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Doc 2009-8335 (2 pgs)

Service Expands REMIC Penalty Relief to Latest Housing Program

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Full Text Published by taxanalysts®

To provide relief to homeowners struggling to meet their mortgage payments, Treasury on April 10 issued guidance that reassures investors who hold mortgage loans through real estate mortgage investment conduits that they will not be penalized for participation in the administration's loan modification program.

According to the Treasury Department, the Home Affordable Modification Program (HAMP) will help up to 4 million at-risk homeowners avoid foreclosure by enabling servicers to modify eligible mortgages to reduce homeowners' monthly mortgage payments.

Because REMICs are "widely used securitization vehicles" for mortgage loans, when the mortgage loans at the base of these REMICs are modified, it could put REMICs in danger of incurring tax penalties. This latest guidance provides exceptions to various tax provisions that may threaten REMICs whose loans are modified under HAMP. (For Notice 2009-36, 2009-17 IRB 1, see *Doc 2009-8331*. For Rev. Proc. 2009-23, 2009-17 IRB 1, see *Doc 2009-8329*.)

These exceptions are not new for the Service. It has issued guidance providing for similar REMIC safe harbors in Rev. Proc. 2007-72 (amplified and superseded by Rev. Proc. 2008-47) and Rev. Proc. 2008-28. (For Rev. Proc. 2007-72, 2007-52 IRB 1257, see *Doc 2007-26795* or *2007 TNT 236-9*. For Rev. Proc. 2008-47, 2008-31 IRB 272, see *Doc 2008-14999* or *2008 TNT 132-5*. For Rev. Proc. 2008-28, 2008-23 IRB 1054, see *Doc 2008-10914* or *2008 TNT 97-13*.)

"It's a good step in the right direction," said Richard Rydstrom, chair of the Coalition for Mortgage Industry Solutions. He said, however, that the guidance does not resolve a potential discrepancy from prior guidance in which the phrases "reasonably foreseeable default" and "imminent default" seem to be used interchangeably. The industry needs to be reassured that the safe harbor will apply to the reasonably foreseeable standard, which is broader, Rydstrom said.

However, since HAMP only began on a trial basis on March 4, the Service hopes the guidance will provide certainty that this latest tool to facilitate mortgage restructuring and provide relief to struggling homeowners won't backfire by triggering penalties imposed by section 860.

HAMP -- with its estimated price tag of $75 billion -- encourages mortgage lenders to modify the terms of a loan through a matching program and various incentive payments. (For more information about HAMP, see http://www.treas.gov/press/releases/reports/housing_fact_sheet.pdf.)

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Without the safe harbor guidance, payments from Treasury to lenders and servicers may have qualified as a section 860G(d)(1) contribution to a REMIC after the start-up date, which are penalized by a 100 percent tax on the contribution. A similar penalty, also covered by the exceptions provided in the latest guidance, is imposed on "prohibited transactions" under section 860F(a)(2), including dispositions of qualified mortgages.

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