

# Mortgage Banking Update

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## WILL FHA LENDING DECLINE AFTER OCTOBER 1?

Three trade groups have sent a letter to the Federal Reserve, the Department of Housing and Urban Development (HUD) and Ginnie Mae advising of an issue under Truth in Lending Act (TILA) rules that are effective on October 1, 2009.

According to the American Bankers Association, Consumer Mortgage Coalition and Mortgage Bankers Association, the new TILA rules could significantly impact Federal Housing Administration (FHA) lending. They create a category of closed-end mortgage loans called higher-priced mortgage loans (HPMLs). Subject to a few exceptions, a mortgage loan is a HPML if it is secured by the consumer's primary dwelling and the annual percentage rate equals or exceeds a certain threshold. The threshold is 1.5 percentage points or 3.5 percentage points above the average prime offer rate for first-lien loans and subordinate-lien loans, respectively. The average prime offer rate is a rate computed by the Fed for fixed-rate loans with various terms to maturity and adjustable-rate loans with various initial-fixed interest periods.

For October 1, 2009, the average prime offer rate for a 30-year fixed-rate loan is 5.09 percent. Based on this rate, a first-lien mortgage loan with an annual percentage rate of 6.59 percent or higher would be an HPML.

Among other restrictions, if a loan is an HPML the loan terms may not provide for a prepayment penalty that can be imposed more than two years after the loan is closed. The trade groups advised that the prepayment penalty restriction presents an issue with FHA loans.

FHA loans often are placed in pools that back securities guaranteed by Ginnie Mae. If a loan is prepaid in full during a month, Ginnie Mae requires that investors receive interest through the end of the month. As a result, many FHA loans provide that if a full prepayment is made on a date other than an installment due date, the borrower may be required to pay interest through the end of month. If the servicer does not collect the interest from the borrower, it would have to pay the interest out of its own funds.

Under TILA, a requirement for the borrower to pay interest after the date of a full prepayment is deemed to be a prepayment penalty. The treatment of a requirement to pay interest after a full prepayment as a prepayment penalty, thus, presents an issue with FHA loans in view of the HPML restriction on prepayment penalties. The trade groups said they "fear that a large segment of FHA loans will not be originated once the changes to [the TILA rules] are effective on October 1, 2009."

## LOOKING AHEAD:

### **MBA's St. Louis Education Seminar**

October 7

**Location:** Clayton, Missouri

**Topic:** Truth in Lending and RESPA

**Time:** 1:00-5:00 p.m. CST

**Patton Boggs participant:**  
**Richard Andreano**

### **How Will FHA Reforms Impact the Mortgage Industry?**

October 14

**Webinar Topic:** Addressing Changes at FHA

**Time:** 1:00-2:00 p.m. EST

**Patton Boggs participants:**  
**Richard Andreano, Heather Hutchings**

Space is Limited

### **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**

## DID YOU KNOW?

- Effective October 1, 2009, mortgage servicers, including those that are not located in-state, are required to register in Nevada.
- Effective January 4, 2010, residential mortgage lender and broker licensees are not required to maintain an office in New Jersey, provided the licensee is qualified to do business in the state and has a registered agent for service of process.

## HUD FAQs NOW EXCEED 200 IN NUMBER

Our After a brief lull, the Department of Housing and Urban Development (HUD) resumed issuing FAQs to provide guidance on the new Real Estate Settlement Procedures Act (RESPA) rule that is to become effective on January 1, 2010. A September 18, 2009 version, issued on September 21, contains 38 new FAQs ranging from technical to controversial. The total number of FAQs issued by HUD now exceeds 200.

### **Broker—Lender Relationship**

One FAQ appears to address a situation in which a lender has accepted an application and a good faith estimate (GFE) from a mortgage broker. In such a situation, the lender is bound by the GFE if the borrower decides to pursue the loan reflected in the GFE. The specific issue addressed in the FAQ is whether the three-business-day period to issue a revised GFE based on changed circumstances or borrower-requested changes commences when the broker or the lender receives the relevant information. HUD advises that the three-business-day time period to issue the revised GFE would commence upon the receipt of the information by either the broker or lender—it is the first receipt that triggers the time period to issue the revised GFE. Thus, if a broker learns of changed circumstances or borrower-requested changes and does not provide the information to the lender in time for the lender to issue a revised GFE within the three-business-day period, the lender would remain bound by the existing GFE. The lender could not issue a revised GFE because the three-business-day period to do so would have expired. HUD's position is highly questionable.

### **Affiliated Tax Service or Flood Certificate Provider**

HUD advises in the FAQs that a lender may not require the use of an affiliated tax service provider or flood certificate provider. The underlying RESPA provision at issue is the affiliated business arrangement exception under which a referral by a party to an affiliated settlement service provider may not be found to violate the RESPA Section 8 referral fee prohibition if three conditions are satisfied. One condition is that there is no requirement to use the affiliated settlement service provider. Statutory exceptions to the condition permit a lender to require the use of an affiliated attorney, credit reporting agency or real estate appraiser. There are no similar exceptions for tax service providers and flood certificate providers. The absence of exceptions may simply reflect that such services were not prevalent in 1983, when the affiliated business arrangement provisions were added to RESPA.

## **Brokers and Interest Rates**

The “important dates” section of the GFE provides for the disclosure of information regarding the availability of the interest rate identified in the GFE. An FAQ raises the issue of how a mortgage broker should complete the “important dates” section if applicable state law does not permit the broker to provide an interest rate. HUD advises that “RESPA and HUD’s regulations do not exempt any person from complying with consistent laws of any state. HUD’s regulations provide a process for addressing questions of consistency between state laws and RESPA.” HUD cites the section of the RESPA rule under which a party may seek a determination of HUD regarding whether a state law is inconsistent with RESPA. RESPA preempts state laws that are inconsistent with the statute, but only to the extent of the inconsistency. HUD is not permitted to deem a state law to be inconsistent with RESPA if HUD determines that the state law gives greater protection to the consumer. Quite simply, HUD did not inform brokers about how they should complete a GFE when applicable state law prohibits a broker from providing an interest rate to the consumer.

## **GFE First, Application Later?**

In a prior version of the FAQs, HUD addressed a situation in which a loan originator issues a GFE without having the property address and the address is later identified. The property address is one of the six minimum items of information that is necessary to have an application that triggers the need to provide a GFE. HUD advised that the subsequent identification of the property address is not a changed circumstance that would permit revisions to the GFE terms. Left open was the issue of whether a loan originator would be deemed to have received an application if it elects to issue a GFE without having all of the six minimum items of information.

In the September 18 version, HUD addresses the basic issues of whether a loan originator may provide a GFE without having the minimum six items of information, and also if a loan originator may process a loan without having such information. As to the first issue, HUD advises that “an application includes information the loan originator requires the borrower to submit in anticipation of a credit decision. If a loan originator issues a GFE, the loan originator is presumed to have received all six pieces of information.” HUD’s response to the loan processing issue is that “[l]oan originators may process a loan after they have issued a GFE and the borrower has received the GFE and decided to proceed with the loan. It is presumed that, prior to issuing a GFE, a loan originator has received all six pieces of information.” Thus, HUD takes the position that a loan originator may provide a GFE without having the minimum six items of information that constitute a loan application, and that if a loan originator does so it will be presumed to have such information.

As noted above, previously HUD took the position that if a loan originator provides a GFE even though there is no property address, the subsequent identification of the property is not a changed circumstance that would allow the loan originator to provide a revised GFE. Presumably, to the extent applicable, HUD will take the same position regarding the other five items of information needed to have an application if a loan originator provides a GFE before it has all of the information. The other five items of information are the borrower’s name, income, social security number (for a credit report), an estimate of the property value and the loan amount sought.

### **10-Business-Day Period**

HUD confirms that when a GFE is mailed, the minimum 10-business-day period during which the borrower may accept the GFE is measured from the date of mailing. HUD also advises that when the GFE is mailed, the date of mailing should be entered in the "date of GFE" box.

### **Revised GFE**

When a loan originator issues a revised GFE based on changed circumstances or borrower-requested changes, HUD advises that the revised GFE must reflect that the estimate for the settlement charges (other than the interest rate dependent charges) remains available for at least 10 business days. Thus, HUD takes the position that each time a loan originator revises a GFE the borrower has at least 10 business days to decide whether to accept the revised terms. The RESPA rule does not clearly set forth that the minimum 10-business-day period applies to revised GFEs in addition to the initial GFE.