



CMSA/MBA Assumption Guide May 15, 2009

A mortgage loan assumption is a common practice for buyers and sellers of commercial/multifamily real estate. Real estate loan assumptions are an effective vehicle to purchase a property with an existing performing loan, without going to the cost and expense of paying off the existing loan and seeking new financing.

The assumption requirements and procedures used by lenders and investors vary widely (and may have changed since the loan was originated), so it can be both time consuming and cumbersome to put together an assumption request package. Servicers also vary in their procedures for collecting the necessary documents and coordinating the assumption process. Because of these various requirements and procedures, borrowers often become confused and frustrated with the entire process. As a result, the members of the Commercial Mortgage Securities Association (CMSA) and the Mortgage Bankers Association (MBA), as part of the industry's intent to assist persons who are working with the borrower (seller) and buyer (prospective borrower) in the purchase and sale process to manage their expectations, have developed this guide. The goal is to highlight information that the borrower needs to know as he goes through the assumption process. The borrower will then have a realistic set of expectations for the completion of the assumption. The purpose of this document is to better define the expectations, the processes and the communication required of the parties to the transaction, including the existing borrower's, assuming borrower's and lender's understanding of the requirements.

For successful management of the process and an executed assumption, the borrower (i.e. seller) should let the primary servicer know as early as possible that a sale of the property may occur. At that point, the servicer and borrower's team (which may include the original mortgage banker, attorney, consultant, buyer or other intermediary) should discuss the following information:

- 1) Establish a realistic timeframe from initial point of contact and the request for assumption to closing. A borrower and buyer may believe that the assumption request will be a brief process since the action may be provided for in the original loan documentation. Emphasizing a realistic timeframe from the initial request of the existing borrower will set the framework for improved communication and cooperation among the parties.
- 2) Instruct the borrower to review the controlling legal documents, with counsel, to clearly understand the transfer and consent requirements;

3) Advise the borrower that complete information about the property, the transaction and the assuming borrower, as well as principals controlling and/or owning significant interests in such parties, will be needed as early as possible in the transaction. The borrower should request the servicer provide a comprehensive list of materials it will require to administer the assumption review. In some cases, a servicer may not begin reviewing a request until it has received all required information. The borrower should also understand there may be instances when pertinent borrower or property information previously submitted to the lender, may be requested again to advance the assumption review in a more expedited manner. This may be more common in transactions where there are multiple servicers.

4) Inform the borrower that there may be multiple parties with consent or review rights as well as economic interests regarding any sale of the collateral and assumption of the mortgage loan. The review time for these parties may add to the servicer's overall review period; and

5) As it relates to securitized loans, remind all parties that REMIC rules may present contractual limitations affecting the assumption.

1. Helping the borrower focus on a clear assumption request:

A. Issue: Borrowers may feel the lender's approval of the assumption is an entitlement, and therefore may perceive scrutiny of the transaction as excessive, administrative or unwarranted. Borrowers may also have unrealistic expectations of lender's review process, underwriting criteria, timing and ability to approve the transaction as proposed, including the costs associated with the process.

Proposed Action: Proactively manage borrower expectations through analysis and understanding of the following:

- Review loan documents for specific assumption requirements (*i.e.*, predetermined conditions or criteria, prenegotiated fees, etc.)
- Obtain written request from current borrower for lender's consent to assumption of the loan by new borrower, with the current borrower's justification.
- Understand the timing of the transaction (*i.e.*, intended closing, possible 1031 exchange deadlines, availability of principals, level of review needed if securitized, etc.)
- Identify the transaction players: attorneys, brokers, title or closing agents, insurance agents, etc
- Provide borrower and transaction players, as needed, with insight on the approval process (collection, review, prepare, submit, approve, close, overall anticipated timeframe based upon overall complexity).
- Obtain a copy of the executed purchase and sale agreement.
- Obtain a summary of the uses and sources of cash in the transaction.

- Review prepayment provisions and, if applicable, calculate a prepayment quote (Defeasance Deposit, Yield Maintenance, Percentage Premium, etc.) for the buyer and seller's review in the event prepaying the loan is a better alternative to assumption.
- Confirm the current borrower's adherence to the loan documents and ensure no default exists (see Issue B below)

B. Issue: Borrowers often believe that prior performance -- particularly related to non-monetary items -- should have little, if any, bearing on processing of an assumption request, since the non-compliant or defaulted borrower will be replaced. However, this ignores the almost universal prohibition in loan documents against processing an assumption request if there is any continuing event of default. Particularly in the CMBS environment, the inability of a borrower to cure a non-monetary default prior to assumption may actually require that the servicer process and receive consent to a waiver, prior to processing the assumption request. Examples of borrower actions taken without note holder consent may represent a non-monetary default that may delay the assumption process include: a) transfers of ownership, b) subordinate financing, c) property management change, or d) non-compliance with cash management provisions.

The servicer's ability to manage through even relatively minor covenant defaults prior to processing the assumption request may be impacted by the loan type (portfolio, CMBS, GSE's, etc.). For instance, in the processing of a CMBS loan, the primary servicer is contractually obligated to consciously disregard its other business relationships with the borrower, making it strikingly different than the processing by a portfolio lender.

Proposed action: Proactively manage borrower expectations through communication of the impact of any monetary or non-monetary default on the servicer's ability to process the assumption request:

Upon initial indication of a forthcoming request for lender's consent to an assumption, the borrower should request the lender or servicer review the borrower's compliance with loan documents to determine if there are any unresolved matters that require attention or that may detract from the lender's or servicer's ability to process the assumption request when submitted. This will allow the borrower to address unresolved or unknown items of specific importance to the lender or servicer, without linkage to the forthcoming assumption request. It should also give the lender or servicer an opportunity to raise issues, separate from the assumption, that have historically delayed such transactions. These may include the following:

- Outstanding monetary or non-monetary defaults, such as:
 - Delinquent principal and/or interest payments
 - Real estate tax or insurance deficiencies
 - Outstanding late charges
 - Reserve fund deficiencies
 - Unauthorized actions that required prior written lender consent

- Other issues per the loan documents
- Outstanding performance reports as may be required, such as:
 - Property operating statements (rent rolls, budgets, etc.)
 - Borrower financial statements
 - Guarantor financial statements
 - Sales or other required reports
- Non-compliance with other covenant requirements, such as:
 - Current evidence of acceptable insurance or insurance policies, as required
 - DSCR or other loan performance defaults
 - Certifications due
 - Other loan document compliance items
- Review of the last property inspection for any deferred maintenance that may lead to the imposition of new or increased reserve requirements. Discuss any potential collateral issues with the borrower.
- Review insurance requirements (property and casualty) and ensure compliance with the loan documents.

C. Issue: Borrowers often do not differentiate between a straightforward assumption request and a “bundled” request that includes or requires additional waivers or loan document modifications. These additional issues may be straightforward, such as a release of a parcel, or may be less obvious, as in the case of a borrower’s inability to cure a non-monetary default prior to assumption or ability to meet any of the loan document requirements related to the assumption. Particularly on CMBS loans, requested modifications that are “wholesale” in nature (e.g. essentially, rewriting the terms of the loan) will not (or cannot, due to REMIC restrictions) be entertained. The modification of transfer restrictions, to the extent existing restrictions factually do not accommodate the borrower’s structure (for example, a public corporation or a REIT), might be negotiated but such negotiations may result in the imposition of a modification fee in addition to the assumption fee stated in the loan documents.

Proposed Action: Identify and notify the borrower of any loan document compliance issues or components of the borrower assumption request that may require additional information, consents or time.

- Confirm that the assumption request does not include any additional processing requirements OR notify the borrower of any additional information needed to process the entire request and the decision model that will be followed
- Determine (along with borrower) potential ways to address exceptions from loan document requirements
- Discuss material exceptions with the consenting party, if possible
- Keep borrower informed

2. Helping the borrower better understand the lender's viewpoint:

A. Issue: Lenders may be comfortable with loan terms based on the borrower in place at loan closing and will be incented to ensure that any replacement borrower has the requisite experience and financial wherewithal to maintain or enhance property performance. In addition, the replacement borrower's net worth, financial standing and experience will likely be reviewed. Loan documents may dictate that the replacement borrower have certain attributes that are equal to or greater than the original borrower. Subject to loan document terms, the lender may impose additional requirements in order to ensure (in its opinion) maintenance of its credit position. Without understanding the lender's viewpoint, borrowers may view or misinterpret the lender's request as an opportunity to improve upon original underwriting.

Proposed Action: Provide adequate information so the lender can re-underwrite the incoming sponsor and demonstrate the proposed new borrower is better than, or at least *no worse than*, the existing borrower. This will require a clear understanding of any assumption provisions in the existing loan documents, submission of a thorough request package and application of the lender's underwriting criteria. The re-underwriting process is intended to provide an analysis of the assuming borrower versus the existing borrower as well as the projected effect, if any, on the operation of the collateral property. While the loan parameters do not usually change as part of an assumption, it is important to stress to the borrower that the lender's request for additional terms may be an offset to perceived deficiencies in the replacement borrower and may allow the lender to approve a transaction that would otherwise be declined.

At the very outset, ask the borrower if they have any issues that will cause a blip on their credit report, no matter how small. All lenders are ordering and scrutinizing these reports today. If there are issues, deal with them up front so they can be resolved early or alternatively kill the deal before much more work is done.

B. Issue: Borrowers often assume that all lenders are similarly motivated, and that an assumption request will be processed in much the same way that the original loan was made. However, the reality is that the lender-type (portfolio, CMBS, GSE's, etc.) and the consequent contractual obligations of the parties can result in significant differences in approach. A "successful" assumption experience requires early and full disclosure to / education of both buyer and seller.

Proposed Action: In general terms, and early in the process, carefully discuss with the borrower the differences in the motivation and considerations of various capital sources / lenders to help set expectations appropriately and facilitate a greater understanding as well as a more cooperative approach.

- Securitized loans:
 - Decisions made will impact all trust certificate holders and, thus, must be focused on loan document and servicing agreement terms.
 - If the securitized loan is part of a REMIC trust, the servicer's motivation may be limited by REMIC tax considerations.
 - The assumption may require review by one or more rating agencies, in addition to multiple servicers and directing certificate holders, potentially adding time and cost to the transaction. Specifically, these parties may review the assumption to confirm the financial strength and experience of the new borrower is at least of equal quality of the previous borrower.

- Portfolio lenders:
 - Decisions made will solely impact the portfolio lender, and thus it may be willing to modify or waive certain loan document requirements to accommodate the replacement borrower.
 - Considerations may include overall business relationship (however, be sure to take into consideration other influences, e.g., regulatory environment; overall investment portfolio performance; etc.).
 - Credit decisions must meet the requirements of the portfolio lender's investment policies, which may have changed since the loan was originated.

- GSE's (Fannie Mae, Freddie Mac, FHA/GNMA)
 - Decisions made ultimately impact the DUS lender and Fannie Mae (as owner or guarantor of the loan),
 - Lender's approach is otherwise, almost identical to portfolio lender.
 - GSE loans will likely have a higher level of administrative issues than may be found in CMBS or portfolio loans.