

Mortgage Banking Update

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HUD FAQ UPDATE

HUD continues to provide guidance on the new rule under the Real Estate Settlement Procedures Act (RESPA) that is effective on January 1, 2010. With a September 9, 2009 version of FAQs, HUD has answered more than 190 questions in total, and recently advised that more than 50 new FAQs will be issued during the coming weeks.

Under the new RESPA rule, various loan charges set forth in the good faith estimate (GFE) are subject to limitations on changes, referred to as "tolerances," subject to exceptions. One type of exception is if there is a changed circumstance. The September 9 version addresses in 11 new situations (and 14 in total) whether a changed circumstance would exist. Unfortunately, the guidance is short on details.

No Changed Circumstance

HUD advises that the following situations would not involve a changed circumstance:

- The property address is identified after the loan originator issued a GFE. (The property address is one of the six minimum items of information required to have an application that triggers the requirement to provide a GFE. This FAQ addresses a situation in which a loan originator elected to issue a GFE even though doing so was not required.)
- A mortgage broker issues a GFE. A lender does not accept the GFE. The lender did not receive the loan application within three days of the date the broker received the application. (It is not clear if HUD is taking the position that when no lender accepts a GFE issued by a mortgage broker, the broker is nevertheless bound because the failure to obtain lender acceptance is not a changed circumstance. If this is HUD's position, HUD would need to provide guidance on the implications, particularly because a broker does not have the ability to make a loan.)

Particular Facts Govern

HUD advises that in the following situations the particular facts would need to be examined to determine if there was a changed circumstance. HUD offers no guidance on the factors that would be relevant to the determination, or what factors would more likely lead to a determination that there is or is not a changed circumstance.

- The borrower does not proceed to closing quickly upon final approval or does not act diligently in providing information to the lender.
- The loan does not close by the close date in the original purchase agreement or construction agreement provided to the lender.
- The vendor originally selected to perform a settlement service goes out of business or stops offering the service.

Maybe a Changed Circumstance

With a number of FAQs, HUD advises that particular situation either “could constitute” or “could be considered” a changed circumstance. HUD does not address if when it uses the “could constitute” language the situation is more likely, less likely or as likely to constitute a changed circumstance as when it uses the “could be considered” language. HUD also offers no guidance on the factors that would be relevant to the determination, or what factors would more likely lead to a determination, that there is a changed circumstance.

HUD advises that the following situations “could constitute” a changed circumstance:

- A government sponsored enterprise, FHA or mortgage insurance program changes, and the loan originator did not have knowledge of the program change before issuing the GFE.
- Credit policy is required to change after the GFE is issued due to regulatory changes and the loan originator did not have notice of the change before issuing the GFE.
- The property address provided by the applicant is not the correct legal address.
- During or as part of the transaction, it is determined that the property use may change, such as from owner-occupied to rental property.
- Automated valuation models (“AVMs”) are commonly used for the property type and loan amount requested, but the AVM request comes back with a “no hit,” necessitating the use of a more expensive valuation method.
- After the GFE is issued, it is determined that an additional service such as an additional pest, structural or other inspection, upgraded appraisal, certification, survey or other requirement is required by the loan originator in connection with the transaction.
- The borrower’s credit score changes.

HUD advises that the following situations “could be considered” a changed circumstance:

- After the GFE is issued, parties are added to or removed from title or the property is moved into or out of trust.
- After the GFE is issued, it is determined that a party will be using a POA to sign, which may require additional work and additional fees.

FED TO COMMENCE SUPERVISORY PROGRAM OF NONBANK SUBS

On September 15, 2009, the Federal Reserve (“Fed”) announced that it has established a policy for conducting a risk-focused consumer compliance supervision program of nonbank subsidiaries of bank holding companies and foreign banking organizations. The program will involve the examination of the nonbank entities for compliance with the consumer protection laws and regulations the Fed has the authority to enforce, as well as the investigation of consumer complaints against any such nonbank entities.

The Fed’s Consumer Affairs letter announcing the policy indicates that risk assessments of nonbank subsidiaries of large complex banking organizations (“LCBOs”) should be completed by the end of the fourth quarter of 2009, and the necessary supervisory work should be identified and scheduled by the end of the first quarter of 2010. For nonbank subsidiaries of regional banking organizations, community banking organizations and non-LCBO foreign banking organizations, the risk assessments should be completed and supervisory work should be identified and scheduled a quarter later (i.e., by the end of the first quarter 2010 and second quarter 2010, respectively).

RED FLAGS COMPLIANCE DEADLINE NEARS...MAYBE

When Congress amended the Fair Credit Reporting Act with the Fair and Accurate Credit Transactions Act of 2003 (“FACT Act”), it mandated that the Federal banking agencies, the National Credit Union Administration and the Federal Trade Commission (“FTC”) issue guidelines for use by the entities they regulate to implement an identity theft protection program. The so-called “red flags rule” containing this information was published in the Federal Register on November 9, 2007 and gave those subject to its provisions until November 1, 2008 to comply.

Since that initial rule was published, the FTC has delayed enforcement of the requirements three times with respect to the entities it regulates. At this time, creditors (including mortgage lenders and mortgage brokers) will be required to have their identity theft programs in compliance with the red flags rule up and running by November 1, 2009. The red

flags rule provides detailed requirements for identifying, detecting and responding to red flags that could indicate identity theft. Drafting and implementing an identity theft program is a significant undertaking, so creditors that have not yet started this process would be prudent not to assume that the FTC will further delay the effective date as November 1st approaches.

DID YOU KNOW?

Oklahoma no longer requires that Mortgage Broker licensees to maintain an office in the state.

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.

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