

Home Affordable Modification Program and Bankruptcy

The Department of Treasury periodically issues new directives to lenders and their servicers relating to [Home Affordable Modification Program \(HAMP\)](#). The new [Supplemental Directive 10-02](#), (SD10-2), going into effect on June 1, 2010, introduced a number of changes for the borrowers who are seeking modification of their first mortgage while in bankruptcy. These changes include, among others, a requirement that servicers accept requests for mortgage modification from debtors who are requesting modification of their mortgage after the filing of the bankruptcy petition, a requirement that servicers cooperate with the borrower and the borrower's counsel in obtaining the necessary bankruptcy court approvals, and a requirement that servicers extend [the three-month trial period](#), by up to two additional months, to accommodate any delays in obtaining such court's approvals.

Debtor in a HAMP trial period at filing of the petition for bankruptcy

Debtor who has been approved for HAMP modification and is in a [HAMP trial period](#) when filing the petition for bankruptcy may not be denied a permanent HAMP modification on the basis of the bankruptcy filing. The SD10-02 requires full cooperation from the loan servicers in obtaining bankruptcy court approvals and accommodating any delays in obtaining such approvals. For example, the servicer and the servicer's counsel must work with the borrower and borrower's counsel to obtain all the necessary court and/or trustee approvals required by local rules and procedures. Servicers are required to extend the trial period plan to accommodate any delays in obtaining court approvals and receiving the borrower's trial period payments when they are made directly to a U.S. Trustee. The servicers are required to extend the usual three-month trial period for up to two additional months, for a total of five-month trial period. The borrower is required to make all trial period payment, including any payments due during the extension month(s), to qualify for permanent modification.

When the borrower has made all post-petition payments on the first lien mortgage in the amount required by the trial period plan, a servicer cannot (1) object to confirmation of a borrower's Chapter 13 plan; (2) move for relief from the automatic bankruptcy stay, or (3) move for dismissal of the Chapter 13 case, on the basis that the borrower only made payments due under the trial period plan, as opposed to the non-modified mortgage payments.

Debtor Proposing HAMP modification after the filing of the petition

Prior to the effective date of SD10-02, bankruptcy counsel had to strategize, and submit the request for modification of the first mortgage on behalf of a debtor, prior to filing of bankruptcy petition. That was because the decision of whether or not to grant a request for modification from the debtor in active bankruptcy was in the discretion of the servicer. With the implementation of SD 10-02 on June 1, 2010, this is no longer going to be the case. Debtor, who requests modification after the filing of the Chapter 7 or Chapter 13 bankruptcy petition, must be considered for HAMP modification if the borrower^[1], borrower's counsel or bankruptcy trustee submits a request to the loan servicer. With the borrower's permission, a bankruptcy trustee may also contact the servicer to request a HAMP modification. But, please note that servicers are not required to proactively solicit these borrowers for HAMP modifications.

The servicer may now substitute the documents required from the borrower for mortgage modification under HAMP, including Request for Modification and Affidavit (RMA) and IRS Form 4506T-EZ, for copies of the bankruptcy schedules and tax returns, and may use this information, together with the current income documentation, to determine borrower eligibility for HAMP. If the bankruptcy schedules are more than 90 days old as of the date that the schedules are received by the servicer, the borrower must provide evidence of current income for the servicer to determine HAMP eligibility. Additionally, either directly or through counsel, borrowers must provide a completed and executed Hardship Affidavit (or the RMA).

Debtor post Chapter 7 discharge

Borrower who has received a Chapter 7 bankruptcy discharge in a case involving the first lien mortgage, and who did not reaffirm the mortgage debt is eligible for HAMP. The following language must be included by the servicer in the Home Affordable Modification Agreement: "I was discharged in a Chapter 7 bankruptcy proceeding subsequent to the execution of the Loan Documents. Based on this representation, Lender agrees that I will not have personal liability on the debt pursuant to this Agreement."

SD10-02 has brought the much needed changes to HAMP regulation for bankruptcy filers. It has clarified debtors' right to seek mortgage modification after filing of the petition for bankruptcy. SD10-02 has further defined servicer's rights to seek bankruptcy court's relief, offered servicers an option to use the information on bankruptcy schedules and tax returns, in lieu of RMA and IRS Form 4506T-EZ to determine borrower's eligibility for modification, and has made clear the servicer's obligation to cooperate with the debtor and debtors' attorneys in obtaining the necessary bankruptcy court's approvals.

[i] Where the borrower filed the bankruptcy pro se, (without an attorney), SD10-02 recommends that the servicer provide information relating to the availability of a HAMP modification to the borrower with a copy to the bankruptcy trustee.

