

Mortgage Banking Update

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if you require additional
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HUD ISSUES ANOTHER UPDATE FOR ITS NEW RESPA RULE

Not long after the Department of Housing and Urban Development (HUD) issued its long-awaited guidance to the rules under the Real Estate Settlement Procedures Act (RESPA) that are to be implemented on January 1, 2010, the agency issued an updated version of its guidance that removed one of the FAQs. (See the August 24, 2009 edition of the Mortgage Banking Update for the article regarding the FAQs.)

One of the FAQs addressed the requirement to disclose in both the good faith estimate (GFE) and HUD-1 if the loan has a prepayment penalty with respect to FHA loans. The FAQ provided that the requirement with an FHA loan that the consumer pay interest through the end of the month—even if the loan prepays earlier in the month—is not a prepayment penalty. This response raised eyebrows in the mortgage industry, because under the Truth in Lending Act (TILA) a prepayment penalty includes interest charges for any period after prepayment in full is made. As noted in the prior article regarding the FAQs, the Commentary to Regulation Z under the TILA does address a type of statement that can be included in a TIL disclosure in cases in which applicable law prohibits a prepayment penalty but also excludes from the prohibition the payment of interest after a full prepayment is made.

In an updated version of the FAQs dated August 19, 2009, the FAQ regarding the prepayment penalty disclosure is removed without explanation.

HUD followed this change by issuing another version of the FAQs dated August 28, 2009. This version will be addressed in a future edition of the Mortgage Banking Update.

DID YOU KNOW?

- As of January 1, 2010, any mortgage loan originator that intends to conduct Florida origination business on behalf of a Florida mortgage lender or correspondent mortgage lender licensee will be required to hold a mortgage broker license.
 - Pennsylvania no longer requires that mortgage lenders, correspondent mortgage lenders, or mortgage broker licensees maintain an office within the state.
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ARE YOU READY FOR THE OCTOBER 1 RULE CHANGES?

In case you aren't aware, significant changes to the Truth in Lending Act (TILA) rules, which are contained in Regulation Z, will become effective on October 1, 2009. Additional changes that you should be privy to are the rules under the Home Mortgage Disclosure Act (HMDA) regarding the determination of the loans for which the interest rate spread must be reported. To get a sense of how these changes will affect you, below you'll find a brief summary that may help you stay compliant.

TILA—Regulation Z

Authority. The Federal Reserve Board adopted the changes to Regulation Z in July 2008 based on authority set forth in different sections of TILA, with most of the changes becoming effective on October 1, 2009. The Fed has general rulemaking authority under certain TILA provisions, including Sections 105 and 122, and has rulemaking authority under a provision added to TILA by the Home Ownership and Equity Protection Act (HOEPA) to address certain practices. The Fed interprets the provision added by HOEPA, contained in TILA Section 129(l)(2), to authorize the Fed to prohibit acts or practices in connection with (1) mortgage loans that the Fed finds to be unfair, deceptive or designed to evade the prohibitions of HOEPA, and (2) refinancing of mortgage loans that the Fed finds to be associated with abusive lending practices or that are otherwise not in the interest of the borrower. Significantly, violations of provisions adopted by the Fed under the Section 129(l)(2) authority are subject to the HOEPA special statutory damages provision under which there is liability for damages equal to the sum of all finance charges and fees paid by the consumer. In this summary, the provisions adopted under the Section 129(l)(2) authority are noted.

Advertisements. New requirements and prohibitions apply to advertisements occurring on or after October 1, 2009. For example, the new requirements and prohibitions apply to radio advertisements that occur, and solicitations that are mailed, on or after October 1, 2009.

For both open-end and closed-end credit secured by any dwelling, the new requirements provide for more complete disclosures regarding interest rates and payments, and the disclosures must satisfy specific clear and conspicuous standards. A key aspect of the new requirements is to provide for the advertising of interest rates and payments in a manner that does not give undue emphasis to low promotional or teaser rates and payments.

Seven specific practices will be prohibited for advertisements of closed-end credit secured by any dwelling. The seven practices, which the Fed prohibited using the Section 129(l)(2) authority, are misleading:

- Advertisements of fixed rates or payments.
- Comparisons between an actual or hypothetical consumer's current interest rate or payments and any advertised interest rate or payment.
- Representations about government endorsement.
- Uses of the name of the consumer's current lender.
- Claims of debt elimination.
- Uses of the term "counselor".
- Uses of a foreign language.

Prohibited Practices For Principal-Dwelling-Secured Loans. For credit transactions secured by a consumer's principal dwelling, other than a home equity line of credit subject to Regulation Z Section 226.5b, the Fed used the Section 129(l)(2) authority to adopt two prohibitions regarding appraisals and three prohibitions regarding servicing practices.

With regard to appraisals, the two prohibitions are that:

- A creditor, mortgage broker or affiliate of a creditor or mortgage broker may not, directly or indirectly, coerce, influence or otherwise encourage an appraiser to misstate or misrepresent the value of the consumer's principal dwelling.

- A creditor who knows, at or before loan consummation, of a violation of the noncoercion or noninfluence prohibition in connection with an appraisal may not extend credit based on the appraisal unless the creditor documents that it has acted with reasonable diligence to determine that the appraisal does not materially misstate or misrepresent the value of the subject principal dwelling.

The appraisal prohibitions apply to loans secured by a consumer's principal dwelling for which the applications are received by the creditor on or after October 1, 2009.

The three prohibitions applicable to servicing practices are that no servicer shall:

- Fail to credit a payment to the consumer's loan account as of the date of receipt, except when a delay in crediting does not result in any charge to the consumer or in the reporting of negative information to a consumer reporting agency. (This does not require crediting on the date of receipt, only as of the date of receipt. Also, if the servicer specified in writing reasonable requirements for the consumer to make a payment, and the servicer accepts a payment that does not conform to the requirements, the servicer must credit the payment as of five days after receipt.)
- Impose on the consumer any late fee or delinquency charge in connection with a payment when the only delinquency is attributable to late fees or delinquency charges assessed on an earlier payment, and the payment is otherwise a full payment for the applicable period and is paid on its due date or within any applicable grace period. (The practice prohibited by this provision, which is known as the pyramiding of late charges, is already prohibited by existing law. However, the Fed adopted the prohibition under the Section 129(l)(2) authority in order to permit state attorneys general to enforce the prohibition by virtue of authority granted to state attorneys general under TILA to enforce Section 129 violations. In March of 2009, Congress included in the Omnibus Appropriations Act of 2009, Pub. L. No. 111-8, an amendment to TILA that grants states further authority to enforce TILA violations.)
- Fail to provide, within a reasonable time after receiving a request from the consumer or any person acting on behalf of the consumer, an accurate statement of the total outstanding balance that would be required to satisfy the consumer's obligation in full as of a specified date. It will be considered to be reasonable under most circumstances to provide a payoff statement within five business days of receipt of a request. A servicer will be permitted to specify reasonable requirements for consumers to make payoff statement requests.

The servicing prohibitions apply to loans secured by a consumer's principal dwelling that are serviced on or after October 1, 2009, including loans that a servicer commenced servicing before October 1, 2009.

Higher-Priced Mortgage Loans. The Fed used the Section 129(l)(2) authority to adopt one requirement and three prohibitions applicable to a new category of consumer credit transactions secured by a principal dwelling and referred to as "higher-priced mortgage loans". A loan secured by the consumer's principal dwelling will be a "higher-priced mortgage loan" if the annual percentage rate exceeds the average prime offer rate calculated by the Fed for a comparable transaction by at least 1.5 percentage points for a first-lien loan and at least 3.5 percentage points for a subordinate-lien loan. Excluded from the definition of "higher-priced mortgage loan" are construction loans, temporary or bridge loans with terms not exceeding 12 months, reverse mortgage loans and HELOCs.

Higher-priced mortgage loans will be subject to the following prohibitions and requirements:

- A prohibition against making such a loan without regard to the consumer's repayment ability, and a requirement to verify repayment ability through the verification of income, assets and obligations.
- A prohibition against the imposition of a prepayment penalty unless certain conditions are satisfied, including that the penalty can be imposed only during the two-year period after consummation and, subject to exceptions, that the periodic payment of principal, interest or both may not change during the four-year period following consummation.
- A prohibition against making a first-lien, higher-priced mortgage loan without an escrow account for property taxes and mortgage-related insurance. (This requirement applies to loans for which applications are received on or after April 1, 2010, or on or after October 1, 2010 for loans secured by manufactured housing.)

The higher-priced mortgage loan provisions apply to higher-priced mortgage loans for which the applications are received by the creditor on or after October 1, 2009.

HOEPA Loans. The HOEPA loan provisions are revised to:

- Add a prohibition against making any HOEPA loan without regard to the consumer's repayment ability, and a requirement to verify repayment ability through the verification of income, assets and obligations. (The pre-October 2009 rule prohibits a creditor from engaging in a pattern or practice of making HOEPA loans without regard to the repayment ability of consumers.)
- Modify the conditions applicable to the imposition of a prepayment penalty by reducing the period during which a penalty may be imposed from five to two years after consummation, and by adding a condition that, subject to exceptions, the periodic payment of principal, interest or both may not change during the four-year period following consummation.

The revisions to the HOEPA loan provisions apply to HOEPA loans for which the applications are received by the creditor on or after October 1, 2009.

HMDA

The HMDA rules for determining loans on which an interest rate spread must be reported have been amended effective October 1, 2009. The change conforms the rate-spread reporting requirement under HMDA with the definition of "higher-priced mortgage loan" under Regulation Z. Thus, under the amended rules a lender must report in its HMDA loan application register the rate spread for a loan when (1) the loan is a first-lien loan and the annual percentage rate on the loan exceeds the average prime offer rate calculated by the Fed for a comparable transaction by at least 1.5 percentage points or (2) the loan is a subordinate-lien loan and the annual percentage rate on the loan exceeds the average prime offer rate calculated by the Fed for a comparable transaction by at least 3.5 percentage points.

The revised rate-spread reporting requirement applies to loans for which the applications are taken on or after October 1, 2009, and to loans that close on or after January 1, 2010 regardless of when the application was taken.

This information is not intended to constitute, and is not a substitute for, legal or other advice. You should consult appropriate counsel or other advisers, taking into account your relevant circumstances and issues. While not intended, this update may in part be construed as an advertisement under developing laws and rules.

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