

# Mortgage Banking Update

PATTON BOGGS LLP | OCTOBER 19, 2009

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**Trade Groups Request that HUD Avoid RESPA Train Wreck: HUD's Response: Full Steam Ahead**

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## TRADE GROUPS REQUEST THAT HUD AVOID RESPA TRAIN WRECK; HUD'S RESPONSE: FULL STEAM AHEAD

With the January 1, 2010 implementation date for the new Real Estate Settlement Procedures Act (RESPA) rule fast approaching, a number of industry trade groups submitted a letter dated October 13, 2009 to the Department of Housing and Urban Development (HUD) asserting that "we are headed for a mortgage market train wreck on the tracks of RESPA compliance." The trade groups are the [American Bankers Association](#), [American Escrow Association](#), [American Financial Services Association](#), [Housing Policy Council](#), [Consumer Mortgage Coalition](#) and [Mortgage Bankers Association](#). In a response dated October 15, HUD advised that it plans to implement the rule as scheduled.

HUD adopted the new RESPA rule in November 2008 and, heeding industry comments that sufficient time would be needed to implement the new rule, HUD provided for a January 1, 2010 implementation date. However, as stated in the letter, the industry sought guidance from HUD on numerous issues regarding the rule, and HUD did not start issuing guidance until the middle of August 2009. Prior editions of the Mortgage Banking Update have addressed the HUD guidance, which is in the form of FAQs. The trade groups state that "HUD has not provided the clear and needed guidance on a timely basis to enable the industry to be fully RESPA-compliant by the first of the year."

The trade groups address various issues regarding the new rule, including the following:

- HUD's interpretations of the requirement to provide a written list of settlement service providers in cases in which the loan originator will allow the borrower to shop for settlement services will actually cause lenders to prohibit shopping. A concern raised by the industry regarding the requirement was that consumers may view loan originators as being responsible for the performance of settlement service providers that are identified on such a list. The letter notes that this result is more likely based on the HUD interpretation that the identification of a provider on the list constitutes a referral of the consumer to the provider for purposes of the RESPA referral fee prohibition. The trade groups also state that HUD's interpretation that a loan originator must identify providers who are likely available to perform the applicable settlement services for the borrower means that the list is not a mere disclosure obligation—it is a due diligence obligation. Loan originators must assess in every market area in which they do business which settlement service providers are "likely available" to perform services. The trade groups note that lenders could be forced to develop methods to identify service

## LOOKING AHEAD:

### LBA's Bank Counsel Conference

November 13

**Location:** The Ritz Carlton,  
New Orleans

**Topic: RESPA Reform:** The  
Latest from Washington, DC

**Time:** 10:35-11:35 a.m. CST

**Patton Boggs participant:**  
Richard Andreano

providers in each market area in which they lend and continually monitor the availability of the providers to perform services, or lenders may opt to use only nationwide service providers, to the disadvantage of smaller providers. The trade groups also state that loan originators may decline to provide written lists at all when they can do so—meaning that the originators would require the use of specific providers of services when permitted.

- HUD's interpretations of the requirements regarding good faith estimates (GFEs) "have radically altered the requirements when mortgage brokers provide GFEs." The trade groups note that the final RESPA rule was not clear on which party was bound by a GFE, given that the rule still permits a GFE to be issued by both a mortgage broker and a lender. The trade groups then state that only in the FAQs did HUD finally make clear that a lender is bound by the GFE issued by a broker when the lender accepts the GFE. The trade groups assert that this may result in shutting down the broker distribution system for mortgage loans, and that a better outcome for consumers would be to permit lenders to either accept a GFE issued by a broker or issue a corrected version of the GFE that contains accurate information on which the consumer can rely.
- HUD has not clearly addressed whether lenders can charge for preapprovals that allow consumers to shop for a home. The trade groups note a particular concern in this area is that the new rule prohibits imposing a fee on the consumer beyond a credit report fee before the consumer receives a GFE, and a GFE does not have to be provided until a property address (which would not be known when the consumer is shopping for a home) and the other required items of information that constitute a loan application are received. The trade groups explain that this approach creates uncertainty regarding the ability to charge for preapprovals.
- HUD's advice on how to disclose points in order to meet Internal Revenue Service (IRS) requirements for the consumer to deduct the points for tax purposes conflicts with the RESPA rule. Among other criteria, the IRS requires that the points be clearly shown on the HUD-1/1A as points paid for the mortgage loan. In the FAQs, HUD advises that the points may be designated on Line 801 of the HUD-1 by adding that the "Our origination charge" disclosure includes the origination point(s). However, the instructions to the HUD-1 provide that Line 801 "includes all charges received by the loan originator, except any charge for the specific interest rate chosen (points)." The trade groups request that HUD first develop a disclosure method that permits consumers to deduct points for tax purposes and is consistent with the RESPA rule, and then allow the industry an appropriate amount of time to implement the disclosure method.
- Based on the loan terms section of the HUD-1 and HUD's interpretations of the section, lenders will not be able to make accurate, nonmisleading disclosures about rate adjustments on

adjustable-rate mortgage (ARM) loans. The trade groups first note that the format of the section provides for disclosing rate changes as percentage amounts and not percentage point amounts. For example, the groups explain that if a loan has a one percentage point cap on periodic rate changes, this would be disclosed as “every change date, your interest rate can increase or decrease by 1 percent.” For a loan with an initial rate of 6 percent, a 1 percent increase would mean the rate would be 6.06 percent, as opposed to a 7 percent rate that would result from a one percentage point increase. The groups recommend that a better approach would be to disclose that “every change date, your interest rate can increase or decrease by one percentage point.” The trade groups also question HUD advice regarding a situation in which a loan has a periodic cap on rate increases but not decreases. HUD advises in the FAQs that in such a situation the periodic cap on the amount the rate can change on each change date should be disclosed as the difference between life of loan maximum and minimum rates on the loan. The trade groups note that if there is an eight percentage point difference between the maximum and minimum rates, this approach would require the lender to disclose that on every change date the rate could increase or decrease by 8 percent. The groups assert that it is “misleading to tell a consumer that the rate may change by a certain percentage at each change date if, in fact, that is not the case.” The trade groups also note that the loan terms section does not allow for disclosure of a loan with a lifetime rate cap and no periodic cap, a loan with a cap but not a floor on the interest rate, or a loan with different rate caps at different change dates. The groups recommend that HUD should permit changes to the mandated language of the HUD-1 to ensure that consumers are not provided with inaccurate and misleading ARM loan disclosures.

The trade groups request that HUD postpone the implementation date of the entire RESPA rule and take the following steps to achieve effective implementation of the rule:

- Finish resolving all of the issues described in the letter.
- After resolution of all of the issues, providing the industry with a reasonable implementation period before compliance becomes mandatory.
- Notifying the public that beginning on January 1, 2010 and through the implementation period, the use of the new or old forms of GFE and HUD-1 will not constitute a violation of RESPA.

HUD was unmoved by the request and advises that it is “aware that industry needs sound guidance to assure prompt and efficient implementation of new systems and training of employees. That is why the rule provided a period of 14 months for implementation.” HUD did not directly respond to the assertion of the trade groups that HUD guidance came far too late during the implementation guidance, and that the guidance conflicts with the final RESPA rule and will produce unintended consequences. If there is to be a delay of the RESPA rule, it appears it will not occur without the involvement of one or both of the other branches of the federal government.

In fact, an expanded number of trade groups sent a joint letter dated October 14 to the House Financial Services Committee regarding H.R. 3126, which includes the Consumer Financial Protection Agency. The groups support an amendment to H.R. 3126 that would require HUD to delay implementation of the rule and coordinate its regulatory efforts with those of the Federal Reserve Board. The trade groups are the American Bankers Association, [Consumer Bankers Association](#), Consumer Mortgage Coalition, [Financial Services Roundtable](#), Housing Policy Council, Mortgage Bankers Association, [National Association of Federal Credit Unions](#), [National Association of Mortgage Brokers](#) and [Real Estate Services Providers Council](#).

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## DID YOU KNOW

- Effective October 11, 2009, the California Real Estate Law was amended to prohibit any person, including California-licensed real estate brokers, real estate salespersons and attorneys, from collecting or requiring an advance fee from a consumer in connection with providing loan modification and/or mortgage forbearance assistance pertaining to one-to-four family residential real properties located in the state. In addition, prior to entering into any fee agreement with a borrower, California law now requires certain individuals or entities engaging in loan modification services to provide a disclosure that specifies that it is not necessary to compensate a third party in order to obtain a loan modification.
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## GET YOUR BUSINESS ON THE ROAD TO 'CAPITAL THINKING'

Our award-winning, custom-published magazine, *Capital Thinking*, was launched in 2006 and has been highly-read by the firm's attorneys, staff, recruiters and – most importantly – clients and prospects. The magazine has helped Patton Boggs spread the word about its breadth of practice by showcasing the firm's depth of expertise in a variety of ways, including interviews with business leaders, attorney-written articles and regular Q&A interviews with CEOs that are shaping today's business landscape. By presenting reader-driven, need-to-know material in a controlled format, *Capital Thinking* magazine provides the firm with an avenue to drive business development, foster client relations and improve communications among attorneys, practice groups and clients.

Shortly after its launch, *Capital Thinking* magazine won the Custom Publishing Council's (CPC) Silver Pearl Award for "Editorial: Best New Magazine." The magazine was also awarded a Silver Pearl Award in 2007 for "Best Distribution Strategy" in 2007. That same year, *Capital Thinking* magazine received a Burton Award from the Burton Foundation and the Association of Legal Administrators in the category of "Best Law Firm Publication." And in 2008, the magazine was awarded Gold in "Design:

Best Special Issue” and “Editorial: Best Feature Article/Package (less than 250,000); and a Bronze for “Design: Best Use of Illustration (Less than 50,000).”

**To read up on the latest issue online or to receive the free biannual magazine, visit [www.capitalthinkingmagazine.com](http://www.capitalthinkingmagazine.com).**