

January 28, 2010

Regulation X Mortgage Disclosure Rules Effective Immediately; FDIC to Enforce January 1, 2010

New mortgage disclosure rules issued by the Department of Housing and Urban Development as part of Regulation X went into effect January 1, 2010. These rules significantly change the Good Faith Estimate (“GFE”) and HUD 1 Settlement Statement forms and limit the percentage by which fees for third-party services such as appraisals, recording charges, credit reports, title insurance, and flood certification can vary between the GFE and HUD 1. If such fees are more than 10% higher on the HUD 1 than on the GFE, and if the lender fails to correct the overcharge, the lender will be deemed to have violated Section 5 of the Real Estate Settlement Procedures Act (“RESPA”). [Note: Interestingly, RESPA currently contains no specific penalty for a Section 5 violation. Several commentators have suggested that the GFE and HUD 1 changes make future adoption of a penalty for Section 5 violations more likely. Lenders may, of course, be subject to regulatory criticism even in the absence of penalties.]

The primary challenge to compliance with the new rules is that lenders or mortgage brokers generally prepare the GFE, while title companies normally prepare the HUD 1 for closing; however, it is the lender who would be responsible in the event of non-compliance. Lenders and brokers will be challenged to provide the binding GFE no later than three business days after a borrower’s application. Lenders will also need to increase coordination with brokers, title companies and other third party service providers to ensure that the numbers from the GFE and HUD 1 match.

Among the numerous additional challenges is the requirement that a new GFE be issued anytime there is a changed circumstance, such as a change in the loan amount, appraisal, or borrower’s credit score. This may require lenders to issue numerous GFEs for a single loan.

In November, HUD announced that it (i) would exercise restraint in enforcing the new requirements for the first four months of 2010 where lenders make a good faith effort to comply, and (ii) was encouraging federal and state bank regulators to exercise the same restraint. However, in a December 23 letter to FDIC-Supervised Banks (most typically state-chartered community banks), the FDIC indicated that its examiners would examine banks for compliance with the new rules effective January 1, 2010. While several trade groups are actively seeking to delay enforcement, to date only HUD has made any formal announcement.

Although the purpose of the new mortgage disclosure rules is to save money for borrowers by allowing them to shop for low closing costs, there is speculation that the result may be the exact opposite. Some lenders have suggested that the surest approach to avoiding a violation will be to overestimate closing costs to assure compliance with Regulation X, leaving the possibility that the amount of overestimates may not be refunded to the borrower.

There continue to be a number of open questions regarding implementation of the new requirements, and we will continue to monitor developments in this area. In the meantime, if you have questions or would like assistance in determining how the mortgage disclosure rules impact your institution, please contact



one of the authors of this alert, or any of the attorneys in Michael Best's Financial Institutions and Bank Regulation Group.