111TH CONGRESS 1st Session | HOUSE OF REPRESENTATIVES | REPORT 111–13

TO PROVIDE A SAFE HARBOR FOR MORTGAGE SERVICERS WHO ENGAGE IN SPECIFIED MORTGAGE LOAN MODIFICATIONS, AND FOR OTHER PURPOSES

FEBRUARY 10, 2009.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. FRANK of Massachusetts, from the Committee on Financial Services, submitted the following

R E P O R T

together with

ADDITIONAL VIEWS

[To accompany H.R. 788]

[Including cost estimate of the Congressional Budget Office]

The Committee on Financial Services, to whom was referred the bill (H.R. 788) to provide a safe harbor for mortgage servicers who engage in specified mortgage loan modifications, and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

CONTENTS

	Page
Amendment	2
Purpose and Summary	3
Background and Need for Legislation	3
Hearings	4
Committee Consideration	5
Committee Votes	5
Committee Oversight Findings	5
Performance Goals and Objectives	5
New Budget Authority, Entitlement Authority, and Tax Expenditures	5
Committee Cost Estimate	6
Congressional Budget Office Estimate	6
Federal Mandates Statement	7
Advisory Committee Statement	7
Constitutional Authority Statement	7
Applicability to Legislative Branch	7

79–006

Earmark Identification 7
Section-by-Section Analysis of the Legislation 8
Additional Views 9

AMENDMENT

The amendment is as follows:
Strike all after the enacting clause and insert the following:

SECTION 1. SERVICER SAFE HARBOR.

(a) SAFE HARBOR.—

(1) LOAN MODIFICATIONS AND WORKOUT PLANS.—Notwithstanding any other provision of law, and notwithstanding any investment contract between a servicer and a securitization vehicle or investor, a servicer that acts consistent with the duty set forth in section 129A(a) of Truth in Lending Act (15 U.S.C. 1639a) shall not be liable for entering into a loan modification or workout plan with respect to any such mortgage that meets all of the criteria set forth in paragraph (2)(B) to—

(A) any person, based on that person's ownership of a residential mortgage loan or any interest in a pool of residential mortgage loans or in securities that distribute payments out of the principal, interest and other payments in loans on the pool;

(B) any person who is obligated pursuant to a derivatives instrument to make payments determined in reference to any loan or any interest referred to in subparagraph (A); or

(C) any person that insures any loan or any interest referred to in subparagraph (A) under any law or regulation of the United States or any law or regulation of any State or political subdivision of any State.

(2) ABILITY TO MODIFY MORTGAGES.—

(A) ABILITY.—Notwithstanding any other provision of law, and notwithstanding any investment contract between a servicer and a securitization vehicle or investor, a servicer—

(i) shall not be limited in the ability to modify mortgages, the number of mortgages that can be modified, the frequency of loan modifications, or the range of permissible modifications; and

(ii) shall not be obligated to repurchase loans from or otherwise make payments to the securitization vehicle on account of a modification, workout, or other loss mitigation plan for a residential mortgage or a class of residential mortgages that constitute a part or all of the mortgages in the securitization vehicle,

if any mortgage so modified meets all of the criteria set forth in subparagraph (B).

(B) CRITERIA.—The criteria under this subparagraph with respect to a mortgage are as follows:

(i) Default on the payment of such mortgage has occurred or is reasonably foreseeable.

(ii) The property securing such mortgage is occupied by the mortgagor of such mortgage.

(iii) The servicer reasonably and in good faith believes that the anticipated recovery on the principal outstanding obligation of the mortgage under the particular modification or workout plan or other loss mitigation action will exceed, on a net present value basis, the anticipated recovery on the principal outstanding obligation of the mortgage to be realized through foreclosure.

(3) APPLICABILITY.—This subsection shall apply only with respect to modifications, workouts, and other loss mitigation plans initiated before January 1, 2012.

(b) REPORTING.—Each servicer that engages in loan modifications or workout plans subject to the safe harbor in subsection (a) shall report to the Secretary on a regular basis regarding the extent, scope and results of the servicer's modification activities. The Secretary shall prescribe regulations specifying the form, content, and timing of such reports.

(c) DEFINITION OF SECURITIZATION VEHICLES.—For purposes of this section, the term "securitization vehicle" means a trust, corporation, partnership, limited liability entity, special purpose entity, or other structure that—

(1) is the issuer, or is created by the issuer, of mortgage pass-through certificates, participation certificates, mortgage-backed securities, or other similar securities backed by a pool of assets that includes residential mortgage loans; and

(2) holds such mortgages.

PURPOSE AND SUMMARY

H.R. 788 was introduced on February 2, 2009 by Mr. Kanjorski, Mr. Castle and Mr. Frank. The purpose of the bill is to provide a safe harbor from lawsuits by investors for mortgage servicers who engage in specified loan modifications consistent with their statutory duties.

BACKGROUND AND NEED FOR LEGISLATION

The number of American families facing or at risk of foreclosure has continued to grow to grow dramatically. According to the Mortgage Bankers Association, 6.99 percent of all loans on single-family properties outstanding in the third quarter of 2008 were delinquent, the highest total delinquency rate ever recorded in the MBA survey. The percentage of loans in the foreclosure process also stands at record highs. The economic downturn, the continuing credit and foreclosure crisis, employment layoffs and the rise in mortgage delinquencies have made it increasingly difficult for borrowers to restructure or refinance their mortgages, particularly those that were securitized into asset-backed securities and sold in the secondary market.

Due in large part to loan modification programs initiated by the Federal Deposit Insurance Corporation and the housing government sponsored enterprises, as well as by portfolio lenders, there has been progress in the number of mortgages modified in certain circumstances. The pace of modifications of securitized mortgages, however, has continued to stall. Legislation was enacted to clarify that a mortgage servicer's duty to maximize or not adversely affect recovery of proceeds from pooled residential mortgage loans is owed to all investors in the aggregate, and to clarify that this duty is fulfilled when a servicer makes reasonable efforts to implement a loan modification or workout plan, or engages in other loss mitigation for loans in default or for which default is imminent or reasonably foreseeable and the servicer reasonably believe that its loss mitigation actions will maximize the net present value of the loan, including over the value that would be realized through foreclosure.

Notwithstanding these legislative actions, servicers continue to cite concerns about legal liability to investors based on loan modifications. While servicers have been trying to work with borrowers under a variety of programs, many of these efforts have fallen short.

This legislation is designed to complement previous Congressional action and further facilitate the loan modification process by providing a safe harbor from lawsuits by investors for mortgage servicers who engage in specified loan modifications and workouts.

Summary of major provisions

Safe harbor

The duties and responsibilities of servicers of securitized mortgage loan pools are established in contracts called servicing agreements or pooling and servicing agreements (Pooling and Servicing Agreements). Such agreements generally include a requirement that a servicer follow accepted servicing practices and procedures. While there is a degree of standardization among Pooling and Servicing Agreements regarding some provisions, other provisions may

vary substantially. For instance, some agreements will give servicers broad authority to engage in loss mitigation on loans that are in default or for which default is reasonably foreseeable, so long as the servicers' actions are in the best interests of the security holders. Other agreements may spell out the types of permissible modifications or limit the number or timing of modifications of loans in the pool. Uncertainty about what modification actions may be permitted under their agreements, and continued fear of litigation by investors has hindered widespread modification efforts by servicers.

Congress enacted legislation in the 110th Congress to provide a measure of clarity and certainty to servicers by codifying concepts that are consistent with existing contractual obligations. The Housing and Economic Recovery Act of 2008, Public Law 110–289 (July 30, 2008) ("HERA"). HERA made clear that, absent any contractual provisions to the contrary, the duty of the servicer to maximize, or not adversely affect, the recovery of proceeds from pooled mortgage loans is owed for the benefit of investors in the aggregate, and not to any individual investor or group of investors. HERA also clarified that, absent contrary contractual provisions, a servicer is acting in the best interest of all investors if it implements a modification or workout plan or engages in other loss mitigation efforts, including accepting a short payment or short sale, for a loan that is in default or for which default is imminent or reasonably foreseeable, to the extent the servicer reasonably believes the modification will maximize the net present value to be realized on the loan, including over that which would be realized through foreclosure.

This legislation supplements the provisions of HERA to provide a safe harbor from investor lawsuits for servicers who meet their prescribed duties, and enter into loan modifications pursuant to the specified criteria, notwithstanding any provision of law or any pooling and servicing agreement.

The safe harbor would apply only to owner-occupied residential mortgage loans, and only to modifications or workout plans initiated prior to January 1, 2012.

The legislation does not create statutory preferences for loss mitigation activities, nor is it intended to limit the ability of servicers to enter into modifications or workouts other than those referenced in the legislation.

The legislation would provide a safe harbor only from investor lawsuits and only for loan modification or workout plans having the specified characteristics. It is the Committee's intent that the legislation would not affect the ability of consumers or borrowers to pursue claims against lenders or servicers for fraud or for discriminatory or abusive lending practices.

HEARINGS

The Committee on Financial Services held a hearing on February 3, 2009, entitled "Promoting Liquidity and Lending Through Deposit Insurance, Hope for Homeowners, and Other Enhancements." The following witnesses testified: Mr. John Bovenzi, Chief Operating Officer, Federal Deposit Insurance Corporation; Ms. Meg Burns, Director of the Office of Single Family Program Development, U.S. Department of Housing and Urban Development; Mr. Edward L. Yingling, President and Chief Executive Officer, Amer-

ican Bankers Association; Mr. R. Michael S. Menzies, Sr., President and Chief Executive Officer, Easton Bank and Trust Company, on behalf of The Independent Community Bankers of America; Mr. John Taylor, President and Chief Executive, National Community Reinvestment Coalition; Mr. John A. Courson, President and Chief Executive Officer, Mortgage Bankers Association; Mr. Mike Calhoun, President and Chief Operating Officer, Center for Responsible Lending; Mrs. Robin Staudt; and Mr. Edward R. Morrison, Professor of Law, Columbia Law School.

COMMITTEE CONSIDERATION

The Committee on Financial Services met in open session on February 4, 2009, and ordered H.R. 788, to provide a safe harbor for mortgage servicers who engage in specified mortgage loan modifications, as amended, favorably reported to the House by a voice vote.

COMMITTEE VOTES

Clause 3(b) of rule XIII of the Rules of the House of Representatives requires the Committee to list the record votes on the motion to report legislation and amendments thereto. No record votes were taken with in conjunction with the consideration of this legislation. A motion by Mr. Frank to report the bill, as amended, to the House with a favorable recommendation was agreed to by a voice vote.

During the consideration of the bill, the following amendments were considered:

An amendment by Mr. Miller of North Carolina, No. 1, adding pursuant to a derivatives instrument, was agreed to by a voice vote.

An amendment by Mr. Neugebauer (and Mr. Price), No. 2, regarding legal costs of unsuccessful actions, was offered and withdrawn.

COMMITTEE OVERSIGHT FINDINGS

Pursuant to clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee held a hearing and made findings that are reflected in this report.

PERFORMANCE GOALS AND OBJECTIVES

Pursuant to clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, the Committee establishes the following performance related goals and objectives for this legislation:

H.R. 788 is designed to complement previous Congressional action and further facilitate the loan modification process by providing a safe harbor from lawsuits by investors for mortgage servicers who engage in specified loan modifications and workouts.

NEW BUDGET AUTHORITY, ENTITLEMENT AUTHORITY, AND TAX EXPENDITURES

In compliance with clause 3(c)(2) of rule XIII of the Rules of the House of Representatives, the Committee adopts as its own the estimate of new budget authority, entitlement authority, or tax expenditures or revenues contained in the cost estimate prepared by

the Director of the Congressional Budget Office pursuant to section 402 of the Congressional Budget Act of 1974.

COMMITTEE COST ESTIMATE

The Committee adopts as its own the cost estimate prepared by the Director of the Congressional Budget Office pursuant to section 402 of the Congressional Budget Act of 1974.

CONGRESSIONAL BUDGET OFFICE ESTIMATE

Pursuant to clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the following is the cost estimate provided by the Congressional Budget Office pursuant to section 402 of the Congressional Budget Act of 1974:

FEBRUARY 9, 2009.

Hon. BARNEY FRANK,
Chairman, Committee on Financial Services,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 788, a bill to provide safe harbor for mortgage servicers who engage in specified mortgage loan modifications, and for other purposes.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Susanne S. Mehlman.

Sincerely,

DOUGLAS W. ELMENDORF,
Director.

Enclosure.

H.R. 788—A bill to provide safe harbor for mortgage servicers who engage in specified mortgage loan modifications, and for other purposes

H.R. 788 would protect mortgage servicers from legal liability if they perform loan modifications according to specific criteria established under the legislation. The federal government could realize additional receipts if enacting this legislation results in additional modifications of federally insured loans or loans held or securitized by the Federal National Mortgage Association or the Federal Home Loan Mortgage Corporation. (CBO considers the financial activities of those organizations to be components of the federal budget.) Other problems, however, such as the complex nature of modifying loans within mortgage securities, would likely continue to impede loan modifications following enactment of this legislation. CBO estimates that on balance, enacting the bill would probably not result in a significant number of additional modifications and thus would not have a significant impact on the federal budget.

Residential mortgages are often pooled together and sold to investors as securities. The pools of loans are overseen by mortgage servicers, who have a fiduciary responsibility to maximize returns to the investors. Many pooling and servicing agreements give servicers authority to modify the terms of securitized loans if that action is in the interest of maximizing the value of the loan pool, but some agreements are more restrictive. Pooling and servicing agreements can be amended with the consent of investors. How-

ever, not all investors in mortgage-backed securities share losses equally, which may limit servicers' ability to obtain permission to modify the terms of loans to ensure maximum value for all investors.

H.R. 788 contains intergovernmental and private-sector mandates as defined in the Unfunded Mandates Reform Act (UMRA). The bill would prevent governmental and private-sector entities that invest in pooled residential mortgages from seeking damages from servicers on the grounds that they violated their duty to maximize the value of the loans. The bill also would require certain mortgage servicers to provide reports to the Secretary of the Treasury and would preempt some state laws. CBO estimates that the costs of the intergovernmental and private-sector mandates would be small and would fall below the annual thresholds established in UMRA ($69 million for intergovernmental mandates and $139 million for private-sector mandates in 2009, adjusted annually for inflation).

The CBO staff contact for this estimate is Susanne S. Mehlman. This estimate was approved by Theresa Gullo, Deputy Assistant Director for Budget Analysis.

FEDERAL MANDATES STATEMENT

The Committee adopts as its own the estimate of Federal mandates prepared by the Director of the Congressional Budget Office pursuant to section 423 of the Unfunded Mandates Reform Act.

ADVISORY COMMITTEE STATEMENT

No advisory committees within the meaning of section 5(b) of the Federal Advisory Committee Act were created by this legislation.

CONSTITUTIONAL AUTHORITY STATEMENT

Pursuant to clause 3(d)(1) of rule XIII of the Rules of the House of Representatives, the Committee finds that the Constitutional Authority of Congress to enact this legislation is provided by Article 1, section 8, clause 1 (relating to the general welfare of the United States) and clause 3 (relating to the power to regulate interstate commerce).

APPLICABILITY TO LEGISLATIVE BRANCH

The Committee finds that the legislation does not relate to the terms and conditions of employment or access to public services or accommodations within the meaning of section 102(b)(3) of the Congressional Accountability Act.

EARMARK IDENTIFICATION

H.R. 788 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9 of rule XXI.

SECTION-BY-SECTION ANALYSIS OF THE LEGISLATION

Section 1. Servicer safe harbor

Subsection (a)—Safe Harbor for Loan Modifications or Workout Plans

This subsection provides that a servicer that acts in a manner consistent with the duty set forth in HERA will not be liable to investors or insurers for entering into specified loan modification or workout plans, notwithstanding any other provision of law and notwithstanding any investment contract between a servicer and a securitization vehicle or investor. Investors subject to the provision are those who own residential mortgage loans, hold any interest in a pool of residential mortgage loans or in pass-through securities, or through derivatives instruments the payments of which are determined in reference to residential mortgage loans, pools or other securities.

This subsection makes it clear that, notwithstanding any other provision of law and notwithstanding any investment contract between a servicer and a securitization vehicle or investor, a servicer shall not be limited in the ability to modify mortgages, the number of mortgages that can be modified, the frequency of loan modifications or the range of permissible modifications, and shall not be obligated to purchase mortgages out of the securitization vehicle in order to effect the modification.

This subsection also specifies that the safe harbor applies only with respect to mortgages for which default has occurred or is reasonably foreseeable; the property is owner-occupied; and the servicer reasonably and in good faith believes that the anticipate recovery on the mortgage under the modification will exceed, on a net present value basis, the anticipated recovery on the mortgage to be realized through foreclosure.

The safe harbor applies only to modifications initiated before January 1, 2012.

Subsection (b)—Reporting

This subsection requires servicers who engage in modifications under the safe harbor to report to the Secretary of the Department of Housing and Urban Development, pursuant to regulations promulgated by the Secretary, regarding the extent, scope and results of the servicer's modification activities.

Subsection (c)—Definition of Securitization Vehicles

This subsection defines the term "Securitization Vehicle" to mean a trust, corporation, partnership, limited liability entity, special purpose entity, or other structure that is the issuer or created by the issuer of asset backed securities, or that holds such mortgages.

ADDITIONAL VIEWS

This legislation is a sensible tool for helping more families stay in their homes without any taxpayer exposure or cost. Mortgage servicers who make loan modifications in a manner that maximizes net present value should have a safe harbor from lawsuits brought by investors.

However, we believe this legislation can do more. H.R. 788 is missing an important provision that was included in Chairman Frank's House-passed bill, H.R. 384. The amendment proposed by Rep. Neugebauer, and considered during Committee consideration of H.R. 788, would have restored the provision from Chairman Frank's original language so that if an unsuccessful action is brought against a servicer, the person who filed the lawsuit must cover any legal costs incurred by the servicer.

In a climate of mounting foreclosures, we need to do all we can to encourage servicers to voluntarily modify mortgages for creditworthy borrowers. While the sponsors withdrew the amendment to H.R. 788 during the markup because of jurisdictional concerns, we believe the full House of Representatives deserves an opportunity to vote on this issue during House Floor debate. We appreciate Chairman Frank's commitment to support making this amendment in order.

SPENCER BACHUS.
RANDY NEUGEBAUER.
KENNY MARCHANT.
LEONARD LANCE.
CHRISTOPHER LEE.

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