

Federal Reserve Bank of San Francisco
101 Market Street, San Francisco, California 94105

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To State Member Banks, Bank
Holding Companies, Financial Holding
Companies, and Foreign Bank Offices
in the Twelfth Federal Reserve District

Mortgage Loan Modification and Regulation B's Adverse Action Requirement

The purpose of this letter is to address questions regarding whether adverse action notices under Regulation B (Equal Credit Opportunity) are required for mortgage loan modification declinations, including those made pursuant to the U.S. Department of Treasury's ("Treasury") Making Home Affordable Modification Program ("HAMP"). Regulation B requires an adverse action notice when a creditor declines an application for an extension of credit from a borrower that is not currently delinquent or in default on that loan.¹ Below is a four-part analysis to determine whether an adverse action notice is required, using HAMP as an example. For mortgage loan modifications outside the HAMP, the same factors listed below should be analyzed.

1. Is there an "extension of credit"? Under Regulation B, "credit" includes "the right granted by a creditor to an applicant to defer payment of a debt."² An "extension of credit" is defined as "the granting of credit in any form (including, but not limited to, credit granted in addition to any existing credit...[,]) the refinancing or other renewal of credit...or the continuance of existing credit without any special effort to collect at or after maturity)."³ For example, we understand that under a HAMP trial period plan or modification, the servicer extends the right to defer payment of a debt by capitalizing accrued interest and certain escrow advances, reducing the interest rate, extending the loan term, and/or providing for principal forbearance.⁴ Based on this understanding, the action(s) taken by a servicer under a HAMP trial period plan or modification would constitute an "extension of credit" for purposes of the HAMP.

2. Is there an "application"? If there is or may be an extension of credit, the next step is to determine whether there is an application. Whether a borrower's request for a mortgage loan modification is an "application" for an extension of credit depends on the creditor's application process. Under Regulation B, an "application" means "an oral or written request for an extension of credit that is made in accordance with procedures used by a creditor for the type of credit requested."⁵ The Official Staff Commentary clarifies that "[a] creditor has the latitude under the regulation to establish its own application process and to decide the type and amount of information it will require from credit applicants."⁶

For example, we understand that Treasury's HAMP guidelines state that a mortgage loan has been evaluated for HAMP when, among other things, a borrower has submitted a written request for consideration for a HAMP modification that includes borrower income and a reason for default or hardship, or a borrower has verbally provided sufficient information to allow the servicer to complete a Net Present Value analysis.⁷ Thus, if a borrower has submitted sufficient information for the mortgage loan to be evaluated under HAMP guidelines, then the borrower has submitted an "application" for an extension of credit.

3. Is there an "adverse action" on the application? Under Regulation B, an "adverse action" includes "a refusal to grant credit in substantially the amount or on substantially the terms requested in an application."⁸ To determine when an inquiry becomes an "application" subject to the adverse action requirements, the Official Staff Commentary states that if the creditor "evaluates information about the

¹ 12 C.F.R. §§ 202.9(a)(1), 202.2(c)(2)(ii).

² 12 C.F.R. § 202.2(j).

³ 12 C.F.R. § 202.2(q).

⁴ HAMP Supplemental Directive 09-01 at 9-10 (April 6, 2009).

⁵ 12 C.F.R. § 202.2(f).

⁶ Official Staff Commentary, 12 C.F.R. § 202.2(f)-1.

⁷ HAMP Supplemental Directive 09-06 at 1 (Sept. 11, 2009).

⁸ 12 C.F.R. § 202.2(c)(1)(i).

consumer, decides to decline the request, and communicates this to the consumer, the creditor has treated the inquiry...as an application and must then comply with the [adverse action] notification requirements under section 202.9."⁹ For example, if a HAMP servicer evaluates a borrower's information according to HAMP guidelines, declines the request, and communicates the decision to the borrower, then the servicer has taken adverse action on an application and must comply with Regulation B's adverse action notice requirements.¹⁰

4. Is the borrower currently delinquent or in default on the loan? Under Regulation B, a creditor is not required to provide an adverse action notice to a borrower whose account is currently delinquent or in default.¹¹ However, a creditor must provide an adverse action notice to a borrower whose account is not currently delinquent or in default. For example, if a borrower whose mortgage loan is not currently delinquent or in default applies for HAMP and the servicer declines the request, the servicer must provide an adverse action notice.

Even if an adverse action notice is not required under Regulation B, borrowers may find it helpful to receive from institutions information regarding why their mortgage loan modification request was declined. For example, we understand that Treasury has directed HAMP servicers to provide written notice to a borrower that has been evaluated for HAMP but is not offered a trial period plan or modification, or is at risk of losing eligibility for HAMP because the borrower has failed to provide the required financial documentation.¹²

Additional Information

All circulars and documents are available on the Internet through the Federal Reserve Bank of San Francisco's website, at <http://www.frbsf.org/banking/letters>.

For additional information, please contact:

Federal Reserve Bank of San Francisco
Banking Supervision and Regulation
(415) 974-3214

⁹ Official Staff Commentary, 12 C.F.R. § 202.2(f)-3.

¹⁰ Under Regulation B, a "creditor" includes a servicer who participates in a credit decision. 12 C.F.R. § 202.2(l).

¹¹ C.F.R. § 202.2(c)(2)(ii); Official Staff Commentary, 12 C.F.R. § 202.2(c)(2)(ii)-2.

¹² HAMP Supplemental Directive 09-08 at 1 (Nov. 3, 2009).