NAR's Frequently Asked Questions - HAFA

(March 16, 2011)

Treasury Department Amends HAFA Program to Increase Borrower Eligibility

On December 28, 2010, the Treasury Department released Supplemental Directive 10-18, an update to the Home Affordable Foreclosure Alternatives Program (HAFA). The changes will increase the number of eligible borrowers who may participate in the program and should expedite approvals:

- HAFA requires the property to be the principal residence of the borrower, with limited exceptions. A borrower's reason for relocation no longer needs to be connected to employment nor be of a certain distance from the property. Borrowers may have moved up to 12 months before the date of the Short Sale Agreement (SSA), Alternative Request for Approval of Short Sale (ARASS) or Deed-in-Lieu (DIL) Agreement with documentation that the property was the borrower's principal residence prior to relocation and borrower has not purchased a 1-4 unit property during the 12-month period prior.

- Servicers are no longer required to determine if the borrower's total monthly mortgage payment exceeds 31% of monthly gross income. Borrowers will still be required to show a hardship. Servicers may still include a requirement in their HAFA Policies that borrowers provide updated financial information to evaluate borrowers.

- Where a borrower submits a short sale sales contract to the servicer before receipt of a SSA, the servicer is now required to communicate approval, disapproval, or a counter offer no later than 30 calendar days after receiving an (i) executed sales contract, (ii) ARASS, and (iii) a signed Hardship Affidavit.

- A servicer must complete and send an SSA to the borrower no later than 30 calendar days from the date the borrower responds to the servicer's HAFA solicitation.

- HAFA will no longer impose a 6% cap on payments to each subordinate mortgage/lien holder. The $6,000 aggregate limit is still in effect. Each servicer must include in its HAFA Policy how subordinate mortgage/lien holders will be paid.

- The update also requires servicers to include a statement in the SSA (or ARASS form in ARASS transactions) that clarifies vendors of the servicer retained to assist the listing broker with the transaction may not be paid from the real estate commission or charged to the borrower.

These changes do not affect loans owned or guaranteed by Fannie Mae or Freddie Mac.

1. What is HAFA?

- The Home Affordable Foreclosure Alternatives Program, known as HAFA, is designed to help owners (referred to below as borrowers) who are unable to retain their home under the Home Affordable Modification Program (HAMP). While the first priority is to keep families in their homes, where this is not possible with a loan modification, they may be able to avoid foreclosure by completing a short sale or a deed-in-lieu of foreclosure (DIL) under HAFA.

- The Treasury Department guidelines and forms, updated on December 28, 2010, do not apply to loans owned or guaranteed by Fannie Mae or Freddie Mac (the housing government sponsored enterprises, or GSEs). Those enterprises have issued their own HAFA guidance and forms. FHA and VA are not participating in HAFA, because they have their own short sales programs.

- The deadline for servicer implementation of the most recent directive for non-GSE loans was February 1, 2011.

2. How will HAFA improve the short sales process?

Treasury

HAFA:

- Complements HAMP by providing a viable alternative for borrowers (the current homeowners) who are HAMP eligible but nevertheless unable to keep their home.

- Can use borrower financial and hardship information already collected in connection with consideration of a loan modification under HAMP.

- Allows borrowers to receive pre-approved short sale terms before listing the property (including the minimum acceptable net proceeds and approvable closing costs).

- Requires borrowers to be fully released from future liability for all mortgage debt (no cash contribution, promissory note, or deficiency judgment is allowed). Lenders may not require contributions from either the real estate agent or borrower/seller as a condition for releasing its lien and releasing the borrower from personal liability.

- Uses standard processes, documents, and timeframes/deadlines.

- Provides financial incentives: $3,000 for borrower relocation assistance; $1,500 for servicers to cover administrative and processing costs; and up to $2,000 match for investors for allowing a total of up to $6,000 in short sale proceeds to be distributed to subordinate lien holders (on a one-for-three matching basis).

GSEs

- Same as Treasury, except the servicer incentive is $2,200 for a short sale. In addition, the Treasury Department does not pay for the incentives.

3. Who is eligible?

Treasury

[Note: Servicers are no longer required to verify a borrower's mortgage payment exceeds 31% of monthly gross income.]

The borrower must meet the basic eligibility criteria for HAMP, other than the 31% of gross income test:

- Principal residence. The property may be vacant up to 12 months before the date of the SSA, ARASS, or DIL Agreement but only if the borrower documents that it was their principal residence and they have not purchased another 1-4 unit property in the prior 12 month period.

- First lien must be short (more than value of the property) and have been originated before January 1, 2009.

- Mortgage must be delinquent or default must be reasonably foreseeable.

- Unpaid principal balance must be no more than $729,750 (higher limits for 2 to 4 unit dwellings).

Fannie
Same as Treasury, except:

- Borrowers are ineligible if they have:
  - The ability to make mortgage payments, but choose not to do so (strategic default).
  - Substantial unencumbered assets or significant cash reserves equal to or exceeding 3 times borrower's total monthly mortgage payment or $5,000, whichever is greater.
  - High surplus income.
- Borrower cannot be within 60 days of foreclosure sale date without Fannie approval.

Freddie
Same as Treasury, except:

- Borrower must be more than 60 days delinquent. [NAR has urged Freddie Mac to drop this requirement.]
- Borrower's cash reserves must be less than the greater of $5,000 or 3 times the current monthly payment.

4. What is the effect of foreclosure on HAFA eligibility? (See, also, Question #15)

Treasury

- Foreclosure may be initiated while a borrower is considered for HAFA eligibility. A servicer must use its written policy that complies with investor guidelines to determine if a borrower will be considered for the HAFA program. Some investor guidelines may dictate that if a foreclosure sale date has already been set, the borrower will not be considered for a short sale.

Fannie

- Servicers must not consider a borrower who requests the HAFA program, or solicit a borrower who is unable to retain their home with the help of a HAMP loan modification, without prior written consent by Fannie if:
  - Foreclosure sale is scheduled to be held within 60 days.
  - Foreclosure could be initiated and reasonably expected to result in a foreclosure sale being held within 60 days.
  - The mortgage loan is secured by a property in Florida on which foreclosure proceedings are pending, judgment has been obtained, or a hearing on summary judgment or trial is scheduled within 60 days.

Freddie

- An eligible, qualified borrower must be considered for HAFA before the mortgage is referred to foreclosure.

5. How is the program being implemented?

Treasury

- The Making Home Affordable Handbook gives servicers guidance for carrying out the program. All servicers participating in HAMP must also implement HAFA in accordance with their own written policy, consistent with investor guidelines. The policy may include such factors as the severity of the loss involved, local market conditions, the timing of pending foreclosure actions, and borrower motivation and cooperation.

GSEs

- HAFA must be implemented by all servicers for all conventional mortgage loans that are held or guaranteed by Fannie and Freddie with some exceptions. Servicers must develop written procedures that are consistent with the GSEs policies.

- For links to the Making Home Affordable Handbook and the GSE guidelines, go to realtor.org/shortsales.

6. What forms are used to participate in the program?

Treasury and Fannie

- Short Sale Agreement (SSA). The servicer will send this to the borrower after determining the borrower is interested in a short sale and the property qualifies. It informs the borrower how the program works and the conditions that apply.

- Request for Approval of Short Sale (RASS). After the borrower contracts to sell the property, the borrower submits a RASS to the servicer within 3 business days for approval.

- Alternative RASS (ARASS). If the borrower already has an executed sales contract and asks the servicer to approve it before an SSA is executed, the Alternative RASS is used instead. The Servicer must still consider the borrower for a loan modification.

Freddie

- Same as Treasury and Fannie except there is no Alternative RASS form. If a borrower already has an executed sales contract, the rules for a Freddie Classic Short Sale apply instead of HAFA.

- RASS: Restructured by breaking out the approval and disapproval pages as separate forms.

7. What are the solicitation and eligibility timelines for HAFA?

- Based on a servicer's written policy, the servicer must consider every potentially eligible borrower for HAFA.

- Servicers must consider HAMP-eligible borrowers for HAFA within 30 calendar days after the borrower does at least one of the following [Note: Fannie Mae has the same trigger events without a deadline.]
    - Does not qualify for a HAMP trial period plan.
    - Does not successfully complete a HAMP trial period plan.
    - Misses at least two consecutive payments if the loan was modified under HAMP.
    - Requests a short sale or DIL.

- If a servicer has not already discussed a short sale or DIL with the borrower, it must notify the borrower in writing of these options and give the borrower 14 calendar days to respond, orally or in writing. If the borrower does not respond, this lack of action ends the servicer's duty to give a HAFA offer. Additionally, if the servicer determines that a borrower who was not previously evaluated for HAMP meets the HAMP eligibility requirements, the servicer may notify the borrower of the availability of HAMP in conjunction with the servicer's consideration of the borrower for HAFA.

Treasury

- If the servicer determines the borrower appears to qualify for HAFA, it must complete and send the borrower a Short Sale Agreement no later than 30 calendar days from the date the borrower responds. The borrower has 14 calendar days from the date of the SSA to sign and return it to the servicer.

- Where a borrower submits a short sale sales contract to the servicer before receipt of a SSA, the servicer is now required to communicate approval, disapproval, or a counter offer no later than 30 calendar days after receiving an (i) executed sales contract, (ii) ARASS, and (iii) a signed Hardship Affidavit.

8. What are the transaction timelines?

Treasury

- The SSA must give the borrower an initial period of 120 days to sell the house (extensions by servicer permitted up to a total of 12 months, if agreed to by the borrower/seller).

- Within 3 business days of receiving an executed purchase offer, the borrower (or listing broker) must submit a completed RASS to the servicer, including (i) a copy of the sale contract and all addenda; (ii) buyer documentation of funds or pre-approval/commitment letter from a lender; and (iii) all information on the status of subordinate liens and/or negotiations with subordinate lien holders.

- Within 10 business days after the servicer receives the RASS and all required attachments, the servicer must approve or deny the request and advise the borrower with reasons for denial.

GSE

- Same as Treasury except extension requests sent to Freddie Mac must be submitted no later than 15 days prior to the expiration of the initial SSA term. Fannie Mae will consider extensions but it must not otherwise delay a foreclosure sale.

9. What are the deadlines for closings and releasing the mortgage lien?

Treasury

- The servicer may require the closing to take place within a reasonable period after it approves the RASS, but not sooner than 45 days from the date of the sales contract unless the borrower agrees.

Fannie

- Same as Treasury, except closing must be no later than 60 days after the contract execution or approval, whichever occurs later. Extension must be approved by Fannie.

Freddie

- Same as Fannie, except closing must not be later than 60 calendar days from date of contract without the consent of Freddie.

Treasury and GSEs

- The servicer should follow local or state law to time the release of its first mortgage lien after receipt of sale proceeds. If local or state law does not include a deadline, the servicer must release its first mortgage lien within 30 business days. The investor must waive rights to seek deficiency judgment and may not require a promissory note for any deficiency.

10. What are the HAFA rules on real estate commissions?

- Under the Treasury Department's HAFA guidelines for non-Fannie Mae/Freddie Mac loans, commission policy is dependent on when the sales contract is executed.
    - If a sales contract has not been executed, the servicer specifies the amount of commission in the Short Sale Agreement (SSA) as a "reasonable and customary" closing cost not to exceed 6 percent of the contract sales price. The servicer transmits the SSA to the borrower for consideration of its terms. The SSA requires the borrower to list the home with a real estate broker. The borrower and the prospective real estate broker may negotiate with the servicer on the terms of the SSA. If the borrower and the listing broker decide to participate, both must sign the SSA, agreeing to its terms.
    - There is a different commission policy for non-GSE loans if the borrower submits an executed sales contract to the servicer for approval before a SSA is executed. In that case, the sales contract is submitted to the servicer along with an ARASS. The amount of the commission in such a case is the amount negotiated in the listing agreement, not to exceed 6 percent. This policy recognizes that the real estate professional has already done the work of marketing the property and obtaining an executed sales contract, so it is not appropriate for the servicer to reduce the commission below the already negotiated amount after the work is done.

- The Fannie Mae and Freddie Mac HAFA programs provide that servicers will pay a commission as contracted in the listing agreement, up to 6 percent of the final sale price. This policy also applies to their non-HAFA short sales.

- At the urging of NAR, in March 2010, the Treasury Department rescinded the November 30, 2009, HAFA policy authorizing the servicer to reduce the real estate commission by a specified amount to pay a vendor/negotiator hired by the servicer to assist the listing broker. The December 28, 2010, update directs servicers to include a statement, within the SSA or ARASS forms, that any associated vendor fees will not be charged to the borrower or deducted from the real estate commission.

- Neither buyers nor sellers may earn a commission in connection with the short sale, even if they are licensed real estate brokers or agents. They may not have any side deals to receive a commission indirectly. A broker or agent may only earn a commission, on either the buy or sell side, if the represented party is unrelated and unaffiliated.

- Under HAFA, an agent is not permitted to rebate any funds or commission to either the borrower or the buyer from the sale of the property.

11. What are the required clauses for the listing agreement?

- Cancellation clause—seller may cancel without notice and without paying commission if property is conveyed to mortgage insurer or mortgage holder.

- Contingency clause—sale is subject to written agreement of all sales terms by the mortgage holder and, if applicable, mortgage insurer.

12. May junior lien holders seek additional contributions from the real estate agent or the borrower as a condition for releasing the lien and the borrower from personal liability?

- No. The $6,000 limit to pay off subordinate lien holders is a hard cap. The Treasury Department and GSE guidelines state that junior lien holders may not receive additional contributions. Any payments to junior lien holders must be shown on the HUD-1, as required by RESPA.

13. Do servicers have to treat similarly situated borrowers the same?

- Yes, but not all borrowers will qualify for a short sale or DIL.
- Participating servicers must have a written policy, consistent with investor guidelines, that describes the basis for deciding whether to go ahead with a short sale in individual cases.
- The policy may include such factors as the severity of the loss involved, local market conditions, the timing of pending foreclosure actions, and borrower motivation and cooperation.

<u>GSEs</u>

- Servicers must evaluate all borrowers with loans that are held or guaranteed by the GSEs with some exceptions.

14. What are the steps for evaluating a loan to see if it is a candidate for HAFA?

- Borrower solicitation and response.
- Assess expected recovery through foreclosure and disposition compared to a HAFA short sale or DIL.
- Use of borrower financial and hardship information from HAMP if borrower had been previously evaluated. Each servicer may include a requirement in its HAFA Policy that borrowers provide updated financial information to evaluate the borrower, but this is not required.
- Property valuation.
- Review of title.
- Borrower notice if short sale or DIL not available (to borrowers that have expressed interest in HAFA).

15. Can the servicer <u>complete</u> a foreclosure during the HAFA process? (See, also, Question #4.)

No. A servicer may initiate foreclosure, but may not complete a foreclosure sale:

- While determining borrower's eligibility and qualification for HAMP or HAFA.
- While awaiting the return of the Short Sale Agreement by the 14 day deadline.
- During the term of a fully executed Short Sale Agreement (while the borrower seeks to sell).
- Pending the transfer of ownership based on an approved sales contract.
- Pending transfer of ownership via a DIL by the date specified in the SSA or DIL Agreement.

16. What about DIL?

- Subject to investor requirements, servicers may accept a deed-in-lieu of foreclosure under HAFA, which requires a full release from debt and waiver of all claims against the borrower.
- The borrower must vacate the property by a specified date, leave the property in broom clean condition, and deliver clear, marketable title.
- The same monetary incentives are available.

17. What else should I know?

- The sale of the property must be an "arm's length" transaction between parties who are unrelated and unaffiliated by family, marriage, or commercial enterprise.
- The seller may not list the property with anyone with whom they are related or have a close personal or business relationship, nor may the buyer be represented by such a person. A real estate professional may not list or purchase the property using his or her brokerage.
- Neither the seller nor the buyer may receive any funds or commissions from the sale of the property. They may not have any agreements to receive a portion of the commission or the sales price after closing.
- The amount of debt forgiven might be treated as income for tax purposes. Under a law expiring at the end of 2012, however, the tax may not apply. Forgiven debt will not be taxed if the amount of forgiven debt does not exceed the debt that was used to acquire, construct, or rehabilitate a principal residence. Check with a tax advisor or the Internal Revenue Service.
- The servicer will report to the credit reporting agencies that the mortgage was settled for less than full payment. There will be a negative effect on credit scores.
- Buyers may not reconvey the property within 90 days after closing (no "flipping").

18. When does the program end?

- Short Sale Agreements must be executed and returned to the servicer no later than 12/31/2012.

19. Where can I find the guidance and forms?

- Go to www.Realtor.Org/shortsales for links to Fannie, Freddie, and the Treasury Department's HAFA guidance and forms, these FAQs, and much more information about short sales.

The Making Home Affordable (MHA) Handbook is a consolidated reference guide outlining the requirements and guidelines for the MHA Program for non-GSE mortgages. The handbook can be accessed at https://www.hmpadmin.com/portal/programs/guidance.jsp