

New RESPA Rules Impact Loan Quotes and the Settlement Statement



— by —
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Fallout related to the mortgage crisis was bound to spur changes to regulations that implement the Real Estate Settlement Procedures Act (RESPA)¹. After thousands of consumers complained about not understanding loan documents, HUD recently reacted by adopting new RESPA regulations. The new rules were adopted on January 16, 2009. Compliance with the new rule is mandatory on January 1, 2010.

If you have purchased a home with bank funds, you will remember a thick stack of paper with nearly each sheet requiring a signature. HUD has followed suit by enacting new laws that require even more paper. HUD intends that the extra paper will explain important loan terms to borrowers and will improve communication between borrowers, brokers and lenders.

HUD believes that more and early disclosure between a borrower and a broker will allow consumers to “shop” for loans which, in turn, will result in greater competition and better loan rates. The main changes to RESPA affect (1) the “shopping” phase of borrowing funds and (2) the disclosures set forth in settlement documents. To protect a borrower during the shopping phase, HUD requires the issuance of a new Good Faith Estimate (GFE). To protect a borrower during the settlement phase, HUD requires the issuance of a new HUD-1/1-A Settlement Statement (HUD-1). The main impact of the new GFE on settlement providers is that they need to include information from the GFE on the HUD-1 for the closing.

The regulations will require a loan originator to provide a prospective borrower with a GFE, using the new form, once the originator has received basic information for a loan application. That basic information includes a social security number, address, monthly income, and amount of loan requested. Once the borrower provides the basic information, the regulations require the

lender to issue a GFE. The requirement applies even if the borrower has not submitted a final loan application. At this point, the originator can charge the borrower for the cost of a credit report, but cannot require the borrower to pay any additional charges or fees. The new GFE form may be downloaded from <http://www.hud.gov/content/releases/goodfaithestimate.pdf>.

The new GFE requires the lender to disclose any payment to a mortgage broker (e.g, a yield spread premium) and to disclose how that payment will affect the borrower’s settlement charges. (This payment must be shown on the HUD-1; a yield spread premium may no longer be shown as a POC charge – i.e., a charge paid outside closing.) The new GFE must disclose an “adjusted origination charge,” which includes all charges by the lender and any broker for originating the loan. Also, a settlement agent must show the adjusted origination charge on the new HUD-1; this is in lieu of the historical yield spread premium.

Once the lender provides a GFE to a consumer, the prospective borrower has a ten-day period in which it may accept the GFE. If the borrower expresses the intent to accept the GFE, then the lender is bound to its terms. If the borrower rejects the GFE, the lender is not bound to its terms. Further, a lender is not bound to the terms of a GFE in cases where an Act of God occurs or, more likely, when the information supplied by a borrower is found to be inaccurate.² For example, if the borrower’s representation of his credit does not support the original GFE terms, the lender may issue a new GFE.

The new HUD-1 form has two pages of line

¹ As codified at 24 CFR Parts 203 and 3500.

² Also, an originator is not bound by the terms offered in the GFE and may revise a GFE if it expressly states that the GFE may be reissued after 60 days has passed and anytime up to 60 days prior to a scheduled settlement - but only for loans related to new home purchases. It is anticipated that an originator may make use of this right to revise the GFE in instances when a new home is purchased and when more than 60 days has passed as a way to keep up with a change in market circumstances.

item categories much like the current form. However, the new HUD-1 contains an entirely new page three. This new third page shows a comparison of the estimated charges shown on the GFE with the actual charges of closing the deal. In other words, the new third page shows a consumer the differential between the costs originally itemized on the GFE and the actual costs charged at the settlement table. The new HUD-1 also requires a disclosure of the loan terms such as the amount of the loan, the term of the loan, the interest rate, and the initial monthly payment (including principal, interest and mortgage insurance). The new HUD-1 form may be downloaded from <http://www.hud.gov/content/releases/hud-1.pdf>.

The good news for settlement agents is that the lender is responsible for providing the settlement agent with the original GFE and with the statement of loan terms that the settlement agent must include on page 3 of the new HUD-1. The bad news is that settlement agents must ensure that the lender delivers both the GFE and loan terms so that the agent can input the data from both onto the new HUD-1. (We anticipate that the settlement statement software companies will amend the computer programs to aid settlement agents to comply with this requirement.)

Although settlement agents must prepare and complete the comparison chart on page three of the HUD, the agent is not responsible for explaining the comparison chart or calculating loan terms. Another bit of good news for settlement agents is that the statement of loan terms on page 3 of the HUD-1 provides information that a borrower might otherwise want a settlement agent to explain, such as the amount of a first payment due.

The new regulations declare a lender in violation of section 5 of RESPA if the charges on the HUD-1 vary from those on the GFE by more than certain "tolerances". That term simply relates to whether the difference between the estimated charges and the closing charges falls within an allowed deviation in costs for a certain category of expenses. Some closing costs may not change at all from the costs stated in the GFE. Other charges may increase up to 10%. Still other charges may change by any amount.

Fees that are set in stone are the origination charges and points charged by the lender or broker when a consumer locks in an interest rate. Fees that are subject to a tolerance, meaning they can increase by up to 10%, are the cost of services selected by the title company, such as title fees or lender's title insurance.³ Finally, fees which are not subject to tolerances and may change in any amount are those fees related to services for which a borrower individually instigates a change. For example, if the borrower states that he wants to add a rider to a homeowner's insurance policy, then the premium amount for the insurance may be changed without restriction.

What happens if the new charges on the HUD-1 exceed the charges on the GFE? Even if the tolerance is not met, settlement will proceed. The catch is that if the relevant charges shown on the HUD-1 exceed those listed on the GFE by 10% or more, then the tolerance is not met and there are consequences for the lender.⁴ Where the tolerance is not met, the loan originator has a thirty-day cure period in order to avoid a section 5 RESPA violation. The originator may immediately reimburse the borrower the amount by which the tolerance was exceeded at the settlement table or may deliver (in person or via mail) the difference within 30 days after settlement. Failure to cure the tolerance overage will be deemed a violation of section 5 of RESPA. Although section 5 of RESPA has no teeth, a section 5 violation may give rise to state law consumer claims.

All title companies are required to institute the new RESPA rules by **January 1, 2010**. On that date, to avoid liability, a loan originator must use the new Good Faith Estimate sheet and a title company must use the new HUD-1/1A form. The new forms may be used now, but beware: if your title company begins using the new HUD-1 form prior to January 1, 2010, it will have to comply with *all* of the new RESPA rules, even if the January 1, 2010 date has not yet arrived. This puts the title company in a difficult position since many loan originators may not yet be using the new GFE sheet. Possibly the best course of action is to practice with the new HUD-1 form but implement it when the loan originators implement the new GFE sheet.

The new RESPA rules have been challenged in two separate lawsuits by the National Association of Home Builders and National Association of Mortgage Brokers. If the NAHB plaintiffs succeed, HUD may need to amend its definition of "required use" as it relates to affiliated service providers. If the NAMB plaintiffs succeed, a court could award injunctive relief which would stop the implementation of the new rules.

The information contained in this article is not legal advice and is not intended to be legal advice. It is recommended that individuals consult with an attorney for legal advice related to individual situations.

ABOUT THE AUTHOR

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³ It is important to note that the tolerance for a discrepancy between the estimated charges and the actual charges is limited to 10% for all relevant charges added together, rather than a review on a per line item charge.

⁴ Curiously, the new rule does not identify who has the responsibility to notice that the tolerances are not met. Presumably, a borrower would notice that there is an overage and would then call the lender.