

Mortgage Banking Update

PATTON BOGGS LLP | NOVEMBER 23, 2009

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DID YOU KNOW?

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NEW HUD FAQs ON RESPA RULE

Last week, after a nearly one-month hiatus, the Department of Housing and Urban Development (HUD) issued two new versions of the FAQs to provide further guidance on the Real Estate Settlement Procedures Act (RESPA) rule scheduled for implementation on January 1, 2010. The new versions are dated November 17 and November 19. Please see the [November 16 edition](#) of Mortgage Banking Update regarding the HUD announcement of restrained enforcement of the new rule through April 2010.

Changed Circumstances. Under the new RESPA rule, when a loan originator permits a borrower to shop for the provider of a required settlement service, the loan originator must give the borrower a list identifying one or more available providers for each applicable service. With regard to title services and lender's title insurance, HUD advises that this is a category that comprises services within the defined term "title service" and includes all of the services within that definition, including conducting the settlement. Thus, when a loan originator permits a borrower to shop for title services and lender's title insurance, the list of providers must identify title services and lender's title insurance as a single service, and the various included services, such as conducting the settlement, may not be listed separately.

The new RESPA rule permits a loan originator, which is a mortgage broker and a lender, to issue a revised good faith estimate (GFE) without regard to the tolerances on fee increases if there is a changed circumstance or borrower-requested change (although only the fees affected by the changed circumstance or borrower-requested change may be revised). The rule provides that documentation supporting the increases in the applicable fees must be retained for three years after settlement. HUD advises that if there is a changed circumstance resulting in a revised GFE both a mortgage broker and lender must retain documentation of the reasons for the revised GFE. Presumably, HUD takes the same position if a revised GFE is issued based on a borrower-requested change. This is an interesting position, as it is stated without qualification, even though in many cases the broker may have no knowledge of a changed circumstance or borrower-requested change that led to the lender issuing a revised GFE.

As noted above, if there is a changed circumstance a loan originator may issue a revised GFE that increases the applicable fee(s) without regard to the tolerances. HUD advises that if a borrower selects a service provider that was not selected or identified by the loan originator, this is not a changed circumstance. This position should not present an issue for loan originators. Under the new RESPA rule, if the borrower uses a provider for a particular service that was not selected or identified by the loan originator,

LOOKING AHEAD:

Mortgage Bankers Association

December 1 - Denver, CO;
December 2 - Irvine, CA;
December 11 - Philadelphia, PA
Topic: A workshop to help with implementation of the new RESPA requirements.
Time: 8:30 a.m. – 4:30 p.m.
Patton Boggs participant:
Richard Andreano

Mortgage Lending Practices Under Fire Webinar

December 2
Topic: Compliance, enforcement and litigation risks resulting from the changing regulatory regime in mortgage lending
Time: 1:00 – 2:30 p.m. EST
Patton Boggs participants:
Patrick McManemin
Michael Waldron
50% Off the Webinar when you use the promo code ZDFCT

RESPA Reform, Fact vs. Fiction

December 8
Topic: Training on the new RESPA rules
Time: 1:00 – 3:00 p.m. EST
Patton Boggs participant:
Richard Andreano
Receive a discount when you use the promo code
RESPA1208

The RESPA Reform Rules: Managing the Compliance Labyrinth

December 10
Topic: Ensuring your bank is in compliance with the new RESPA reform rules
Time: 2:00 – p.m. EST
Patton Boggs participant:
Richard Andreano

AllRegs Webinar

December 14
Topic: Understanding RESPA Reform
Time: 2:00 – 4:00 p.m. EST
Patton Boggs participant:
Richard Andreano

no tolerance applies to the fee for the service—the fee can increase by any amount.

HUD also advises that if a borrower initially selects a provider not identified by the loan originator for a particular service and then changes to a provider identified by the loan originator, this is not a changed circumstance. Thus, in such a situation the fee for the service would be included in the services that are subject to the 10 percent tolerance.

List of Providers and Affiliates. As noted above, under the new RESPA rule when a loan originator permits a borrower to shop for the provider of a required settlement service, the loan originator must give the borrower a list identifying one or more available providers for each applicable service. HUD advises that an affiliate of a loan originator may be included on such a list; however, an affiliated business arrangement disclosure “must be provided at the time the GFE is provided to the borrower or at the time of referral, whichever is earlier.” This statement by HUD appears to conflict with RESPA and Regulation X, under which a lender may provide an affiliated business arrangement disclosure at the time it provides a GFE.

Government-Selected Provider. HUD advises that if a government loan program chooses a settlement service provider, such as the appraiser on a VA loan, the settlement service should be disclosed in Block 3 on the GFE. Block 3 includes the charges for each service required by the loan originator when the originator selects the provider of the service.

No Cost Loan. If a lender will provide a credit that will cover third party costs, HUD advises that, if at closing the third party costs end up being less than anticipated, the loan originator may not reduce the amount of the credit. The loan originator may choose to (1) apply the remaining credit to additional costs, (2) apply the remaining credit to reduce the principal balance of the loan, (3) reduce the interest rate and the credit accordingly or (4) provide cash from the remaining credit to the borrower.

Loan Level Price Adjustment. HUD advises that a loan level price adjustment is included in the determination of whether there is a credit or charge for the specific interest rate chosen.

Credit or Charge Calculation. HUD provides further advice regarding the calculation of the credit or charge for the rate chosen in a transaction involving a mortgage broker:

For transactions involving a mortgage broker, the credit for Block 2 of the GFE is calculated as the net payment from the lender above the principal amount of the loan. The net payment from the lender includes any payments made from the lender to the broker. The resulting computation is stated as a dollar amount. The calculation of Block 2 is the same, whether or not the transaction is table funded.

Tolerance Cure. HUD provides the following response regarding whether a tolerance cure may be listed on the first page of the HUD-1:

The cure for a potential tolerance violation may be listed as a credit to the borrower on page 1 of the HUD-1 with a description of the service(s) the credit is applied to. If the tolerance cure is applied to the overall tolerance category "Charges That in Total Cannot Increase More Than 10%", the tolerance cure credit may be listed as a "lump sum" amount on a blank line in Lines 204 thru 209 with a description of the tolerance category cure. The comparison chart on page 3 of the HUD-1 should reflect the credit given for that service to cure the potential tolerance violation in the appropriate tolerance category.

HUD also provides an example of a \$180 tolerance cure for the items included within the 10 percent tolerance category. In the example, "Cure for '10% Tolerance Category'" is set forth on Line 204 of the HUD-1, with \$180 in the borrower's column. HUD does not provide an example of how in this situation the comparison chart on page 3 of the HUD-1 would be completed to reflect the tolerance cure, and guidance on this point would be helpful.

HUD also advises that when a settlement agent issues a revised HUD-1 to reflect a tolerance cure or cure a technical error, the agent may label the HUD-1 as "Amended" to distinguish it from the original HUD-1.

ARM Adjustment. The loan summary portion of the HUD-1 provides for the disclosure of a single periodic interest rate adjustment cap. Some adjustable rate loans have more than one periodic rate cap, such as one cap for the initial adjustment and another cap for subsequent adjustments. HUD advises that when different limits apply at different times in the life of the loan, either the maximum interest rate or the range of the change limits, such as 2 percent to 5 percent, can be inserted. It is not clear why inserting the maximum interest rate would be an appropriate option.

GFE Acknowledgment. The GFE form does not contain signature lines, and HUD advises that signature lines may not be added to the GFE. HUD also advises that, while a loan originator may seek a borrower's acknowledgment of receipt of a GFE, an originator may not refuse to provide a GFE based on a refusal of a borrower to acknowledge receipt. Additionally, if a borrower provides an acknowledgment of receipt of a GFE, the acknowledgment by itself does not constitute an expression of an intention to proceed with the loan covered by the GFE.

GFE Formatting. While additional pages may be added to the HUD-1 or HUD-1A, HUD confirms prior informal advice that additional pages may not be added to the GFE. HUD will permit the addition of lines to Block 3 (required services for which the loan originator selects the provider), Block 6 (required services for which the borrower may shop) and Block 11 (homeowner's insurance) of the GFE. HUD provides examples of how additional lines may be added either vertically or horizontally to the blocks.

Font Size. HUD confirms that under the RESPA rule no minimum font size applies to the GFE, HUD-1 or HUD-1A.

HOA Transfer Fee. HUD confirms that a fee such as a Homeowners Association (HOA) transfer fee, unless it is service required by the loan originator, is not disclosed in the GFE and would be shown on a blank line in the 1300 Series of the HUD-1.

MONETIZATION OF HOMEBUYER TAX CREDIT PROGRAM

As reported in our [November 9, 2009 Mortgage Banking Update](#), on November 6, President Obama signed legislation that extended and expanded the homebuyer tax credit program. A qualified first time homebuyer can obtain a tax credit of up to \$8,000 and a qualified repeat homebuyer can obtain a credit of up to \$6,500 if he or she contracts for a home by April 30, 2010 and closes on it by June 30. A major issue in the original tax credit program was the question of how to “monetize” it – that is how to fund the downpayment for a homebuyer who needs the credit in order to have an adequate downpayment. Monetization is an obvious concern to sellers, homebuilders, realtors and lenders. One approach is for a state or local government agency to make a second mortgage loan subordinate to a FHA-insured mortgage, which is permitted by the National Housing Act. Earlier this year, HUD issued Mortgagee Letter 2009-15 to deal specifically with these second mortgages in the homebuyer tax credit context. We have worked closely with clients who are assisting local government agencies with their homebuyer tax credit second mortgage programs and have prepared the documentation for such programs. If you want further information about this topic, contact Tim Vanderver at (202) 457-6074 or at tvanderver@pattonboggs.com.

MASSACHUSETTS ISSUES REGULATIONS FOR SAFEGUARDING PERSONAL INFORMATION

The Massachusetts Office of Consumer Affairs and Business Regulation issued regulations establishing new minimum standards for safeguarding personal information. These requirements, effective March 1, 2010, go beyond the personal information safeguards under the Gramm-Leach-Bliley Act and apply to a wide range of entities, including “all persons that own or license personal information about a resident” of Massachusetts. The term “owns or licenses” is defined as receiving, storing, maintaining, processing or otherwise having access to personal information in connection with the provision of goods or services or in connection with employment. “Personal information” is defined as a Massachusetts resident’s first and last name, or first initial and last name, in combination with any one or more of the following pieces of information: (1) social security number; (2) driver’s license number or state-issued identification card number; or (3) financial

account number, credit card number or debit card number, with or without any required security code, access code, personal identification number or password that would permit access to a financial account. The definition of personal information does not include information that is lawfully obtained from publicly available information or from federal, state or local government records lawfully available to the general public.

All persons subject to the Massachusetts regulations have a duty to safeguard personal information by maintaining a written comprehensive information security program. Such programs can be tailored to the characteristics of the entity and must include administrative, technical and physical safeguards that are appropriate to: (1) the size, scope and type of business; (2) the amount of resources available; (3) the amount of stored data; and (4) the need for security and confidentiality of consumer and employee information. Among the minimum requirements for an acceptable security program are the following: (1) designating one or more employees to maintain the program; (2) identifying internal and external risks to information security and evaluating safeguards for limiting such risk; (3) developing security policies for employees regarding the storage, access and transportation of records outside of business premises; (4) imposing disciplinary measures for the violation of security procedures; (5) preventing terminated employees from accessing records containing personal information; (6) ensuring that third-party service providers maintain security measures that are consistent with the Massachusetts regulations; (7) restrictions on physical access to sensitive records and the secured storage of such records; (8) regular monitoring and upgrades of the security program; (9) a review of the security program at least annually or upon a material change in business practices that may implicate the security of personal information; and (10) documenting responsive actions in the event of any breach to the security of personal information.

Comprehensive information security programs must also include measures to safeguard the electronic storage and transmission of personal information. The Massachusetts regulations detail the measures required, to the extent they are technically feasible, in the areas of: (1) secure user authentication protocols; (2) securer access control measures; (3) encryption of personal information transmitted across public networks or wirelessly; (4) monitoring systems for unauthorized access or use; (5) encryption of personal information stored on laptops or other portable devices; (6) maintaining firewall protection for online systems; (7) maintaining anti-virus and other security software; and (8) ongoing training for employees on the proper use of computer systems.

DID YOU KNOW

- On or around January 25, 2010, the Nationwide Mortgage Licensing System will be updated to incorporate certain changes to the questions that must be answered by each licensee. Among other revisions, the update will result in modifications to the disclosure questions and an

- updated definition of the term, "control". Licensees are advised to review these updates carefully to ensure that they do not impact the existing responses in their Nationwide Mortgage Licensing System record.
- As of January 1, 2010, mortgage loan originators applying for Utah licensure will be required to complete 60 hours of approved pre-licensure education, including 40 hours of education approved by the Utah Residential Mortgage Regulatory Commission and the Utah Division of Real Estate and 20 hours of education approved by the Nationwide Mortgage Licensing System.

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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