

Mortgage Banking Update

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HUD OFFERS GUIDANCE ON NEW RESPA RULE

The Department of Housing and Urban Development (HUD) finally issued its long-awaited guidance on the major revisions to the rules under the [Real Estate Settlement Procedures Act \(RESPA\)](#) that are to be implemented on January 1, 2010. While there are a number of interesting points, [HUD's guidance](#), which was released in the form of FAQs, mainly addresses basic issues. Many industry proponents, including ourselves, are hoping the government agency will issue additional FAQs that address more complex issues, such as the precise manner for calculating the credit or charge for the interest rate chosen by the borrower. To offer you more insight into HUD's guidance, we address certain of the FAQs and, in particular, note when the HUD guidance appears to conflict with the new RESPA rule and with the Truth in Lending Act (TILA).

Transition From Old to New Forms

The FAQs confirm previous informal advice from HUD that if a good faith estimate (GFE) is issued in the existing form before January 1, 2010, then the existing form of a HUD-1 settlement statement must be used even if the closing occurs on or after January 1, 2010. The FAQs also provide that if a GFE is issued in the old form, a loan originator has the option to reissue the GFE, with the same terms and charges, in the new form. If a loan originator does so, then the new form of HUD-1 must be used.

Electronic Disclosures

With regard to the use of e-mail or other electronic means to issue a GFE and other documents, the FAQs provide that "as long as the borrower consents and the other specific requirements for consumer disclosures under the [Electronic Signatures in Global and National Commerce Act \(ESIGN\)](#) are met, a loan originator may e-mail, fax or send by other electronic means the GFE (and other RESPA disclosures, such as the HUD-1/1A)." This conflicts with the GFE portion of the RESPA rule, which provides that the "lender must provide the GFE to the loan applicant by hand delivery, by placing it in the mail, or, if the applicant agrees, by fax, e-mail or other electronic means." Because HUD drafted the GFE rule to expressly permit the delivery of a GFE by fax, e-mail or other electronic means based only on the condition that the consumer consent, it is questionable if HUD can (through the FAQs) impose a requirement to comply with ESIGN for the provision of a GFE.

Fee Restriction

The FAQs provide that "[a]fter a loan applicant both receives a GFE and indicates an intention to proceed with the loan covered by the GFE, the loan originator may collect fees beyond the cost of a credit report for origination-related services." The fee restriction in the RESPA rule provides only that additional fees (i.e., fees beyond a fee for a credit report) may not be charged "until after the applicant has received the GFE." Apparently HUD intended that the consumer also indicate an intention to proceed with the loan, but HUD did not draft the fee restriction to provide for this.

The TILA rule implementing the Mortgage Disclosure Improvement Act contains a similar fee restriction. The fee restriction under TILA requires that the consumer receive the initial TIL disclosure before a fee, other than a fee to obtain the consumer's credit history, may be imposed and does not provide that the consumer must also indicate an intention to proceed with the loan. Also, while the TILA rule allows the imposition of a fee to obtain the

consumer's "credit history" before the consumer receives the initial TIL, the RESPA rule allows the imposition of a fee to obtain a "credit report" before the consumer receives the GFE. Thus, the exceptions to the general fee restriction under TILA and RESPA use different language to refer to the type of allowable fee.

Loan Terms

Initial Monthly Payment. For the requirement to disclose in the GFE the initial monthly amount owed for principal, interest and any mortgage insurance, the FAQs provide that regardless of the type of loan, the initial amount owed for principal, interest and any mortgage insurance must be entered, and the amount shown must be the greater of (1) the required monthly payment for principal and interest for the first regularly scheduled payment, plus any monthly mortgage insurance payment, or (2) the accrued interest for the first regularly scheduled monthly payment, plus any monthly mortgage insurance payment. The FAQs also provide that the amount should not include any discretionary amounts, such as credit insurance. Presumably the intent is to refer to voluntary credit insurance.

Initial Interest Rate and Change Date. The FAQs address the requirement to disclose the initial interest rate and date of the first interest rate change in the context of a loan that has a conditional preferred rate feature, such as a loan to an employee that provides for a lower rate during the term of employment. The FAQs provide that in this situation (1) the initial interest rate is the rate that is applicable on the date of closing and that (2) "[i]f the first interest rate change date is not known due to a conditional preferred rate feature, the first change date box should state 'unknown'." If a loan with a conditional preferred rate feature is a variable rate or other type of loan that by contract provides for a rate change separate from the preferred rate feature, such as a rate change based on movements in an index, it is questionable if "unknown" should be inserted for the rate change date simply because it is not known whether or when the borrower will cease to qualify for the preferred rate feature. Also, for TILA purposes, a preferred rate feature would be reflected in the TIL disclosures only if the feature is made part of the legal obligation.

Prepayment Penalty. The FAQs also address the requirement to disclose in both the GFE and HUD-1 if the loan has a prepayment penalty with respect to FHA loans. The FAQs provide 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. However, under TILA a prepayment penalty includes interest charges for any period after prepayment in full is made. The Commentary to Regulation Z 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.

Title Charges

Charges Included In Line 1101. With regard to title charges that would appear in Block 4 of the GFE and Line 1101 of the HUD-1, HUD confirmed previous informal advice that the approach taken with title charges is similar to the approach taken with origination charges for the loan. All of the origination-related charges of the lender and mortgage broker must be combined into the "Our origination charge" item, except for a credit or charge for the interest rate chosen. For the title services, except for the owner's title insurance charges, all of the various title charges, including charges for title examination and evaluation, preparation and issuance of the commitment, clearance of underwriting objections, preparation and issuance of policies, conducting the settlement and processing and administrative services, such as document delivery, document preparation, copying, wiring, preparing endorsements, document handling and notarization, must be included in the "Title services and lender's title insurance" item.

No Cost Loans

The FAQs address no cost loans both when the no-cost feature covers only the fees of the loan originator(s) and when the no-cost feature covers both the fees of the loan originator(s) and some or all of the third-party fees. For cases in which the no-cost feature covers only the fees of the loan originator(s), a credit equal to the amount of the “Our origination charge” in Line 801 would be set forth in Line 802, and as a result the “Your adjusted origination charges” in Line 803 would be zero. When the no-cost feature also covers some or all of the third-party fees, the credit set forth in Line 802 must cover both the fees of the loan originator(s) plus the amount of the third-party fees to be covered by the no-cost feature. The “Your adjusted origination charges” in Line 803 would be a negative number equal to the amount of the third-party fees being covered by the no-cost feature. Each of the applicable third-party fees covered by the no-cost feature must be itemized on an appropriate line in the HUD-1 and listed in the borrower’s column.

Two Mortgage Loans

For cases in which a borrower is obtaining two mortgage loans to purchase a property, the FAQs provide that there must be a GFE and HUD-1 for each loan. The FAQs also provide that in Lines 204-209 of the HUD-1 for the first loan, the principal amount of the second loan and a brief explanation of the second loan should be entered. The instructions to the HUD-1 address the requirement to add information regarding the second loan in Lines 204-209.

Coercion For Tolerance Compliance

The FAQs address whether a RESPA Section 8(a) issue would be presented if a lender pressures a settlement agent to reduce the agent’s charges to avoid a tolerance violation. The FAQs provide: “If a loan originator (or other settlement service provider) pressures a settlement agent (or other settlement service provider) to reduce their charges or otherwise ‘cover the difference’ to bring the costs into compliance with the tolerances as a condition of receiving future referrals of business, it may be considered a potential violation of RESPA Section 8(a). Please contact the Office of RESPA and ILS to file a complaint.” While it is interesting for the FAQs to provide for contacting HUD to file a complaint for something that “may be considered a potential violation,” it is important to note that both the party giving and the party receiving a thing of value for the referral of settlement service business are liable for Section 8(a) violations.

Technical Matters

Separate Borrower and Seller HUD-1s. The FAQs confirm the continued ability to provide the borrower and seller with separate HUD-1s that reflect their respective transactions. The FAQs also provide that the settlement agent must provide the lender with both HUD-1s when the borrower’s and seller’s HUD-1s differ.

Additional Lines. The FAQs provide that if there are not enough lines to disclose all charges in a category, additional lines may be added to Blocks 3, 6, and 11 of the GFE. These are the blocks that provide for itemization of individual charges. The FAQs also provide that additional lines may be added to the HUD-1 when needed to disclose the applicable charges.

Translation Into Other Languages. The FAQs provide that both the GFE and HUD-1 may be translated into languages other than English, as long as the applicable form is translated accurately. No guidance is provided on how the accuracy of a translation would be assessed.

VA Funding Fee. For [VA loans](#), the FAQs provide that the VA funding fee should be disclosed in Block 3 of the GFE as a fee for required services selected by the loan originator.

HOEPA Trigger Decreased

The [Federal Reserve Board](#) recently announced the adjusted point and fee dollar trigger for 2010 under the Home Equity and Ownership Protection Act (HOEPA). Certain home mortgage loans are subject to the additional requirements of HOEPA if either the annual percentage rate on the loan exceeds a certain threshold or the points and fees exceed the greater of 8 percent of the total loan amount or a specified dollar amount that is subject to annual adjustment. For 2009 the dollar amount is set at \$583. Based on a decrease in the [Consumer Price Index](#) used by the Fed, the dollar amount for 2010 has been lowered to \$579.

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)."

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