survey Archives, [http://www.freddiemac.com/pmms/pmms\\_archives.html](http://www.freddiemac.com/pmms/pmms_archives.html).
110. See MHA Handbook v4.0, *supra* note 11, at ch. II § 1.2.
111. See *id.* at ch. II § 6.3.1.
112. Diane Pendley et al., Fitch Ratings, U.S. RMBS Servicers' Loss Mitigation and Modification Efforts Update II 1, 16 (2010); U.S. Dep't of the Treasury, Making Home Affordable Data File Summary (July 31, 2012), available at [https://www.hmpadmin.com/portal/programs/docs/hamp\\_servicer/MHAPRAResearchSummary.pdf](https://www.hmpadmin.com/portal/programs/docs/hamp_servicer/MHAPRAResearchSummary.pdf); Goodman, *supra* note 10, at 6.
113. The August MHA report indicates that, of 127,734 modifications started with principal reduction, 19,118 are still in trial plans and 87,410 are in permanent modifications. This means that over the life of the program, only 17% of the modifications with principal reduction drop out. By contrast, 1,912,439 HAMP trial modifications of all kinds were started, and, in August 2012, there were 64,863 outstanding trial modifications and 831,661 outstanding permanent modifications. U.S. Dep't. of the Treasury, Making Home Affordable Program Performance Report Through August 2012, at 3-4 (2012) [hereinafter MHA Performance Report Through August 2012]. Thus, slightly more than 53% of all trial modifications initiated since the beginning of HAMP have ended, for one reason or another.
114. See Goodman, *supra* note 10, at 6 ("There is no question that principal modifications have been the most effective form of modification . . ."); Zhiqin Huang et al., *Modified Current Loans Are Three Times as Likely to Default as Unmodified Current Loans*, Moody's ResiLandscape (Feb. 1, 2011), at 10; Peter McNally et al., *Principal Reduction Helps to Reduce Rates in the Long Run*, Moody's ResiLandscape (Moody's Investors Service), Jan. 20, 2012; Diane Pendley et al., Fitch Ratings, U.S. RMBS Servicers' Loss Mitigation and Modification Efforts Update II 1,16 (2010) (modifications without principal reductions experience higher re-default rates than those with principal reductions); Diane Pendley & Thomas Crowe, Fitch Ratings, U.S. RMBS Servicers' Loss Mitigation and Modification Efforts 2, 10-11, 15(2009) (modifications with principal reductions greater than 20% perform better than any other category of modifications, but few modifications with principal reductions done and re-default rates, even for loans with a 20% principal reduction, remain at 30%–40% after 12 months); Quercia et al., *supra* note 97; Cesar Romero, Standard & Poor's, *The Best Way to Limit U.S. Mortgage Redefaults May Be Principal Forgiveness* (2012), available at <http://www.standardandpoors.com/ratings/articles/en/us/?articleType=HTML&assetID=1245335672295>.
115. *Negative Equity Increase in Q4 2011*, *supra* note 37 (finding 11.1million residential mortgages underwater, 22.8% of all mortgaged residential properties). See also Kelly, *supra* note 37 (estimating 15.7 million homeowners are underwater).

116. Laurie S. Goodman et al., *Negative Equity Trumps Unemployment in Predicting Defaults*, 19 J. of Fixed Income 67 (2010).
117. Home Affordable Modification Program, Supplemental Directive 10-14, Making Home Affordable—Principal Reduction Alternative Update 1-2 (Oct. 15, 2010), *available at* [https://www.hmpadmin.com/portal/programs/docs/hamp\\_servicer/sd1014.pdf](https://www.hmpadmin.com/portal/programs/docs/hamp_servicer/sd1014.pdf).
118. Investors can enter into an equity share agreement with borrowers if the HAMP modification results in principal reduction. Investors are also eligible for incentive payments of up to \$0.63 for each dollar of principal forgiven. MHA Handbook v4.0, *supra* note 11, at ch. II §6.4.6, 13.3.4.1.
119. MHA Performance Report Through August 2012, *supra* note 113, at 4.
120. *See* MHA Performance Report Through October 2012, *supra* note 96, at 5 (reporting that the median pre-modification loan-to-value ratio is 120%).
121. *Id.* (reporting that 32% of all 840,835 permanent modifications contain principal forbearance, or 269,000 modifications, while only 95,339 permanent modifications outstanding contain principal reduction).
122. U.S. Dep't. of the Treasury, Making Home Affordable Program: Servicer Performance Report Through September, 2010 (2010), *available at* [http://www.treasury.gov/initiatives/financial\\_stability/results/MHA-Reports/Documents/Sept%20MHA%20Public%202010.pdf](http://www.treasury.gov/initiatives/financial_stability/results/MHA-Reports/Documents/Sept%20MHA%20Public%202010.pdf) (estimated number of applications is based on the number of trial offers extended plus the number of borrowers not accepted into trial mods by the eight largest servicers).
123. Thompson, *Foreclosing Modifications*, *supra* note 12, at 802.
124. Federal Housing Finance Agency, Review of Options Available for Underwater Borrowers and Principal Forgiveness 11 (2011), [http://www.fhfa.gov/webfiles/24108/PF\\_FHFApaper73112.pdf](http://www.fhfa.gov/webfiles/24108/PF_FHFApaper73112.pdf).
125. *See* Office of the Comptroller of the Currency, OCC Mortgage Metrics Report: Disclosure of National Bank and Federal Savings Association Mortgage Loan Data: Second Quarter 2012 at 5 (2012) [hereinafter Mortgage Metrics Q2 2012], *available at* <http://www.occ.treas.gov/publications/publications-by-type/other-publications-reports/mortgage-metrics-2012/mortgage-metrics-q2-2012.pdf>.
126. Mortgages insured by Fannie Mae and Freddie Mac account for 50.76% of HAMP loan modifications. Analysis of the Nat'l Consumer Law Ctr., based on MHA Data File (October 2012), *available at* [http://www.treasury.gov/initiatives/financial-stability/reports/Pages/mha\\_publicfile.aspx](http://www.treasury.gov/initiatives/financial-stability/reports/Pages/mha_publicfile.aspx) (data downloaded on Dec. 12, 2012).
127. Christopher Matthews, *Why Is Ed DeMarco Blocking a Win-Win Housing Program?*, Time, Aug. 1, 2012, *available at* <http://business.time.com/2012/08/01/why-is-ed-demarco-blocking-a-win-win-housing-program/>; Letter from Timothy Geithner, Treasury Secretary, to Edward DeMarco, Acting Director of the Fed. Housing Fin. Agency (July 31, 2012), *available at* <http://www.treasury.gov/connect/blog/Documents/letter.to.demarco.pdf>.
128. Press Release, Federal Housing Finance Agency, Statement by Edward J. DeMarco, Acting Director, Federal Housing Finance Agency, on the Use of Principal Forgiveness by Fannie Mae and Freddie Mac (July 31, 2012), <http://www.fhfa.gov/webfiles/24113/PFStatement73112.pdf>.
129. The FHA is considering whether to do principal reduction based on an increase in incentives currently available under HAMP. *See* John Griffith, Ctr. for Am. Progress, The FHA is on Board with Principal Reduction (2012), [http://www.americanprogress.org/issues/2012/06/fha\\_announcement.html](http://www.americanprogress.org/issues/2012/06/fha_announcement.html).
130. *See* Goodman, *supra* note 10, at 17-18.
131. Mortgage Metrics Q2 2012, *supra* note 125.

132. U.S. Dep't of the Treasury, TG-185, Obama Administration to Launch National Outreach Campaign in Support of Making Home Affordable Program (2009), *available at* <http://www.treasury.gov/press-center/press-releases/Pages/tg185.aspx>.
133. Special Inspector Gen. for the Troubled Asset Relief Program, SIGTARP-10-005, Factors Affecting Implementation of the Home Affordable Modification Program 2 (2010), *available at* [http://www.sig tarp.gov/Audit%20Reports/Factors\\_Affecting\\_Implementation\\_of\\_the\\_Home\\_Affordable\\_Modification\\_Program.pdf](http://www.sig tarp.gov/Audit%20Reports/Factors_Affecting_Implementation_of_the_Home_Affordable_Modification_Program.pdf). *See also* GAO: MHA Implementation Challenges, *supra* note 41, at 47 (“While Treasury originally estimated that 3 to 4 million people would be helped by these programs, only 550,000 homeowners had received permanent HAMP first-lien modifications as of November 30, 2010, and the number of homeowners starting trial modifications has been rapidly declining since October 2009.”); *Statement of Neil Barofsky, Special Inspector General, Troubled Asset Relief Program Before the S. Comm. on Banking, Hous. and Urban Affairs* 15 <http://www.sig tarp.gov/Testimony/Testimony%20Before%20the%20Senate%20Committee%20on%20Banking,%20Housing%20and%20Urban%20Development.pdf> (March 17, 2011) (“Secretary Geithner has at least begun to acknowledge the program’s obvious shortcomings, recently conceding that HAMP “won’t come close” to the initial estimate of helping 3 to 4 million at-risk homeowners avoid foreclosure.”). *See also* Agarwal, *supra* note 13, at 26.
134. MHA Performance Report Through August 2012, *supra* note 113, at 3.
135. *Id.*
136. 63,000 Completed Foreclosures in May, *supra* note 3.
137. Goodman testimony: *Glut of Foreclosed Properties*, *supra* note 4.
138. *See* Paul Kiel, *Foreclosure Fail: Study Pins Blame on Large Banks*, ProPublica, Sept. 11, 2012, <http://www.propublica.org/article/foreclosure-fail-study-pins-blame-on-big-banks> (reporting estimates that at least 800,000 homeowners did not receive HAMP modifications, due solely to servicer error).
139. *See* “Contact Your Mortgage Servicer,” at Making Home Affordable.gov, <http://www.makinghomeaffordable.gov/get-started/contact-mortgage/Pages/default.aspx> (last visited on Dec. 26, 2012) (listing participating servicers in HAMP). Despite this, CitiFinancial employees sometimes represented both in formal court documents and informally that CitiFinancial was participating in HAMP. *CitiFinancial, Inc. v. Burris*, No. 2011-CP-740, ¶ 12 (Anderson County, S.C., Mar. 7, 2011); E-mail correspondence with Grace Pazdan, Attorney, Vermont Legal Aid (Apr. 6, 2011).
140. Home Affordable Modification Program, Supplemental Directive 10-02, Making Home Affordable Program—Borrower Outreach and Communication 9 (Mar. 24, 2010) [https://www.hmpadmin.com/portal/programs/docs/hamp\\_servicer/sd1002.pdf](https://www.hmpadmin.com/portal/programs/docs/hamp_servicer/sd1002.pdf); Home Affordable Modification Program, Supplemental Directive 11-04, Making Home Affordable Program—Single Point of Contact for Borrower Assistance 4 (May 18, 2011), [https://www.hmpadmin.com/portal/programs/docs/hamp\\_servicer/sd1104.pdf](https://www.hmpadmin.com/portal/programs/docs/hamp_servicer/sd1104.pdf) [hereinafter HAMP, Supplemental Directive 11-04]; Home Affordable Modification Program, Supplemental Directive 11-12, Making Home Affordable Program—Servicing Transfers (Dec. 27, 2011) [https://www.hmpadmin.com/portal/programs/docs/hamp\\_servicer/sd1112.pdf](https://www.hmpadmin.com/portal/programs/docs/hamp_servicer/sd1112.pdf). *See generally* U.S. Dep't of the Treasury, Making Home Affordable Program: Handbook for Servicers of Non-GSE Mortgages v4.0 ch. I § 1.4.1 (2012).
141. *See, e.g.,* *Brandon v. Wells Fargo*, 2011 WL 6338832 (E.D. Tex. Nov. 30, 2011) (detailing travails of a homeowner with a loan held by Freddie Mac).
142. *See, e.g.,* Fannie Mae 2010 Servicing guide Update Part VII and Part VIII at 293 (Apr. 2010) , <https://www.fanniemae.com/content/guide/svc042810.pdf> (“In most states, the foreclosure

- attorney (or trustee) must initiate the proceedings in the servicer's name . . ."). *See generally* Bank of Am., N.A., v. Cloutier, No. YOR-12-361 (Me. Sup. Ct.)
143. *See* III.B.2.c, III.C.2.d,; III.C.3.c, and III.D.2.
  144. *See* Mortgage Metrics Q2 2012, *supra* note 125, at 5.
  145. The FDIC's NPV model is available at <http://www.fdic.gov/consumers/loans/prevention/NPVCALculator.html>.
  146. *See* Special Inspector Gen. for the Troubled Asset Relief Program, SIGTARP 12-003, The Net Present Value Test's Impact on the Home Affordable Modification Program (2012) [hereinafter *SIGTARP: NPV Test's Impact*], available at [http://www.sig tarp.gov/Audit%20Reports/NPV\\_Report.pdf](http://www.sig tarp.gov/Audit%20Reports/NPV_Report.pdf).
  147. *Id.*
  148. *See, e.g.,* United States v. Sloan, 505 F.3d 685 (7th Cir. 2007); United States v. Agboola, 417 F.3d 860 (8th Cir. 2005); Vaughn v. Consumer Home Mortg., Inc., 293 F.Supp.2d 206 (E.D.N.Y. 2003). *See generally* Nat'l Consumer Law Ctr., Foreclosures §§ 3.2.2, 3.3.3, 3.4.2.5 (3d ed. 2010) (collecting cases involving FHA, VA, and RHS loans, respectively).
  149. Kiser v. CitiMortgage, Inc., 2011 WL 4699355, at \*1-2 (N.D. Ohio, Oct. 6, 2011).
  150. *See, e.g.,* MHA Handbook v. 4.0, *supra* note 62 ch. 2 § 2.3.1.2 (extending the time for a homeowner to provide additional documentation); 4.1.1.2 (reviewing information submitted by the homeowner about rents received); 5.1.1 (accepting non-consecutive paystubs); 5.1.5 (offering a HAMP modification instead of an Unemployment Program forbearance); 5.1.9 (deciding whether to include non-borrower household income or not); 5.3 (deciding whether to trust the credit report or the borrower about residence); § 5.6 (deciding the level of "perfection" required in the documents submitted by the borrower).
  151. In the month following the new income verification requirements, the conversion rate from trial to permanent modifications reached nearly 26% from 12.4% the previous month. *See* U.S. Dep't. of the Treasury, Making Home Affordable Program: Servicer Performance Report Through February 2010 (2010), available at <http://www.treasury.gov/initiatives/financialstability/results/MHA-Reports/Documents/Feb%20Report%20031210.pdf>; U.S. Dep't. of the Treasury, Making Home Affordable Program: Servicer Performance Report Through January 2010 (2010), available at <http://www.treasury.gov/initiatives/financial-stability/results/MHA-Reports/Documents/January%20Report%20FINAL%2002%2016%2010.pdf>.
  152. *See, e.g.,* Kiel, *Watchdog Doesn't Bark or Bite*, *supra* note 45 (noting that fewer than 800,000 have received loan modifications, fewer than 1 in 4 who have applied, and detailing rampant non-compliance by GMAC that has gone mostly unaddressed by the Treasury Department).
  153. *See* Agarwal, *supra* note 13, at 2 (concluding that if all servicers had modified loans in accordance with the HAMP standards, 70% more loans would have been modified under HAMP).
  154. *See, e.g.,* Special Inspector Gen. for the Troubled Asset Relief Program, Quarterly Report to Congress: April 25, 2012 (2012) [hereinafter *SIGTARP: Quarterly Report April 2012*], available at [http://www.sig tarp.gov/Quarterly%20Reports/April\\_25\\_2012\\_Report\\_to\\_Congress.pdf](http://www.sig tarp.gov/Quarterly%20Reports/April_25_2012_Report_to_Congress.pdf); U.S. Gov't Accountability Office, GAO-11-433, Mortgage Foreclosures: Documentation Problems Reveal Need for Ongoing Regulator Oversight (2011) [hereinafter *GAO: Need for Ongoing Regulator Oversight*], available at <http://www.gao.gov/assets/320/317923.pdf>; Cong. Oversight Panel, 64-832, March Oversight Report: The Final Report of the Congressional Oversight Panel (2011) [hereinafter *COP: Final Report*], available at <http://www.gpo.gov/fdsys/pkg/CHRG-112shrg64832/pdf/CHRG-112shrg64832.pdf>.
  155. *See, e.g.,* Phillips v U.S. Bank, NA, No. 11-cv-00504 (Ga. Super. Ct. Nov. 3, 2011) (lambasting the bank for denying a modification with absolutely no explanation); BAC Home Loans Servicing v. Westervelt, 2010 WL 4702276 (N.Y. Sup. Ct. Nov. 18, 2010) (finding *sua sponte* that the

bank had not participated in good faith in mandatory mediation and threatening sanctions, including discharge of the underlying mortgage obligation, for continuing failure); *IndyMac Bank F.S.B. v. Yano-Horoski*, 890 N.Y.S.2d 313, 319 (Sup. Ct. 2009) (finding that IndyMac's actions had been "harsh, repugnant, shocking and repulsive"), *rev'd sub nom*, *Indymac Bank, F.S.B. v. Yano-Horoski*, 912 N.Y.S.2d 239, 240 (N.Y. App. Div. 2010) (finding trial court had no authority to cancel mortgage as a sanction).

156. *See, e.g., Kiser v. CitiMortgage*, 2011 WL 4699355, at \*1 (N.D. Ohio, Oct. 6, 2011) (servicer failed to provide information packet to borrower); E-mail correspondence from Rochelle Sparko, N.C. Justice Ctr., (May 6, 2011) (servicer in 2011 mailed loan modification packets to made-up address, instead of homeowner's address or address of homeowner's attorney, even though servicer was in regular contact with both homeowner and attorney).
157. Analysis of the Nat'l Consumer Law Ctr., based on MHA Data File (October 2012), available at [http://www.treasury.gov/initiatives/financial-stability/reports/Pages/mha\\_publicfile.aspx](http://www.treasury.gov/initiatives/financial-stability/reports/Pages/mha_publicfile.aspx) (data downloaded on Dec. 12, 2012).
158. *See, e.g., Empowering and Protecting Servicemembers, Veterans and their Families in the Consumer Financial Marketplace: Hearing Before the S. Comm. on Banking, Housing & Urban Affairs*, 112th Cong. (2012) (statement of Hollister K. Petraeus, Ass't Dir., Consumer Fin. Protection Bureau, Office of Servicemember Affairs) (noting that servicemembers have been "stalled with repeated demands for loan documents that have already been sent"); *A Status Update The Need for National Mortgage Servicing Standards: Hearing Before the S. Subcomm. on Housing of the S. Comm. on Banking, Housing & Urban Affairs*, 112th Cong. 6-7 (2011) (statement of Diane E. Thompson) [hereinafter Thompson testimony: *Need for National Mortgage Servicing Standards*], available at [http://www.nclc.org/images/pdf/foreclosure\\_mortgage/mortgage\\_servicing/testimony-thompson-mortgage-servicing-standards.pdf](http://www.nclc.org/images/pdf/foreclosure_mortgage/mortgage_servicing/testimony-thompson-mortgage-servicing-standards.pdf).
159. *SIGTARP: NPV Test's Impact*, *supra* note 146.
160. Paul Kiel, *Foreclosure Fail: Study Pins Blame on Large Banks*, ProPublica, Sept. 11, 2012, <http://www.propublica.org/article/foreclosure-fail-study-pins-blame-on-big-banks>.
161. *See* U.S. Dep't of the Treasury, *Making Home Affordable: Program Performance Report Through April 2011* 19, 25 (2011) [hereinafter MHA Performance Report Through April 2011], available at <http://www.treasury.gov/initiatives/financial-stability/results/MHA-Reports/Documents/April%202011%20MHA%20Report%20FINAL.PDF> (reporting that Bank of America miscalculated the income, based on the numbers in its records, 22% of the time; Chase miscalculated the income 31% of the time).
162. *See SIGTARP: NPV Test's Impact*, *supra* note 146.
163. E-mail from Alan White (Mar. 7, 2011).
164. Treasury excuses servicers from correctly calculating the income in five percent of all files. MHA Performance Report Through April 2011, *supra* note 161, at 37.
165. *Problems in Mortgage Servicing from Modification to Foreclosure: Hearing Before the S. Comm. on Banking, Hous. and Urban Affairs*, 111th Cong. 8 (2010) (testimony of Diane E. Thompson, Counsel, Nat'l Consumer Law Ctr.) [hereinafter Thompson testimony: *Problems in Mortgage Servicing*], available at [http://banking.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore\\_id=c1fac0f6-5ac5-4ae5-85cc-e2220255dfd9](http://banking.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=c1fac0f6-5ac5-4ae5-85cc-e2220255dfd9).
166. Thompson, *Foreclosing Modifications*, *supra* note 12, at 782-785.
167. *See* Conn. Fair Housing Ctr., *Report on the Efficacy of the HAMP Solution Center 2* (Sept. 27, 2012) (on file with the authors).
168. Doyle McManus, *The Home Loan Modification Mess*, L.A. Times, Nov. 18, 2010.
169. E-mail from Thomas A. Cox, Attorney (July 3, 2012).
170. *See, e.g., Deutsche Bank, N.A. v. Smith*, No. AANCV106002435S (Conn. Super. Ct. Nov. 15,



- 2011) (ordering plaintiff to “request waiver on investor restrictions and provide proof of request of waiver”).
171. See III.B.2.b, *supra*.
  172. See, e.g., *Brandon v. Wells Fargo*, 2011 WL 6338832 (E.D. Tex. Nov. 30, 2011) (discussing servicer’s incentives to delay modifying loans while pursuing foreclosure).
  173. E-mail correspondence from Stefanie Ebbens Kingsley, Attorney, AppalReD (Dec. 1, 2012).
  174. Jessica Mador, *Foreclosures down, yet struggles for loan modifications continue*, Minnesota Public Radio, Nov. 28, 2012, available at <http://minnesota.publicradio.org/display/web/2012/11/28/business/john-chun-foreclosure-loan-modification/>; Dina ElBoghdady, *Amid mortgage mess, owners blindsided*, Wash. Post., Oct. 30, 2010, at A1.
  175. E-mail correspondence from Kari Rudd, Attorney, Bay Area Legal Aid (Dec. 6, 2012, Dec. 11, 2012).
  176. Complaint at ¶ 21, *Castillo v. Bank of Am., N.A.*, No. 12-CV-233256 (Cal. Sup. Ct., County of Santa Clara, Oct. 1, 2012).
  177. *Brandon v. Wells Fargo*, 2011 WL 6338832 (E.D. Tex. Nov. 30, 2011).
  178. Thompson testimony: *Need for National Mortgage Servicing Standards*, *supra* note 158.
  179. Complaint, *Esquivel v. Bank of Am., N.A.*, No. 12-CV-02502 (E.D. Cal., Oct. 5, 2012).
  180. See *Fannie Mae: SVC-2011-08R*, *supra* note 106; *Freddie Mac, Bulletin 2011-11, Servicing Alignment Initiative and Hawaii Legislative Changes Affecting Non-Judicial Foreclosures (2011)*, available at <http://www.freddiemac.com/sell/guide/bulletins/pdf/bl1111.pdf>; *Freddie Mac, Bulletin 2011-16, Single-Family Seller/Servicer Guide (2011)*, available at <http://www.freddiemac.com/sell/guide/bulletins/pdf/bl1116.pdf>; *Freddie Mac, Bulletin 2011-17, Updates to Post-Referral to Foreclosure Solicitation Letter (2011)*, available at <http://www.freddiemac.com/sell/guide/bulletins/pdf/bl1117.pdf>; *Freddie Mac, Bulletin 2011-19, Single-Family Seller/Servicer Guide (2011)*, available at <http://www.freddiemac.com/sell/guide/bulletins/pdf/bl1119.pdf>; *Freddie Mac, Single-Family Seller/Servicer Guide, Volume 2 ch. B65: Workout Options (2011)*, available at <http://www.freddiemac.com/sell/guide> (follow “AllRegs” hyperlink under “Access the Guide”).
  181. Thompson testimony: *Need for National Mortgage Servicing Standards*, *supra* note 158, at 31–35 (discussing weaknesses of the FHFA’s SAI); Thompson testimony: *Problems in Mortgage Servicing*, *supra* note 165, at 3–5, 8–17 (discussing failures of HAMP). While the GSE rules require a pause in some circumstances if a loan mod application package is received in the first 30 days after a referral to foreclosure letter is sent, there is no general pause for homeowners seeking a modification once the foreclosure has started.
  182. Thompson testimony: *Need for National Mortgage Servicing Standards*, *supra* note 158, at 12-1.
  183. See, e.g., *SIGTARP: Quarterly Report April 2012*, *supra* note 154; GAO: *Need for Ongoing Regulator Oversight*, *supra* note 154; COP: *Final Report*, *supra* note 154.
  184. *Williams v. Geithner*, No. 09-1959 ADM/JJG, 2009 WL 3757380, at \*7 (D. Minn. Nov. 9, 2009).
  185. Kiel, *Watchdog Doesn’t Bark or Bite*, *supra* note 45.
  186. Kiel, *Secret Documents Show Weak Oversight*, *supra* note 45.
  187. See III.C.3.b.1 (discussing limitations in the transparency of the net present value test).
  188. See, e.g., *Bank of Am. N.A. v. Lucido*, No. 2009-03769, 2012 WL 1292732 (N.Y. Sup. Ct. Apr. 16, 2012) (detailing over 2 years of non-cooperation by Bank of America, including a 155 day delay in providing the court with the PSA containing the alleged investor restriction).
  189. *Brandon Ivey, SIGTARP Laments HAMP Liability Release in Servicing Settlement*, Inside Mortgage Finance, May 1, 2012, available at <http://www.insidemortgagefinance.com/blogs/SIGTARP-Laments-HAMP-Liability-Release-in-Servicing-Settlement-1000019638-1.html>.
  190. Federal Deposit Insurance Corporation, *Loan Modification Net Present Value Model*, [www.fdic.gov/consumers/loans/loanmod/NPV.xls](http://www.fdic.gov/consumers/loans/loanmod/NPV.xls) (last visited Dec. 10, 2012).

191. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376, sec. 1482.
192. Carrie Bay, *Treasury Unveils Do-It-Yourself NPV Assessment*, DSNews.com, May 23, 2011, <http://www.dsnews.com/articles/treasury-unveils-do-it-yourself-npv-assessment-2011-05-23>.
193. Authors' calculation based on the number of homeowners denied for NPV failure as of March 2012 and the percentage of total HAMP denials that occurred before April 2011, when the NPV test became public. See MHA Performance Report Through April 2011, *supra* note 161 (753,041 trial modifications cancelled through March 2011); MHA Performance Report Through April 2012, *supra* note 72 (767,996 trial modifications cancelled through March 2012); *SIGTARP: NPV Test's Impact*, *supra* note 146, at 1 (160,870 NPV denials).
194. *SIGTARP: NPV Test's Impact*, *supra* note 146, at 10.
195. E-mail correspondence with Alan White, Prof., Valparaiso University, Mar. 7, 2011.
196. Making Home Affordable, GETTING STARTED WITH CheckMyNPV, *available at* <https://checkmynpv.com/overview> (last visited Dec. 11, 2012).
197. MHA Handbook v4.0, *supra* note 11, at ch. II §74. The discount rate is the amount by which future payments are discounted to a present value. The larger the discount rate, the less the future payments on a modified loan are worth.
198. *SIGTARP: NPV Test's Impact*, *supra* note 146, at 4.
199. See Special Inspector Gen. for the Troubled Asset Relief Program, Quarterly Report to Congress: January 26, 2012, at 18-19 (2012), *available at* <http://www.sig tarp.gov/pages/quarterly.aspx>.
200. Cal. Reinvestment Coalition, *Race to the Bottom: An Analysis of HAMP Loan Modification Outcomes by Race and Ethnicity for California* 2-3, 27 (2011), <http://www.calreinvest.org/publications/crc-reports>; Nat'l. Cmty. Reinvestment Coal., *HAMP: Mortgage Modification Survey 2010* 3 (2010), *available at* [http://www.ncrc.org/images/stories/mediaCenter\\_reports/hamp\\_report\\_2010.pdf](http://www.ncrc.org/images/stories/mediaCenter_reports/hamp_report_2010.pdf).
201. U.S. Dep't of the Treasury, *Making Home Affordable Program: Servicer Performance Report through August 2009* (2009), *available at* <http://www.treasury.gov/initiatives/financial-stability/results/MHA-Reports/Documents/July%202011%20MHA%20Report%20FINAL.PDF>.
202. See, e.g., U.S. Dep't of the Treasury, *Making Home Affordable: Program Performance Report Through July 2011* 18, 21-22, 27-28 (2011), *available at* <http://www.treasury.gov/initiatives/financial-stability/results/MHA-Reports/Documents/July%202011%20MHA%20Report%20FINAL.PDF>.
203. See, e.g., Agarwal, *supra* note 13, at 23.
204. See generally IIID5, *infra* (discussing conversion problems).
205. See Goodman, *supra* note 10, at 16-17.
206. See, e.g., [http://www.freddiemac.com/avoidforeclosure/working\\_with\\_lender.html?intcmp=GPCYL-HPstep4](http://www.freddiemac.com/avoidforeclosure/working_with_lender.html?intcmp=GPCYL-HPstep4) ("However, if you still have questions or need additional guidance after talking to your lender, you may contact a Freddie Mac representative at 800-373-3343 and selecting option #2.").
207. See, e.g., *Brandon v. Wells Fargo*, 2011 WL 6338832 (E.D. Tex. Nov. 30, 2011) (discussing homeowner's reliance on a friend, a former employee at Fannie Mae, to attempt to resolve problems with a modification of a Freddie Mac loan).
208. Jon Prior, *Treasury Makes Adjustments to Give HAMP a Chance*, HousingWire (Feb. 24, 2011), <http://www.housingwire.com/news/treasury-makes-adjustments-give-hamp-chance>.
209. See *HAMP Solution Center Report*, *supra* note 46, at 1 (noting that the process is useful for getting a denial reason from servicers).

210. See Gene Sperling, *We Can't Wait: Recent Executive Actions to Support the Housing Market and Help Struggling American Homeowners*, The White House Blog, Oct. 24, 2011 (discussing creation of HSC) <http://www.whitehouse.gov/blog/2011/10/24/we-cant-wait-recent-executive-actions-support-housing-market-and-help-struggling-ame>; *HAMP Solution Center Report*, *supra* note 46, at 2-3 (discussing unsuccessful attempts to use HSC to resolve disputes on GSE loans).
211. *E.g.*, E-mail from Sheila O'Sullivan, Attorney (Nov. 28, 2012) (attorney needs to file power of attorney and release from client before HSC will talk to attorney; POA valid for a single day only).
212. SIGTARP-10-005, *supra* note 133, at 27 ("Putting aside whether there are homeowners who could have been helped had knowledge of HAMP been broader, the lack of basic understanding about the program has sown confusion . . . If Treasury were to launch its own public service announcement, it would also provide a broad opportunity to educate the public about foreclosure rescue scams . . . SIGTARP alone has opened more than two dozen investigations into this type of fraudulent behavior, and television public service announcements could better educate the public of the danger of these frauds.").
213. See *HAMP Solution Center Report*, *supra* note 46, at 2-3.
214. U.S. Dep't of the Treasury, Supplemental Directive 11-02, *Making Home Affordable Program – Administrative Clarifications* (Mar. 30, 2011), [https://www.hmpadmin.com/portal/programs/docs/hamp\\_servicer/sd1102.pdf](https://www.hmpadmin.com/portal/programs/docs/hamp_servicer/sd1102.pdf).
215. John Rao & Geoff Walsh, Nat'l Consumer Law Ctr., *Foreclosing a Dream: State Laws Deprive Homeowners of Basic Protections* 12 (2009), available at <http://www.nclc.org/images/pdf/pr-reports/report-foreclosing-dream.pdf>.
216. *HAMP Solution Center Report*, *supra* note 46, at 1.
217. *Id.* at 2.
218. Peter S. Goodman, *Mortgage Settlement Deal Confronts Legacy of Obama Foreclosure Failure*, Huffington Post, Mar. 7, 2012, [http://www.huffingtonpost.com/peter-s-goodman/foreclosure-settlement-\\_b\\_1325356.html](http://www.huffingtonpost.com/peter-s-goodman/foreclosure-settlement-_b_1325356.html).
219. *Id.*
220. MHA Handbook v4.0, *supra* note 11, at ch. I §4; HAMP, Supplemental Directive 11-04, *supra* note 140.
221. *E.g.*, E-mail from Rochelle Sparko, Attorney, N.C. Justice Center (Apr. 9, 2012); E-mail from Elizabeth S. Letcher, Director of Litigation, Housing and Economic Rights Advocates (Mar. 26, 2011).
222. E-mail from Sarah Edwards, Attorney, South Brooklyn Legal Services (Mar. 23, 2012).
223. MHA Handbook v4.0, *supra* note 11, at ch. II §1.2, 8.5-8.6.
224. *Id.* at ch. II §1.2.
225. The Freddie Mac guidance requires that borrowers in Chapter 13 bankruptcy have their mortgage loan "released" from the bankruptcy before the permanent modification is finalized. Freddie Mac, *Single Family Servicer Guide*, *supra* note 66, at C.65.7.1(b) ("A Servicer may not convert a Mortgage to a permanent HAMP modification for such a Borrower unless the Mortgage is released from the bankruptcy plan on or before the proposed due date of the first modified payment."). This is both unclear and poor policy.
226. Fannie Mae, *Fannie Mae Single Family 2012 Servicing Guide*, *supra* note 66, at 706-64 (§ 609.01).
227. 11 U.S.C. §524(j).
228. See *e.g.*, *In re Bellano*, 2011 WL 3563012 (Bankr. E.D. Pa. Aug. 11, 2011) (refusing to reopen bankruptcy to file reaffirmation involving HAMP modification based in part on HAMP directive); *In re Tincher*, 2011 WL 2650569, at 3 (Bankr. D.S.C. July 5, 2011) ("This directive

makes clear that debtors who file bankruptcy were intended to be eligible for HAMP post-bankruptcy, without being required to reaffirm their mortgage debt.”); *In re Hart*, 402 B.R. 78 (Bankr. D. Del. 2009) (reaffirmation agreement not required to retain possession of real property); *In re Waller*, 394 B.R. 111 (Bankr. D.S.C. 2008); *In re Wilson*, 372 B.R. 816 (Bankr. D.S.C. 2007).

229. MHA Handbook v. 4.0, *supra* note 11, at ch. II §1.2.
230. *See, e.g., Aceves v. U.S. Bank, N.A.*, 120 Cal.Rptr.3d 507, 512 (Cal. Ct. App., 2011) (homeowner told that she could not speak to the servicer until the automatic stay lifted; once the automatic stay was lifted, the servicer proceeded to foreclose), *modified* (Feb. 9, 2011).
231. U.S. Dep’t of Hous. and Urban Dev., Mortgagee Letter 2008-32 (Oct. 17, 2008), *available at* [http://portal.hud.gov/hudportal/documents/huddoc?id=DOC\\_16794.doc](http://portal.hud.gov/hudportal/documents/huddoc?id=DOC_16794.doc).
232. MHA Handbook v4.0, *supra* note 11, at ch. II §1.2, 8.5-8.6.
233. MHA Handbook v4.0, *supra* note 11, at ch. I §3.3.5.
234. MHA Performance Report Through October 2012, *supra* note 96, at 7 (back end debt-to-income includes mortgage principal and interest, taxes, insurance, homeowners association and/or condo fees, plus payments on installment debts, junior liens, alimony, car lease payments and investment property payments).
235. *E.g.*, E-mail from Daniel E. Claggett, Attorney, Legal Services of Eastern Missouri (Sept. 9, 2009) (elderly couple denied HAMP modification, although combined monthly payment on both the first and second mortgage, both serviced by CitiMortgage, was greater than 42% of their gross monthly income).
236. Nat’l Consumer Law Ctr., *Loan Mods & Curing Defaults in Bankruptcy for Widows, Orphans and Divorcees*, NCLC Reports Bankruptcy and Foreclosures Edition 19, at 19-21 (March/April 2012) [hereinafter NCLC, *Loan Mods for Widows, Orphans and Divorcees*]; Jessica Silver-Greenberg, *Mortgage Catch Pushes Widows Into Foreclosure*, N.Y. Times, Dec. 1, 2012, *available at* [http://www.nytimes.com/2012/12/02/business/widows-pushed-into-foreclosure-by-mortgage-fine-print.html?hp=&adxnnl=1&adxnnlx=1355321114-1cv8xfsxR89Xia/Xtaxc0A&\\_r=0](http://www.nytimes.com/2012/12/02/business/widows-pushed-into-foreclosure-by-mortgage-fine-print.html?hp=&adxnnl=1&adxnnlx=1355321114-1cv8xfsxR89Xia/Xtaxc0A&_r=0).
237. U.S. Dep’t of the Treasury, Supplemental Directive 11-10, *Making Home Affordable Program – Administrative Clarifications* at 4–5 (Sept. 29, 2011), [https://www.hmpadmin.com/portal/programs/docs/hamp\\_servicer/sd1110.pdf](https://www.hmpadmin.com/portal/programs/docs/hamp_servicer/sd1110.pdf) [hereinafter [hereinafter HAMP, Supplemental Directive 11-10].
238. E-mail from Judith Fox, Clinical Professor of Law, Notre Dame Law School (Nov. 12, 2010).
239. Garn–St Germain Depository Institutions Act of 1982, Pub. L. 97-320, §805(a)(2), 96 Stat 1469 (1982). *See generally* NCLC, *Loan Mods for Widows, Orphans, and Divorcees*, *supra* note 236.
240. *See, e.g., Wigod v. Wells Fargo Bank, N.A.*, 673 F.3d 547 (7th Cir. 2012); *Herold v. U.S. Bank, N.A.*, 2011 WL 4072029 (D. Ariz. Sept. 13, 2011), appeal docketed, No. 11-8108 (9th Cir. Oct. 14, 2011); *Stolba v. Wells Fargo & Co.*, 2011 U.S. Dist. LEXIS 87355 (D.N.J. Aug. 8, 2011), appeal docketed, No. 11-3411 (3d. Cir. Sept. 9, 2011); *Pandit v. Saxon Mortg. Servs., Inc.*, 2012 WL 4174888 (E.D.N.Y. Sept. 17, 2012); *Trautman v. JP Morgan Chase Bank*, 2012 WL 3263907 (Minn. Ct. App. Aug. 13, 2012); *Johnson v. Trott & Trott*, 2012 WL 3150954 (E.D. Mich. Aug. 2, 2012); *Gass v. CitiMortgage, Inc.*, 2012 WL 3201400 (N.D. Ga. June 25, 2012); *Pandit v. Saxon Mortg. Servs., Inc.*, 2012 WL 4174888 (E.D.N.Y. Sept. 17, 2012); *Turbeville v. JP Morgan Chase Bank*, 2011 U.S. Dist. LEXIS 42290 (C.D. Cal. Apr. 4, 2011); *Singh v. Wells Fargo Bank, N.A.*, 2011 WL 66167 (E.D. Cal. Jan. 7, 2011), 2012 WL 691705 (E.D. Cal. Mar. 1, 2012); *Kiser v. CitiMortgage, Inc.*, 2011 WL 4699355 (N.D. Ohio Oct. 6, 2011); *Senter v. JP Morgan Chase Bank*, 810 F. Supp. 2d 1339 (S.D. Fla. 2011); *Allen v. CitiMortgage, Inc.*, 2011 U.S. Dist. LEXIS 86077 (D. Md. Aug. 4, 2011); *Rackley v. JP Morgan Chase Bank, N.A.*, 2011 WL 2971357 (W.D. Tex. July 21, 2011); *James v. Wells Fargo Bank, NA Corp.*, 2011 WL 1874707 (D. Utah May 17, 2011);

- Bourdelais v. J.P. Morgan Chase Bank, N.A., 2011 WL 1306311 (E.D. Va. Apr. 1, 2011); Ansanelli v. JP Morgan Chase, 2011 WL 1134451 (N.D. Cal. Mar. 28, 2011); Brown v. Bank of New York Mellon, 2011 WL 206124 (W.D. Mich. Jan. 21, 2011); Grill v. BAC Home Loans Servicing LP, 2011 WL 127891 (E.D. Cal. Jan. 14, 2011); Vida v. OneWest Bank, 2010 WL 5148473 (D. Or. Dec. 13, 2010); Durmic v. JP Morgan Chase, 2010 WL 4825632 (D. Mass. Nov. 24, 2010); Hanson v. Wells Fargo, 2010 WL 3310615 (E.D. Ark. Aug. 18, 2010); Faulkner v. OneWest, 2010 WL 2472275 (N.D. Va. June 16, 2010); *In re Salvador*, 2011 Bankr. LEXIS 1772 (Bankr. M.D. Ga. May 12, 2011); JP Morgan Chase Bank Nat'l Ass'n v. O'Neil, 2011 WL 1408904 (Conn. Super. Ct. Mar. 24, 2011).
241. MHA Handbook v4.0, *supra* note 11, at ch. II §12.2.1.
242. *Id.*
243. Jane J. Kim & M.P. McQueen, *Digging Yourself Out of a Mortgage Mess*, Wall Street Journal, Oct. 26, 2009, available at <http://online.wsj.com/article/SB10001424052748703787204574449381337753834.html>.
244. MHA Performance Report Through October 2012, *supra* note 96, at 10.
245. *Cf.* Agarwal, *supra* note 13, at 23 (noting wide variations by servicer in the rate of conversion, independent of loan and borrower characteristics).
246. *See, e.g.*, Singh v. Wells Fargo Bank, No. 1:10–CV–1659 AWI SMS, 2012 WL 691705 (E.D. Cal. Mar. 2, 2012) (finding that plaintiffs had stated a cause of action against Wells Fargo to enforce the permanent modification, despite the fact that Wells Fargo did not sign it); *In re Pico*, No. 10–11408–MM13, 2011 WL 3501009 (Bankr. S.D. Cal. Aug. 9, 2011) (finding that Chase could not back out of loan modification agreement after borrower complied with terms, despite Chase's failure to sign the agreement).
247. Paul Kiel & Olga Pierce, *Homeowner Questionnaire Shows Banks Violating Gov't Program Rules*, ProPublica, Aug. 16, 2010, available at <http://www.propublica.org/article/homeowner-questionnaire-shows-banks-violating-govt-program-rules>.
248. U.S. Dep't of the Treasury, Supplemental Directive 10-04, *Home Affordable Unemployment Program* (May 11, 2010), [https://www.hmpadmin.com/portal/programs/docs/hamp\\_servicer/sd1004.pdf](https://www.hmpadmin.com/portal/programs/docs/hamp_servicer/sd1004.pdf).
249. Michael Greenstone & Adam Looney, *The Hamilton Project, Unemployment and Earnings Losses: The Long-Term Impacts of the Great Recession on American Workers* (2011), [http://www.hamiltonproject.org/files/downloads\\_and\\_links/110411\\_jobs\\_greenstone\\_looney.pdf](http://www.hamiltonproject.org/files/downloads_and_links/110411_jobs_greenstone_looney.pdf).
250. Ronald D. Orol, *Groups: Help Jobless to Keep Homes*, Pittsburgh Post-Gazette, Dec. 26, 2009, at A15.
251. Bureau of Labor Statistics, U.S. Dep't of Labor, *The Employment Situation – May 2010* (June 4, 2010), at 2, 23, available at [http://www.bls.gov/news.release/archives/empsit\\_06042010.pdf](http://www.bls.gov/news.release/archives/empsit_06042010.pdf); U.S. Dep't of the Treasury, MHA Handbook v3.2, *Making Home Affordable Program: Handbook for Servicers of Non-GSE Mortgages* (June 1, 2011), at ch. II § 4, available at [https://www.hmpadmin.com/portal/programs/docs/hamp\\_servicer/mhahandbook\\_32.pdf](https://www.hmpadmin.com/portal/programs/docs/hamp_servicer/mhahandbook_32.pdf)
252. MHA Handbook v3.4, *supra* note 71, at ch. III § 4.8.
253. *See* Ferdinand Perrault, *Success of Pennsylvania's HEMAP Is Credit Positive for State's Housing Finance Agency*, Service (Moody's Investors Report No: 132956, 2011); James Orr *et al.*, Fed. Res. Bank of N.Y., *Help for Unemployed Borrowers: Lessons from the Pennsylvania Homeowners' Emergency Mortgage Assistance Program*, 17 Current Issues Econ. & Fin. 1, at 1–2 (2011), available at [http://www.newyorkfed.org/research/current\\_issues/ci17-2.pdf](http://www.newyorkfed.org/research/current_issues/ci17-2.pdf).
254. U.S. Dep't of Housing & Urban Dev., *Emergency Homeowner Loan Program—Summary* (2010), available at <http://www.hud.gov/offices/hsg/sfh/hcc/mgs/ehlp100810.pdf>.
255. U.S. Dep't of the Treasury, Supplemental Directive 12-03, *Making Home Affordable Program*

–*Handbook Mapping for MHA Extension and Expansion and Administrative Clarifications on Tier 2*, at A-45 (Apr. 17, 2012), [https://www.hmpadmin.com/portal/programs/docs/hamp\\_servicer/sd1203.pdf](https://www.hmpadmin.com/portal/programs/docs/hamp_servicer/sd1203.pdf).

256. *Id.* at A-68.
257. See III.D.3, *supra* (discussing treatment of junior liens under HAMP).
258. U.S. Dep't of the Treasury, *Need to Leave Your Home?*, <http://www.makinghomeaffordable.gov/programs/exit-gracefully/Pages/default.aspx> (last visited Dec. 13, 2012).
259. Reed Fujii, *Short Sale Process Flawed, Realtors Say*, *The Record*, July 31, 2011, [http://www.recordnet.com/apps/pbcs.dll/article?AID=/20110731/A\\_BIZ/107310302/-1/A\\_BIZ04](http://www.recordnet.com/apps/pbcs.dll/article?AID=/20110731/A_BIZ/107310302/-1/A_BIZ04).
260. Mortgage Metrics Q2 2012, *supra* note 125, at 47.
261. See Agarwal, *supra* note 13, at 28 (noting that incentive structure adequate to encourage modifications, but insufficient to get all servicers to perform modifications at the same rates).
262. *Helping Homeowners Harmed by Foreclosures: Ensuring Accountability and Transparency in Foreclosure Reviews: Hearing Before the Subcomm. on Hous., Transp. and Cmty. Dev. of the S. Comm. on Banking, Hous. and Urban Affairs*, 112th Cong. (2011) (testimony of Alys Cohen, Staff Att'y, Nat'l Consumer Law Ctr.), available at [http://banking.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore\\_id=c4cdb540-7330-44be-a274-1b793ae812ed](http://banking.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=c4cdb540-7330-44be-a274-1b793ae812ed).
263. 2012 Real Estate Settlement Procedures Act (Regulation X), 77 Fed. Reg. 57200 (proposed Sept. 17, 2012)(to be codified at 12 CFR Part 1024); 2012 Truth in Lending Act (Regulation Z), 77 Fed. Reg. 57318 (proposed Sept. 17, 2012)(to be codified at 12 CFR Part 1026).
264. See NCLC Regulation Z Comments, *supra* note 22; NCLC Regulation X Comments, *supra* note 22.
265. Congress has the power to produce similar legislation as well, and several bills have been introduced, but such an outcome in the current environment is unlikely. 15 U.S.C. 1639(l)(2) and 12 U.S.C. § 2605(k).
266. 12 U.S.C. § 2605(k).
267. MHA Performance Report Through April 2012, *supra* note 72, at 2; MBA: *National Delinquency Survey Q4 2011*, *supra* note 1, at 6, 8.
268. Thompson, *Foreclosing Modifications*, *supra* note 12, at 821–22.
269. Thompson testimony: *Need for National Mortgage Servicing Standards*, *supra* note 158, at 11.
270. Consent Judgment at A-17 to -21, *United States v. Bank of Am. Corp.*, No. 1:12-cv-00361-RMC (D.D.C. Apr. 4, 2012), available at [www.justice.gov/crt/about/hce/documents/scra\\_boa\\_settle.pdf](http://www.justice.gov/crt/about/hce/documents/scra_boa_settle.pdf).
271. Homeowner Bill of Rights, ch. 86, Sec. 2923.5 and 2923.6 (2012), available at [http://leginfo.ca.gov/faces/billNavClient.xhtml?bill\\_id=201120120AB278](http://leginfo.ca.gov/faces/billNavClient.xhtml?bill_id=201120120AB278) (the provisions go into effect beginning Jan. 1, 2013).
272. Dan Immergluck, *The Local Wreckage of Global Capital: The Subprime Crisis, Federal Policy and High-Foreclosure Neighborhoods in the US*, 35 Int'l J. Urb. & Regional Res. 130 (2011).
273. Dan Immergluck & Geoff Smith, *The Impact of Single-Family Mortgage Foreclosures on Neighborhood Crime*, 21 Hous. Stud. 851 (2006).
274. See III.B.2.a., *supra*.
275. See III.B.2.c., *supra*.
276. Goodman testimony: *Investor Protection*, *supra* note 9, at 2.
277. See III.B.2.c., *supra*.
278. HAMP currently allows for a modest interest rate increase after five years, of one percentage point a year in interest rate until the ceiling of the Freddie Mac weekly survey rate at the time the modification was negotiated. See III.C.1.b., *supra*. More troubling than this system, which will result only in modest payment increases for a relatively short period of time, are

modifications that allow the interest rate to fluctuate or permit re-evaluation of the amount of principal reduction or principal forbearance after a set period of time.

279. *See, e.g.*, Bakker v. Wells Fargo Home Mortg., 2012 WL 5197950 (D.Or., Oct. 19, 2012) (rejecting argument that HAMP modification constituted waiver of Truth-in-Lending rescission rights).
280. *See* III.B.1.c and 2.a, *supra*.
281. *See generally* National Consumer Law Center, Mortgage Lending § 6.2.3 (2012); National Consumer Law Center, The Cost of Credit: Regulation, Preemption, and Industry Abuses § 11.3.5 (4th ed. 2009).
282. Silver-Greenberg, *supra* note 236.
283. HAMP, Supplemental Directive 11-10, *supra* note 237, at 4–5.
284. 284NCLC, *Loan Mods for Widows, Orphans and Divorcees*, *supra* note 236; 12 U.S.C. § 1701j-3 (West 2012).
285. *The Limitations of and Opportunities for The Current Public and Private Sector Foreclosure Prevention Policy & Responses Before the H. Subcomm. on Domestic Policy*, 111th Cong. 11 (2010)(statement of David Berenbaum, Chief Program Officer, Nat'l Community Reinvestment Coalition).
286. While 57% of households with less than \$30,000 annual income access the internet from home, only 42% own a desktop computer and 38% a laptop computer. Jim Jansen, Pew Research Ctr., *Use of the Internet in Higher-Income Households 2*, 9(2010) available at <http://pewinternet.org/~media/Files/Reports/2010/PIP-Better-off-households-final.pdf>.
287. Cal. Reinvestment Coal., *supra* note 200, at 2–3, 27.
288. *See, e.g.*, 14 Maine Rev. Stat. Ann. § 6321-A; Rev. Code Wash. § 61.24, *et seq.* The FDIC's NPV model is available at <http://www.fdic.gov/consumers/loans/prevention/NPVCALculator.html>.
289. Thompson, *Foreclosing Modifications*, *supra* note 12, at 782-85.
290. 12 U.S.C. § 1701p-2 (West 2012).
291. *See, e.g.*, Homeowner Advocate Act, S. 690, 112th Cong. (2011).
292. 292 Office of the Comptroller of the Currency & Bd. of Governors of the Fed. Res. Sys., *Financial Remediation Framework for Use in the Independent Foreclosure Review* (June 21, 2012), <http://www.occ.gov/topics/consumer-protection/foreclosure-prevention/financial-remediation-framework.pdf>.
293. *See* Paul Kiel, *Big Foreclosure Compensation, But Only for the Right Wrongs*, ProPublica (July 3, 2012), <http://www.propublica.org/article/big-foreclosure-compensation-but-only-for-the-right-wrongs>.
294. *See* Remediation Framework, *supra* note 292, at 2, 4.
295. Nat'l Consumer Law Ctr., *Cost of Credit* §3.1.1 (4th ed. 2009); Margot Saunders & Alys Cohen, *Federal Regulation of Consumer Credit: The Cause or the Cure for Predatory Lending?*, (Jt. Ctr for Housing Studies of Harvard University, Working Papers and Reports No. 2004-12-21, 2004), available at <http://www.jchs.harvard.edu/research/publications>.

## APPENDIX

### MORTGAGE SERVICING REFORM: SUMMARY RECOMMENDATIONS

#### I. Pre-Foreclosure Requirements

##### a. Make offers of sustainable loan modifications routine.

- i. A loan modification should be offered to every homeowner facing hardship at a minimum where the loan modification produces a positive net present value outcome for the investor. Loan modifications should be available regardless of what entity originates, insures, or services the loan.
- ii. The modification should be based on an affordable debt-to-income ratio, achieved through a waterfall that prioritizes principal reduction and reduces the interest rate before extending the loan term, and includes a proportional modification of any junior liens. Loan payments should be permanently set at an affordable level, without large balloon payments.
- iii. Additional modifications must be offered when a homeowner experiences subsequent hardship.

##### b. End dual track.

- i. No foreclosure should begin until a loan modification review has been completed or until designated outreach steps have been completed. The loan modification review should occur before foreclosure has been initiated and before any foreclosure-related fees have been incurred.
- ii. If a loan modification application is received after the foreclosure is initiated, judicial and non-judicial foreclosures should be stayed during review and scheduled sales should be set aside when the sale occurred as a result of the servicer's non-compliance.

##### c. Permit direct enforcement of rights and prohibit legal waivers.

- i. Homeowners should be able to enforce servicer compliance with requirements regarding loan modification reviews, foreclosure stays, and other foreclosure avoidance servicing reforms. A servicer's failure to comply with these requirements must be a complete defense to judicial and non-judicial foreclosure. Foreclosure sales not made to bona fide third party purchasers should be set aside based on the servicer's failure to comply with servicing requirements.
- ii. Modifications (other than those entered into as part of the settlement of litigation) should not include a waiver of a homeowner's legal rights.

##### d. Make modifications broadly available to qualified homeowners.

- i. Translation services should be available to homeowners needing such assistance when seeking a modification.
- ii. Surviving family members and divorced spouses who live in the home should be able to assume the loan and obtain a modification.



- iii. Homeowners in bankruptcy should be offered loan modifications on the same terms as homeowners not in bankruptcy. Homeowners in bankruptcy should be able to enter into these modifications as part of their Chapter 13 plans.
  - iv. Homeowners facing imminent default on their mortgage should be evaluated for a loan modification under a clear, objective, and public imminent default standard.
  - v. Homeowners suffering long-term unemployment or reduction in hours should have the opportunity to be evaluated for a loan modification. Such homeowners should not be required to accumulate substantial arrearages in forbearance before being evaluated for a modification. Arrearages accumulated during forbearance can disqualify homeowners for a loan modification or otherwise make a modification unaffordable. Few long-term unemployed homeowners have no income—many will have a second job, income from other household members, or public benefits income that can support a modification.
- e. Provide low-interest loans to cure arrearages for homeowners who have suffered long-term unemployment.** Pennsylvania’s HEMAP program has, over its existence, made money for the state, while saving thousands of homes from foreclosure. The federal Emergency Homeowners’ Loan Program (EHLPP) should be expanded and made permanent.
- f. Require other, sequential, loss mitigation methods.** Servicers should offer homeowners not eligible for an affordable modification other loss mitigation options in a timely manner and in the following order:
- i. temporary forbearance followed by a new analysis for a loan modification or payment plan, depending on the homeowner’s ability to pay after the temporary forbearance;
  - ii. short sale; or
  - iii. deed in lieu of foreclosure.
- Servicers must waive deficiency judgments in the case of a short sale or deed-in-lieu.
- g. Establish mediation programs with standards.** Foreclosure mediation programs with judicial oversight, access to counseling, and legal support for homeowners dramatically increase the number of sustainable loan modifications and reduce foreclosures.
- h. Ensure that the tax consequences of modifications or other foreclosure alternatives do not cause additional hardships for borrowers.** Homeowners currently face confusing and overlapping reporting requirements in the event of a modification, short sale, or foreclosure and potentially devastating tax liability, which can undermine the sustainability of a loan modification. Homeowners of limited means should be protected from adverse tax consequences and reporting should be simplified for all homeowners.
- i. Allow states to act.** Federal servicing rules should be a floor, not a ceiling for regulation. Additional requirements imposed under state law or regulation should apply to mortgages secured by homes in that state.

## II. Transparency and Accountability in Loss Mitigation

- a. **Standardize eligibility.** Servicers should use a standard net present value test, available to the public. Servicers should supply homeowners who were denied a modification all of the test inputs as well as the numerical result.
- b. **Document loan balances.** All homeowners seeking modifications or other loss mitigation options should be provided with a detailed accounting of the unpaid principal balance.
- c. **Disclose the loan modification process.** Homeowners should be notified in writing regarding the availability of a loan modification, the process for obtaining one, and any relevant information regarding investor restrictions. Denials based on restrictions imposed by investors should include documentation of the relevant investor contracts and correspondence, including servicer efforts to obtain exceptions. Homeowners should be given contact information for individuals at the servicer who oversee the loan modification process.
- d. **Establish timelines.** Time deadlines should be established for review and response.
- e. **Dispense with trial modifications.** Permanent modifications should be offered to borrowers with verified income to avoid the widespread problems with failure to convert trial modifications. Existing trial modifications should be automatically converted.
- f. **Oversee appeals.** A government-run administrative appeals or escalation process for wrongful denials and other modification problems should be established, modeled on the Office of the Taxpayer Advocate.
- g. **Eliminate fraud.** Default notices should be signed under penalty of perjury. Foreclosure notices should be personally served in all states.
- h. **Make data publically available.** Require and enforce thorough, loan-level, data collection, including data on race and national origin. Data should be available by individual servicer, so that the public can compare the performance of individual servicers.
- i. **Review performance.** The agencies should incorporate review of compliance with servicing standards in regular exams.

## III. Force-Placed Insurance

- a. **Maintain existing policies.** If a policy lapses for non-payment, servicers should be required to advance the premium payments for existing policies, regardless of whether the loan is in default, whether there is an existing escrow account, or whether there are sufficient funds in the escrow account to cover the premium. Only if a policy lapses for reasons other than non-payment should a servicer be permitted to substitute alternate coverage, and the servicer must make all efforts to obtain a policy offering comparable coverage at a comparable price to the homeowner's lapsed policy.

- b. **Protect borrowers without escrow.** Servicers who advance the premiums when there is no escrow account should be required to spread out the collection of those premiums either in increments of 1/12 per month or through creation of an escrow account under RESPA.
- c. **Require disclosure.** Servicers should be required to fully and clearly disclose these procedures to homeowners.

#### IV. Application of Payments

- a. **Promptly credit payments.** Payments should be applied as of the date received.
- b. **Prioritize principal and interest payments.** Payments should be applied first to accrued and unpaid interest, then to principal. Late fees and other fees should not be deducted from a homeowner's payment if there remain outstanding amounts due for principal, interest, or escrow. This payment application order should apply as well to payments held in suspense accounts.
- c. **Limit costs.** Servicers should not require payment via a method more costly than certified check or attorney escrow account.

#### V. Foreclosure and Other Fees

- a. **Limit foreclosure related fees.** Permit only one property valuation and one title search fee per foreclosure. No fee for home preservation services should be allowed if any payments were submitted within 60 previous days, the home is occupied, or the servicer has contact with the borrower. All fees, including property valuation, home preservation, title fees, and attorney fees should be limited to the reasonable cost of the work actually done to date.
- b. **No retroactive fees.** No fee should be charged unless advance notice of the type of fee and the applicable circumstances has been provided. Servicers should be required to notify homeowners of the actual amount of any fees and the reason for the assessment of the fees within 30 days of the service that triggers the fees. The failure to notify the homeowner within this time should trigger a waiver of that fee.
- c. **Establish regular disclosure schedules.** The disclosure of fees that may be charged should be disclosed both when servicing is transferred to a new servicer and annually. This notice should provide meaningful information with reasonable specificity of the fee amount and the circumstances that may trigger such a fee. A list of all assessed but unpaid fees should be included in all notices to the homeowner regarding amounts due.
- d. **Regulate late fees.** Late fees should be regulated as they are under the Uniform Consumer Credit Code. Homeowners should not be charged late payment fees on payments timely made, even if an earlier payment remains unpaid. Being late once should result in one late fee.

## VI. Transfer of Servicing and Periodic Statements

- a. Make transfer notices meaningful.** Transfer notices should advise if the homeowner is current, whether there are any unpaid fees, and whether a modification is pending. If the notice indicates that the homeowner is not current or fees, including late charges, have been incurred, the servicer should be required to provide the homeowner with a complete payment history, including a breakdown of any fees assessed. These disclosure requirements should apply to both the old and the new servicer, so that the homeowner may promptly ascertain if there is a discrepancy in the records.
- b. Fee omissions in monthly statements and transfer notices should be binding.** If a fee is not listed on the monthly statements as having been incurred, or in the “goodbye letter” and “hello letter” to the homeowner, as having been incurred, it should be deemed to have been waived.
- c. Disclose dispute procedures.** Monthly statements should advise of dispute procedures to address wrongly assessed fees and include contact information.
- d. Provide disclosure during delinquency and default.** Periodic statements, servicing transfer notices, and escrow account statements should be provided notwithstanding delinquency or default status.
- e. Mandate continuity upon transfer.** New servicers should be required to accept and continue processing prior loan modification requests; new servicers must honor loan modification agreements entered into by prior servicers.

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