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## IRS Issues Notice and Revenue Procedure Regarding Mortgage Loan Modifications Under the Home Affordable Modification Program

On April 10, 2009, the Internal Revenue Service ("IRS") issued Notice 2009-36 (the "Notice") and Revenue Procedure 2009-23 (the "Revenue Procedure") to provide guidance regarding the impact of loan modifications made pursuant to the Obama administration's recently announced Home Affordable Modification Program ("HAMP"). The HAMP contains several incentives to encourage modifications, including payments to servicers, borrowers and lenders/investors, which would include securitization vehicles. The Notice and the Revenue Procedure provide issuers and servicers greater flexibility to implement loan modifications pursuant to the HAMP.

In general, the Notice provides clarity that any payment made to a real estate mortgage investment conduit ("REMIC") under the HAMP will not be subject to the 100 percent prohibited contributions tax. The Revenue Procedure provides clarity that loan modifications pursuant to the HAMP will not result in prohibited transaction taxes or loss of REMIC or grantor trust status. Copies of the Notice and the Revenue Procedure are attached at the end of this alert.

### **Notice 2009-36**

The HAMP provides for a variety of incentive payments to encourage residential loan modifications, including payments (i) to lenders/investors if the debt-to-income ratio of a loan is reduced below a certain threshold, (ii) to lenders/investors if a modification is made while a borrower is still current, (iii) to lenders/investors if certain home price declines occur and (iv) in reduction of the principal balance of the mortgage loan if the borrower remains current. Prior to the Notice, it was unclear whether these incentive payments, assuming they were treated as made to a REMIC, would cause adverse tax consequences to the REMIC. The Notice provides that if a payment is made to a REMIC under the HAMP, irrespective of whether that payment might otherwise be subject to the 100 percent prohibited contributions tax under existing regulations, such payment will not be subject to such tax. The IRS will provide this clarity specifically through regulations that are expected to be effective retroactively for payments made on or after March 4, 2009.

Taxpayers may rely on the Notice pending the issuance of further guidance and,

based on the Notice, any payment to a REMIC under the HAMP will not be subject to the 100 percent prohibited contributions tax. The Notice does not provide any comfort regarding payments made to grantor trusts under the HAMP. In addition, if any incentive payments are not immediately distributed by the REMIC, the Notice does not provide any comfort regarding whether the proceeds of such payments will be treated as qualifying assets for a REMIC.

### **Revenue Procedure 2009-23**

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The Revenue Procedure provides comfort that modifications in accordance with the HAMP will not adversely impact the tax classification of a REMIC or grantor trust holding the modified mortgage or result in certain prohibited transaction taxes on such a REMIC. Specifically, the Revenue Procedure provides that, in the case of one or

more modifications of residential mortgage loans pursuant to the HAMP:

- the IRS will not challenge a securitization vehicle's qualification as a REMIC on the grounds that the modifications result in significant modifications of the REMIC's qualified mortgages or a deemed reissuance of the REMIC regular interests;
- the IRS will not contend that the modifications result in prohibited transactions on the grounds that the modifications result in one or more dispositions of qualified mortgages that are not excepted from prohibited transaction treatment under Code Section 860F(a)(2)(A); and
- the IRS will not challenge a securitization vehicle's classification as a grantor trust on the grounds that the modifications manifest a "power to

vary the investment of the certificate holders."

The Revenue Procedure is effective for loan modifications made pursuant to the HAMP on or after March 4, 2009.

A copy of the Notice is available at [http://www.hunton.com/emailblast/pdfs/Notice\\_2009-36.pdf](http://www.hunton.com/emailblast/pdfs/Notice_2009-36.pdf), a copy of the Revenue Procedure is available at [http://www.hunton.com/emailblast/pdfs/RevProc\\_2009-23.pdf](http://www.hunton.com/emailblast/pdfs/RevProc_2009-23.pdf) and a copy of the HAMP Guidelines is available at [http://www.hunton.com/emailblast/pdfs/hamp\\_guidelines.pdf](http://www.hunton.com/emailblast/pdfs/hamp_guidelines.pdf). If you would like to receive more information about the Notice, the Revenue Procedure or any of the recent guidance regarding mortgage loan modifications, please contact George C. Howell III at (804) 788-8793 or [ghowell@hunton.com](mailto:ghowell@hunton.com), or Cecelia Philipps Horner at (804) 788-7394 or [chorner@hunton.com](mailto:chorner@hunton.com).

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