

# Mortgage Banking Update

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## THE FAQs JUST KEEP ON COMING

The Department of Housing and Urban Development (HUD) is continuing to issue guidance in the form of FAQs on the new Real Estate Settlement Procedures Act (RESPA) rule to be effective January 1, 2010. An August 28 version of the FAQs added 50 new FAQs, although one of the FAQs was removed in a September 1 update. Then on September 3, another version appeared that restored in modified form the FAQ removed on September 1, and added six new FAQs. Continuing on its roll, HUD issued updated FAQs on September 4 with 20 additional FAQs. Certain issues raised by the FAQs are addressed in this article and will allow you to stay up to speed on HUD's continuous changes.

### Withdrawn FAQs—What Do They Signal?

HUD has now removed two FAQs. Previously, HUD removed the FAQ regarding the requirement to disclose in the good faith estimate (GFE) and HUD-1 if a loan has a prepayment penalty. The removed FAQ addressed whether in the requirement to pay interest on a monthly basis with an FHA loan is a prepayment penalty. HUD advised that because FHA loans accrue interest on a monthly basis, the requirement for a borrower to pay interest through the end of the month upon the payoff of an FHA loan is not a prepayment penalty. However, under the Truth in Lending Act (TILA) a prepayment penalty includes interest charges for any period after prepayment in full is made. HUD removed the FAQ without explanation, and apparently, removed it based on a discussion with the Fed.

The August 28 version includes three new FAQs that address loan document preparation fees. One FAQ provides that loan document preparation fees are included in the "our origination charge" item on Line 801 of the HUD-1, and that if a third party prepares the documents the payment to the third party must also be itemized on a blank line in the 800 series. The amount is disclosed outside of the columns, because it already is included in the Line 801 amount. In the September 1 update, this FAQ was removed without any explanation.

The two other FAQs that address loan document preparation fees provide that (a) loan document preparation is a processing and administrative service in the origination of a loan and is included in Block 1 of the GFE "our origination charge" amount and in Line 801 of the HUD-1, and (b) attorney's fees charged to prepare loan documents for the lender are considered part of the origination services on Block 1 of the GFE and should not be separately itemized. The two FAQs appear in the September 1 update without revision.

Then in the September 3 version, the withdrawn FAQ reappeared in modified form. As modified, the FAQ now provides that loan document preparation done on behalf of the loan originator is a processing and administrative service in the origination of a loan and is included in Line 801 of the HUD-1 for "our origination charge" and can not be separately itemized. Thus, HUD reversed its original position that a charge for loan document preparation by an attorney must be included in

**WHERE WE'RE HEADED:**

**[MBA's Regulatory Compliance Conference](#)**

Washington, DC - September 15

**Panel:** Hot Topics 1:

Implementation of TILA, HOEPA, MDIA, RESPA and Other Pressing Requirements

**Time:** 3:30 – 4:45 p.m. EST

**Panel:** TILA Roundtable

**Time:** 5:00 p.m. EST

**Patton Boggs participants:**

[Richard Andreano](#)

**[American Bankers Association, Mortgage Markets Committee](#)**

Washington, DC - September 16

**Topic:** HUD Guidance on New RESPA Rule

**Time:** 3:00 p.m. EST

**Patton Boggs participant:**

[Richard Andreano](#)

**ALLRegs Webinar**

September 21

**Topic:** MDIA – Steps to

Implementing New Requirements

**Time:** 2:00 – 3:30 p.m. EST

**Patton Boggs participant:**

[Richard Andreano](#)

**[Five Star Default Servicing Conference and Expo](#)**

Dallas - September 22

**Panel:** Commercial Servicing Issues

**Time:** 4:00 – 5:00 p.m. CST

**Patton Boggs participant:**

[Patrick McManemin](#)

the Line 801 amount and must also be separately itemized. This may well signal that HUD has abandoned its long-standing position that any amount paid to a third party for the performance of a settlement service must be disclosed on the HUD-1.

**Who's The Lender?**

In the new RESPA rule, HUD revised the definition of mortgage broker to provide that a broker includes a party that closes a loan in its own name in a table-funded transaction. This raised the issue of whether in a table-funded transaction the party identified as the lender in the HUD-1 should be the mortgage broker who closes the loan in the broker's name, or the lender that funds the loan. HUD provides the answer in the September 4 version, which says that the lender that funds the loan is to be identified as the lender in the HUD-1. This may come as a surprise to many borrowers, who likely will never have had any contact with the funding lender.

**Tolerance Correction—Duty to Issue Revised HUD-1**

In a prior version of the FAQs, HUD addressed the correction of a tolerance violation, and indicated that "a HUD-1 that is revised to adjust charges, such as to cure a tolerance violation, is also completed by the settlement agent." The advice raised questions as to the duty of a settlement agent to issue a revised HUD-1 when the lender corrects a tolerance violation post-closing. The August 28 version contains a new FAQ in which HUD advises that (a) if the lender refunds money to a borrower to correct a tolerance violation, the lender is responsible for informing the settlement agent of any changes that would necessitate a revised HUD-1, and (b) after the lender informs the settlement agent of changes, the settlement agent must correct the HUD-1 and provide copies of the corrected HUD-1 to the borrower, seller and lender, as applicable. Such a duty is not expressly set forth in the new RESPA rule and may be questioned by settlement agents.

HUD then followed this advice up with another new FAQ in the September 3 version addressing how the correction of a tolerance violation is reflected in the HUD-1. The agency again states that the settlement agent must prepare a revised HUD-1 that states the actual charges paid by the borrower and the seller. If the lender pays a portion of a borrower charge to cure a tolerance violation, HUD explains that the amounts for the charge on pages two and three of the HUD-1 must be corrected to show the actual amount charged to the borrower, and that the settlement agent should include a notation on a blank line in the applicable HUD-1 series that the lender paid part of the applicable charge. The FAQ includes an example of how this would be done.

**"Monthly" Disclosure Terms**

A new FAQ in the August 28 version addresses whether portions of the GFE and HUD-1 that refer to "monthly" loan payments can be revised when the loan is paid on a different periodic basis, such as biweekly. HUD advises that because the GFE and HUD-1 are prescribed forms, the "monthly" references must be retained and, for example, a loan with biweekly payments would have to be disclosed as if there were monthly payments. HUD does not distinguish between, for example, the HUD-1 requirement to disclose monthly reserves for taxes and insurance and the requirement to disclose the loan terms. It is one thing to require a monthly-based disclosure for the former, but quite another thing to impose a monthly-based disclosure requirement for the latter. Assuming that HUD believes a biweekly loan must be disclosed as if it provides for monthly payments, then HUD is taking a position that conflicts with TILA.

**[West Legalworks Webinar](#)**

**\*25% discount code: 0909LW25**

September 29

**Topic:** New TILA Rules

**Time:** 12:00 – 1:00 p.m. EST

**Patton Boggs participants:**

[Richard Andreano](#), [John Socknat](#),  
[Michael Waldron](#)

**Association of Corporate  
Counsel Webinar**

September 30

**Topic:** Washington Update

**Time:** 12:00 – 1:00 p.m.

**Patton Boggs participants:**

[Richard Andreano](#), [Micah Green](#),  
[Carol Van Cleef](#)

**[ALI-ABA Seminar](#)**

September 30

**Seminar:** Addressing Fraud in an  
Ever Changing Mortgage Banking  
Landscape: A Practical Guide to  
Navigating the Issues

**Time:** 12:30 – 1:30 p.m. EST

**Patton Boggs participant:**

[Michael Waldron](#)

What's key here is that RESPA is the federal settlement cost disclosure statute and TILA is the federal statute that provides for the disclosure of loan terms. Under TILA, a lender must disclose the loan terms based on the legal obligation—that is, the lender must disclose the actual loan terms. Thus, a lender would disclose a biweekly payment loan as a biweekly payment loan. For HUD to take the position that a lender must disclose a biweekly payment loan as a monthly payment loan for purposes of RESPA raises concerns, particularly regarding the potential for borrower confusion.

### **GFE Issued Without a Property Address**

Under the new RESPA rule, a loan originator must issue a GFE upon receipt of a loan application, and a loan application is defined to consist of six specific items of information, plus any additional items of information required by the loan originator. One of the six specific items of information is the property address. In the September 4 version HUD addresses a situation in which a loan originator issues a GFE without having the property address. HUD advises that the subsequent identification of the property address is not a changed circumstance that would permit revisions to the GFE terms. The six specific items of information that constitute a loan application also include an estimate of the property's value. Presumably if the estimate of the value is changed upon the identification of the specific property, this would constitute a changed circumstance.

### **Interest Credit**

In some cases, particularly when a loan is closed near the beginning of a month, instead of requiring that the borrower pay interim interest through the end of the month, the lender will credit the borrower with interest from the beginning of the month and require a full loan payment on the first of the following month. In the September 4 version, HUD advises that in such cases the interest credit may be disclosed as a negative number in Line 901 of HUD-1.

### **Transition**

Previously, HUD advised that if a GFE is issued in the existing form before January 1, 2010, the existing form of HUD-1 must be used even if the closing occurs on or after January 1, 2010. In the September 4 version, HUD addresses a situation in which a first-lien loan and a second-lien loan will be made at the same time to the borrower. HUD advises that even if the new GFE form is used for the first-lien loan, either the existing or new GFE form can be used for the second-lien loan. The corresponding HUD-1 would also be used for the second-lien loan.

### **Seller-Paid Fees**

In the August 28 version, HUD confirms that fees typically paid by the borrower should be shown as being paid by the borrower in the GFE and HUD-1, even if fees are paid by the seller or another party. When, for example, the seller pays certain fees on behalf of the borrower, the HUD-1 still should show the applicable fees as being paid by the borrower. However, a seller credit to the borrower for the amount of the applicable fees would be disclosed in the 200 series of the HUD-1, with a corresponding charge to the seller in the 500 series of the HUD-1.

This approach raises the issue of how to treat fees customarily paid by the seller. The August 28 version also contains a new FAQ that addresses the scenario of when it is customary in a locality for the borrower and seller to each pay a charge to the party conducting the settlement. HUD

advises that charges that the seller pays as a matter of common practice and experience are not disclosed in the GFE. Although not stated by HUD, apparently such charges are disclosed in the HUD-1 as being paid by the seller.

In the September 3 version, it appears HUD tried to put this issue to rest by adding a new FAQ that addresses whether any charges to the seller are listed on the GFE. HUD explains that the GFE is for the borrower and is intended to show the fees typically charged to the borrower, regardless of who pays the fees. Fees typically charged to another party, such as the seller, do not have to be disclosed on the GFE. If there is a question about whether the borrower or seller will pay for a particular settlement service, the charge for that service should be disclosed on the GFE.

### **GFE and Interest Rate Lock**

HUD addresses in the August 28 version a situation in which the interest rate and rate-dependent charges in a GFE are no longer available, but the borrower locks the rate within the time period that the remaining GFE terms are still available. HUD advises that the lender must issue a new GFE with an interest rate, rate-dependent charges and loan terms that are based on the locked rate. No other charges may be changed based on the rate lock (but could be changed if there was an independent basis, such as a changed circumstance).

### **Buy-Down Fee**

In the August 28 version, HUD addresses how to disclose a fee paid by the borrower for a temporary interest rate buy-down. HUD advises that such a fee is a charge to the borrower for the interest rate chosen. To disclose the fee, HUD states that a "lender could check either the first or third box of Block 2 of the GFE" and that a "mortgage broker must check the third box in Block 2 of the GFE." Presumably, HUD means that if there is no broker involved, then the lender has the option of including the buy-down fee in Block 1 of the GFE for "our origination charge" and then indicating in Block 2 of the GFE that any charge or credit for the rate is reflected in the "our origination charge" amount, or separately disclosing the buy-down fee in Block 2 of the GFE.

### **Average Charge Exception**

The new RESPA rule includes an average charge exception that permits the imposition of an average charge for certain settlement services, subject to numerous conditions. One of the conditions is that the total amounts paid by borrowers and sellers for a settlement service based on the use of an average charge may not exceed the total amounts paid to the providers of that service for the applicable class of transactions for which the fee is charged. In a new FAQ in the August 28 version, HUD advises that if the total amount paid by borrowers and sellers for a service exceeds the amount paid to the service providers, the excess may not be retained, but it does not have to be refunded. HUD explains that the excess may be applied to the next average charge period. This approach of addressing such an excess is not reflected in the new RESPA rule.

### **Referral**

Under the new RESPA rule, if the loan originator will allow the borrower to shop for the providers of settlement services, the originator must provide the borrower with a separate list of providers of the services. HUD confirms in the September 4 version that the inclusion of a settlement service provider in such a list is a referral of the borrower to the provider for RESPA Section 8 purposes.

### **Special Information Booklet**

The existing RESPA rule provides that if a lender denies a loan application within the three-business-day period after application, the lender does not have to issue either a GFE or the Special Information Booklet. While HUD modified the GFE delivery requirement in the new RESPA rule to expressly provide that the lender does not have to issue a GFE if the borrower withdraws the loan application within such period, it did not make a conforming change to the Special Information Booklet delivery requirement. HUD confirms in the September 4 version that if a lender denies a loan application, or the borrower withdraws the application, within the three-business-day period after application, the lender does not have to issue the Special Information Booklet.

### **HUD-1A Not Appropriate With a Credit**

In the September 4 version, HUD advises that a HUD-1A may only be used if there is no seller and the use of the form is otherwise appropriate. If there is a credit to the borrower being provided by the lender or another party, the HUD-1A may not be used. The HUD-1A does not have the 200 Series that is used to show such credits to the borrower.

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### **DID YOU KNOW?**

- Beginning October 1, 2009, the annual fee for accessing the National Do Not Call Registry will be \$55 per area code of data, up to a maximum of \$15,058. As before, access to the first five area codes of data is free.
- Sellers and telemarketers can no longer place prerecorded commercial telemarketing calls to a consumer without the consumer's prior written consent. Beginning September 1, 2009, a seller or telemarketer who places a "robocall" without proper consent will face penalties up to \$16,000 per call, even if the consumer has a prior business relationship with the seller.

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### **FINCEN CONSIDERS SUBJECTING LENDERS AND BROKERS TO ANTI-MONEY LAUNDERING REQUIREMENTS**

In the wake of the terrorist attacks of September 11, 2001, Congress adopted changes to the Bank Secrecy Act (BSA) aimed at preventing terrorist financing. Specifically, the BSA was amended to require financial institutions to adopt and implement anti-money laundering (AML) programs. To date, nonbank mortgage lenders and originators have been excluded from the requirements, but a recent advance notice of proposed rulemaking (ANPR) issued by the Financial Crimes Enforcement Network (FinCEN) may signal a change to this exclusion.

Although authorized to include "loan or finance companies" and "persons involved in real estate closings and settlements" as falling within the definition of "financial institutions," FinCEN has not imposed the AML program requirements on nonbank residential mortgage lenders and originators in the past. The ANPR appears to signal that FinCEN is considering regulations that would extend AML requirements to nonbank mortgage lenders and originators.

The Mortgage Bankers Association (MBA) responded to the request for public comments, arguing in favor of requiring nonbank residential mortgage lenders and originators to file suspicious activity reports (SARs) and against subjecting those entities to other AML program requirements. According to the MBA, filing SARs constitutes the best mechanism for uncovering mortgage fraud.

Stay tuned to future issues of the *Mortgage Banking Update*, which will report on developments as they occur.

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## IN CASE YOU MISSED IT

[Patrick McManemin](#), a partner in the firm's Dallas office, was quoted by the [National Law Journal](#) and [DSNews.com](#) on August 25, 2009, following the release of the [Second Quarter 2009 Mortgage Litigation Report](#).

The report, produced by MortgageDaily.com in conjunction with the firm's [Mortgage Banking Practice](#) group, found that legal fights over loan modifications, appraisals and foreclosures were the driving forces behind a 54 percent second-quarter spike in mortgage-related lawsuits. This year's first and second quarter activity totaled 206 cases, nearly matching last year's 207 cases.

There appears to be a direct correlation between an increase in legislative and regulatory activity and a pronounced upswing in litigation, Mr. McManemin told *NLJ*.

"As industry members continue to survey the new landscape and navigate their way through implementational and operational hurdles, issues will need to be litigated to clear up gray areas, and address grievances," he said.

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