NAR's Frequently Asked Questions - HAFA

(August 1, 2012)

These FAQs answer many common questions about the Home Affordable Foreclosure Alternatives Program (HAFA). Since HAFA was announced in February 2009, at the urging of NAR, there have been many changes designed to increase eligibility and successful participation. The Treasury Department announced the latest changes in Supplemental Directive 12-02 on March 9, 2012. Supplemental Directive 12-03 (April 17, 2012) provides further administrative clarifications and indicates the changes made to the Making Home Affordable Program Handbook for Servicers of Non-GSE Mortgages. Chapter 4 of the Handbook covers the HAFA program. Generally, the new changes take effect June 1, 2012. These FAQs assume they have already taken effect to minimize confusion, but be advised that there may be situations where some requirements are not yet in effect for a particular short sale under HAFA.

For the most part, these FAQs apply only to the HAFA program for non-GSE loans (loans not owned or guaranteed by Freddie Mac or Fannie Mae, known as the government sponsored enterprises, or GSEs), but some GSE information is included to illustrate some differences between the HAFA programs. The GSE regulator, the Federal Housing Finance Agency (FHFA), is continuing to roll out its Servicing Alignment Initiative (SAI) to promote uniformity between the Fannie Mae and Freddie Mac rules. On April 17, 2012, FHFA announced new deadlines for certain GSE short sale-related actions. Starting in June, the GSEs must:

- Review and respond to borrower requests for short sales within 30 days after receipt of a short sale offer and a complete borrower request.

- If the review is still under way after 30 days, give the borrower weekly status updates. (This allows more time where necessary, such as where subordinate lenders and/or mortgage insurance is involved.)

- Advise the borrower of the final decision within 60 days after receipt of a short sale offer and a complete borrower request.

The new timelines apply both to GSE HAFA loans and to other GSE short sales. Additional GSE enhancements are planned by the end of 2012 addressing borrower eligibility, simplifying documentation, valuing property, payments to subordinate lien holders, and mortgage insurance.

HAFA does not apply to loans insured or guaranteed by the Veterans Administration, the Rural Housing Service (RHS), or the Federal Housing Administration (FHA). These agencies have their own short sale alternatives.

1. What is HAFA?

The Home Affordable Foreclosure Alternatives Program, known as HAFA, is designed to help borrowers who are unable to retain their home under the Home Affordable Modification Program (HAMP) or other loan modification programs. 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.

2. How does HAFA improve the short sales process?

HAFA:

- Complements HAMP by providing a viable alternative for borrowers to avoid foreclosure.

- Requires servicers to inform borrowers, before they list the property, of the approved list price or acceptable sales proceeds (expressed as the net amount after subtracting allowable closing costs and any other costs).

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

- Establishes uniform processes, documents, and timeframes/deadlines.

- Provides financial incentives: $3,000 for borrower or tenant relocation assistance; $1,500 for servicers to cover administrative and processing costs (GSEs pay $2,200); and up to a $2,000 match for mortgage investors for allowing a total of up to $8,500 in short sale proceeds to be distributed to subordinate lien holders (on a one-for-three matching basis). The $8,500 cap does not apply to non-mortgage lien holders, such as mechanics' liens or homeowner association assessment liens.

3. Who is eligible?

The borrower and property must meet these eligibility criteria:

- The mortgage must be a first lien originated on or before January 1, 2009. The balance remaining on the first lien must be short (more than the current value of the property).

- HAFA is no longer limited to borrowers who occupy the property as a principal residence. There is no limit on the number of properties owned by a borrower that may be approved under HAFA.

- The mortgage must be delinquent or default must be reasonably foreseeable. Loans in foreclosure or bankruptcy are eligible.

- The mortgage loan must be secured by a one- to four-unit property that has not been condemned.

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

- The borrower must document a financial hardship.

- The borrowers must have submitted either (i) a fully executed HAFA Short Sale Agreement (SSA) or Deed-in-Lieu (DIL) Agreement, or (ii) a written request for consideration for a SSA or DIL Agreement or Alternative Request for Approval of Short Sale (Alternative RASS or ARASS) on or before December 31, 2013. Closing must occur on or before September 30, 2014.

- The borrower must be a "natural person." Mortgage loans made to, or secured by properties owned by, corporations, partnerships, or other business entities are not eligible.

4. What about foreclosures?

- Pursuant to the servicer's written HAFA policy, every potentially eligible borrower must be considered for HAFA before the loan is referred to foreclosure or before an already pending foreclosure may occur.

- A servicer must use its written policy 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.

- A servicer may initiate or continue the foreclosure process during the HAFA process, but may not complete a foreclosure sale:

    - While determining a borrower's eligibility and qualification for HAFA.

    - Until 5 business days after the date the servicer sends a notice that a HAFA short sale or DIL is not available.

    - While awaiting the return of the Short Sale Agreement from the borrower 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 agreement.

    - Until the servicer has resolved an appeal/escalation in accordance with the Handbook (section 3 of Chapter I).

5. How is the program being implemented?

- Chapter 4 of the Making Home Affordable Handbook guides servicers 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, borrower motivation and cooperation, customary transaction costs of short sales and DILs, and amount that may be required to release any subordinate liens.

- Under a contract with the Treasury Department, Freddie Mac oversees servicer implementation as the Compliance Agent for the HAFA program.

- Each servicer must post on its website a matrix identifying its unique HAFA eligibility criteria and program rules, consistent with its HAFA policy and any specific investor requirements or prohibitions.

6. What forms are used in the HAFA short sale program?

- Short Sale Agreement (SSA). The servicer will send a SSA 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, the borrower may opt for a short sale instead.

7. What are the primary steps for determining HAFA eligibility?

- Based on a servicer's written policy, the servicer must consider every potentially eligible borrower for HAFA. Unless prohibited by investor guidelines and if the borrower and property qualify, servicers should use HAFA instead of a proprietary short sale option.

- Servicers must consider possible HAMP-eligible borrowers for HAFA within 30 calendar days after the borrower does at least one of the following.

  - Does not qualify for a HAMP trial period plan.

  - Does not successfully complete a HAMP trial period plan and is not being evaluated for another loan modification.

  - Misses at least two consecutive payments if the loan was modified under HAMP and is not being evaluated for another loan modification opportunity.

- If the servicer determines a borrower is eligible for HAFA and the borrower did not initiate a request, the servicer must notify the borrower in writing and give the borrower 14 calendar days from the date of the notification to request consideration under HAFA (orally or in writing). A servicer may, but is not required to, consider a borrower for HAFA even if the borrower misses the 14 day deadline.

- Within 10 business days after a servicer receives a request by a borrower for a short sale or DIL, or receives an Alternative RASS, the servicer must acknowledge receipt. The acknowledgement must describe the HAFA evaluation process and a timeline for decision.

- If a borrower requests HAFA but has not previously been evaluated for HAMP, the servicer must evaluate the borrower for HAFA under its written policy. If the servicer determines the borrower is also eligible for HAMP, the servicer must notify the borrower (orally or in writing) and give the borrower 14 days to request consideration for HAMP. The borrower may elect to proceed immediately to HAFA.

- If the servicer determines a HAFA short sale or DIL is not available for a borrower, the servicer must advise the borrower. The notice must explain why the borrower does not qualify for HAFA or a DIL and provide a toll free telephone number the borrower may call to discuss the decision.

8. What happens after a servicer determines a borrower is eligible for HAFA?

- If the borrower's hardship information has already been documented and verified as part of the HAMP evaluation (hardship affidavit or request for mortgage assistance (RMA)), no additional financial or hardship assessment is needed under HAFA. The servicer may, however, request updated information.

- Where the borrower was not previously evaluated for HAMP, the servicer must determine basic eligibility under HAMP, including evidence of hardship.

- If the borrower requests relocation incentive compensation ($3,000) for the borrower or eligible tenant, the servicer must require the borrower to provide evidence of occupancy.

- Before closing, the servicer must obtain a Dodd-Frank Act certification (which took effect on September 21, 2010) from all borrowers and from any non-borrower tenants that are expected to receive relocation incentives. The Dodd-Frank Act requires that no one receiving Making Home Affordable program assistance, including HAFA, may have been convicted in the last 10 years of felony larceny, theft, fraud, or forgery; money laundering; or tax evasion.

- The servicer must independently assess the current value of the property, in accordance with investor guidelines. HAFA rules govern how the servicer must deal with changes in value, including after the initial SSA termination date (at least 120 days).

- Though not required, servicers are expected to determine whether a short sale or DIL is in the best interest of the investor, guarantor, and/or mortgage insurer.

- The servicer must review information submitted by the borrower, the borrower's credit report, the loan file, and other information to identify subordinate liens and other claims on the title. The purpose of this review is to determine if the borrower will be able to deliver clear marketable title. The servicer may, but it not required to, order a title search or preliminary title report.

- If there is mortgage insurance on the loan, the servicer or investor must obtain mortgage insurer approval. The mortgage insurer must waive any right to collect additional sums (cash or promissory note) from the borrower.

- If the servicer determines the borrower and property qualify for HAFA, it must complete and send the borrower a Short Sale or DIL Agreement no later than 45 calendar days from the date the borrower requests a short sale or DIL or responds to the servicer's notification (or follow procedures if it cannot meet the 45 day).

- The SSA must identify the amount of the monthly mortgage payment, if any, the borrower must make while the property is marketed for sale under HAFA. The amount may not exceed 31% of the borrower's monthly gross income unless the borrower opts to make the full payment to stay current on the mortgage loan.

- The borrower has 14 calendar days from the date of the SSA to sign and return it to the servicer, with a copy of the real estate broker listing agreement, information regarding any subordinate liens, and the occupancy status of the property.

- If the servicer is unable to respond within the 45 calendar day deadline, the servicer must send a written status notice to the borrower on or before the 45th calendar day, with written updates every 15 calendar days thereafter, until the servicer is able to provide an SSA, written notification that the borrower will not be offered a short sale, or a written response to the ARASS.

9. What are the transaction timelines?

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

- 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 or 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 of the reasons for denial.

- Where a borrower submits a short sale sales contract to the servicer before receipt of a SSA, the servicer must communicate approval, disapproval, or a counter offer no later than 45 calendar days after receiving an (i) executed sales contract, (ii) ARASS, (iii) evidence of borrower or tenant occupancy, and (iv) a signed Hardship Affidavit. See item 8 for procedure where the servicer cannot meet the 45 day deadline. If the borrower appears eligible for HAMP, the servicer must notify the borrower.

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

- 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.

- 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.

11. 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 depends 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, including the proposed commission. 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.

- If the servicer retains a contractor or vendor to assist the listing broker, any associated fees may not be charged to the borrower or deducted from the real estate commission.

- The GSEs' HAFA and proprietary programs provide that servicers will pay a commission as contracted in the listing agreement, up to 6 percent of the final sale price.

- Neither buyers nor borrowers 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.

12. What are the conflict of interest rules on HAFA transactions?

- 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.

- Notwithstanding the previous sentence, servicers have the discretion to approve sales to non-profit organization with the stated purpose that the property will be rented or resold to the borrower, so long as all other HAFA program requirements are met.

- 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.

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

- Cancellation clause—borrower 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.

14. May subordinate 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 $8,500 limit to pay off subordinate lien holders is a hard cap. Junior lien holders may not receive additional contributions. Any payments to subordinate lien holders must be shown on the HUD-1, as required by RESPA.

15. What about DIL?

As indicated, many of the processing steps for a HAFA short sale are the same for DIL. Servicers have the discretion to offer and accept a DIL as part of the HAFA program. Full release of the debt and a waiver of all claims against the borrower are required, as they are for the short sale program. Servicers and investors usually, but not always, require borrowers to make a good faith effort to list and sell the property before accepting a DIL.

16. What else should I know?

- The amount of debt forgiven might be treated as income for tax purposes. Under a law now scheduled to expire 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 on the status of the loan every month. There will be a negative effect on credit scores for delinquent borrowers and short sales.

- Buyers may not reconvey the property within 90 days after closing (no "flipping").

17. 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/docs/hamp_servicer/mhahandbook_34.pdf