

Legislative Highlights

TARP Reform Bill Including New Foreclosure Relief Passes House; Ch. 13 Approach Gets New Hearing

House Financial Services Committee Chairman Barney Frank (D-Mass.) introduced the TARP Reform and Accountability Act (H.R. 384) on Jan. 9, 2009. The bill is designed to amend the Troubled Assets Relief Program provisions of the Emergency Economic Stabilization Act of 2008 (EESA) and passed the House on Jan. 21 by a 260-166 vote. The bill responds to many criticisms of the initial Federal bailout legislation in the areas of accountability, transparency and foreclosure mitigation, among other issues. Title II of the proposal, now pending in the House, would condition use of the second \$350 billion upon the allocation of up to \$100 billion, but not less than \$40 billion, for foreclosure mitigation. The new Treasury Dept. plan would be required by March 15, 2009. TARP funds must begin to flow in implementation of the plan by April 1, and the Secretary must certify to Congress by May 15 that he has committed at least the required \$40 billion. The foreclosure mitigation plans must apply only to owner-occupied residences and shall leverage private capital to the maximum extent possible consistent with maximizing prevention of foreclosures. Treasury must use some combination of program alternatives, such as providing payments to servicers in connection with implementation of qualifying loan modifications.

By compensating servicers who modify mortgages using TARP funds, the bill thus seeks to align the servicers' incentive with the interests of borrowers and investors. The bill also provides a safe harbor from liability for servicers who engage in loan modifications, regardless of any restrictive provisions in a servicing agreement, so long as (1) the servicer acts in a manner consistent with the duty established in the Homeowner Emergency Relief Act of pooled mortgages to all investors as a whole; (2) the servicers engage in loan modifications for mortgages that are in default or for which default is reasonably foreseeable; (3) the property is owner-occupied; and (4) the anticipated recovery on the modification would exceed, on a net present value basis, the anticipated recovery through foreclosure. The bill further provides that persons who bring suit unsuccessfully against servicers for engaging in loan modifications under the Act should pay the servicers' court costs and legal fees. The language provides as follows: Sec. 205. Servicer Safe Harbor.

(a) Safe Harbor—

(1) Loan Modifications and Workout

Plans—Notwithstanding any other provision of law, and notwithstanding any investment contract between a servicer and a securitization vehicle or investor, a servicer that acts consistent with the duty set forth in section 129A(a) of Truth in Lending Act (15 U.S.C. 1639a) shall not be liable for entering into a loan modification or workout plan with respect to any such mortgage that meets all of the criteria set forth in paragraph (2)(B) to—

(A) any person, based on that person's ownership of a residential mortgage loan or any interest in a pool of residential mortgage loans or in securities that distribute payments out of the principal, interest and other payments in loans on the pool;

(B) any person who is obligated to make payments determined in reference to any loan or any interest referred to in subparagraph (A); or

(C) any person that insures any loan or any interest referred to in subparagraph (A) under any law or regulation of the United States or any law or regulation of any State or political subdivision of any State.

(2) Ability to Modify Mortgages—

(A) ABILITY- Notwithstanding any other provision of law, and notwithstanding any investment contract between a servicer and a securitization vehicle or investor, a servicer—

(i) shall not be limited in the ability to modify mortgages, the number of mortgages that can be modified, the frequency of loan modifications, or the range of permissible modifications; and

(ii) shall not be obligated to repurchase loans from or otherwise make payments to the securitization vehicle on account of a modification, workout, or other loss mitigation plan for a residential mortgage or a class of residential mortgages that constitute a part or all of the mortgages in the securitization vehicle,

if any mortgage so modified meets all of the criteria set forth in subparagraph (B).

(B) Criteria—The criteria under this subparagraph with respect to a mortgage are as follows:

(i) Default on the payment of such mortgage has occurred or is reasonably foreseeable.

(ii) The property securing such mortgage is occupied by the mortgagor of such mortgage.

(iii) The servicer reasonably and in good faith believes that the anticipated recovery on the principal outstanding obligation of the mortgage under the particular modification or workout plan or other loss mitigation action will exceed, on a net present value basis, the anticipated recovery on the principal outstanding obligation of the mortgage to be realized through foreclosure.

(3) Applicability—This subsection shall apply only with respect to modifications, workouts, and other loss mitigation plans initiated before Jan. 1, 2012.

(b) Legal Costs—If an unsuccessful action is brought against a servicer by any person described in subparagraph (A), (B), or (C) of subsection (a)(1), such person shall bear any actual legal costs of the servicer, including reasonable attorney fees and expert witness fees, incurred in good faith in such action, as determined by the court.

(c) Reporting—Each servicer that engages in loan modifications or workout plans subject to the safe harbor in subsection (a) shall report to the Secretary on a regular basis regarding the extent, scope and results of the servicer's modification activities. The Secretary shall prescribe regulations specifying the form, content, and timing of such reports.

(d) Definition of Securitization Vehicles—For purposes of this section, the term 'securitization vehicle' means a trust, corporation, partnership, limited liability entity, special purpose entity, or other structure that—

(1) is the issuer, or is created by the issuer, of mortgage pass-through certificates, participation certificates, mortgage-backed securities, or other similar securities backed by a pool of assets that includes residential mortgage loans; and

(2) holds such mortgages.

The House bill thus attempts to benefit homeowners by addressing incentives for both servicers and investors. Meanwhile the alternative approach—to allow bankruptcy judges to modify home mortgages in chapter 13—continues to be a popular option with lawmakers and the Obama administration. A hearing was held in the House Judiciary Committee on Jan. 22 on H.R. 200, the companion to the Durbin bill (S. 61) described in the Legislative Update on page 10. ■