



Passing Referral Fees on to Customers

Question: Our Bank has an idea to get more residential mortgage business from mortgage brokers and community group referrals. We're told that mortgage brokers typically want points, while community groups want a flat fee. Can the Bank pass these costs to the customer and, if so, how? Can the bank offer a different rate through mortgage brokers than it offers to walk-in customers? Does this compensation have to be disclosed separately?

Answer by Dan Persfull:

You need to review Section 8 of RESPA. Base on your post you are paying strictly for referrals (not work performed) - this is a direct violation of Sec. 8 and carries some hefty penalties and possible jail time.

If you search in the Bankers' Threads (Lending Forum) on "referral fees" you will find a lot of discussion that will give you an idea of what you can or can not do.

Reg X: Relying on Business Purpose Exemption

Question: Reg X: Requires that POCs be shown on the HUD-1\HUD-1A. Since business purpose loans are exempt from RESPA, is the above requirement for disclosure of POCs in the HUD-1 an exemption on loans made to corporations, partnerships, etc., as well? Title Companies do not show POCs and we continuously go back and forth to get them to show POCs on the HUD-1's. Would we have safe harbor relying on the Business Purpose Exemption?

Answer by Dan Persfull:

The HUD Settlement Statement is not required for exempt loans. Thus, there are no regulatory concerns, however you could run into enforceability problems for providing inaccurate closing statements.

A good rule to follow, "If you are going to provide a statement/document, for whatever reason, in a legal contractual transaction then that statement/document should be accurate." Another one is "If you aren't required to provide the disclosure, don't."

If you don't show the POCs, then you are not showing the actual costs of the loan which could, and I repeat could, haunt you in a legal action against the borrower.

Is this Loan Exempt From RESPA & Does Rescission Apply?

Question: I am preparing a loan to purchase 40 acres with two residences. I know the 40 acres takes it out of RESPA. However, I am taking a 2nd mortgage on the existing residence in town out of an abundance of caution. Is it still RESPA exempt? Also, will rescission apply?

Answer by Dan Persfull:

The 25 acre rule only applies if you are taking a single parcel of land \geq 25 acres. If you are taking 2 parcels at 12 and a half acres each, RESPA would apply. Therefore the "abundance of caution" property in town would be subject to RESPA if on less than 25 acres.

If the loan is for a consumer purpose, all applicable consumer regulations will apply, including ROR if the existing residence is currently the borrower's primary residence.

Servicing Disclosure on Second Loan

Question: If we are going to do a residential real estate loan and will be taking a second mortgage behind our first mortgage, are we required to provide a servicing disclosure on the second mortgage loan?

Answer by Dan Persfull:

No.

From HUD's Regulation X (RESPA) 3500.21(a)

Mortgage servicing loan means a federally related mortgage loan, as that term is defined in §3500.2, subject to the exemptions in §3500.5, when the mortgage loan is secured by a first lien. **The definition does not include subordinate lien loans** or open-end lines of credit (home equity plans) covered by the Truth in Lending Act and Regulation Z, including open-end lines of credit secured by a first lien.

RESPA Business Purpose Loan?

Question: If a bank were to lend to a business for a business purpose loan but used the sole principal's primary residence as collateral, would RESPA apply?

Answer by Dan Persfull: No.

Answer by Andy Zavoina: RESPA follows Reg. Z in that the purpose of the loan is what matters and in this instance you are being clear that it is a business purpose loan.

If you review the Commentary to Reg. Z at §226.3, 2 you will see under

examples of exempt transactions, "A loan to expand a business, even if it is secured by the borrower's residence or personal property."

Property Taxes on HUD-1 and GFE

Question: What line do property taxes go on the Good Faith Estimate and on the HUD? Do we just put POC?

Answer by David Dickinson: Here's some info we have prepared for our clients on taxes and on hazard insurance.

Hazard Insurance and Taxes:

Any time a lender requires hazard insurance or real estate taxes to be paid, it must be disclosed on the settlement statement regardless of whether a loan is a purchase money transaction, home equity loan, home improvement loan or a refinance. If the fees are not collected at closing, they should be disclosed as P.O.C. In virtually every case, the bank will require real estate taxes and hazard insurance to be current in order to lend the borrower money. Because of this, every HUD-1 or HUD-1A should disclose the premium and term (usually 1 year) of hazard insurance and real estate taxes. If the amount is not collected at closing it should be listed as P.O.C.

1. Purchase Loans:

- a) Taxes. Identify the proration of taxes on lines 211 and 511. If the bank is escrowing for the next year, show the reserves on line 1004 as well.
- b) Hazard Insurance. Identify the hazard and flood insurance premiums required at closing as P.O.C. Also identify the term and to whom the premiums are paid on lines 903 and 904, respectively. If the bank is escrowing for the next year also show these reserves on lines 1001 and 1006, respectively.

2. Non-Purchase Loans (refinance, home equity, home improvement):

- a) Taxes.
 - i) If the bank is not escrowing for taxes, identify the fee and term on lines 808-811 as P.O.C.
 - ii) If the bank is escrowing for taxes, identify the fees on line 1004.
- b) Hazard Insurance.
 - i) If the bank is not escrowing for insurance, identify the premiums, term and to whom paid on line 903 and 904 (flood) as P.O.C.
 - ii) If the bank is escrowing for hazard insurance, identify the fees on line 1001 (hazard) and 1006 (flood).

HUD-1: Where To Put the Fees

Question: Frequently asked questions from attorneys: Can they lump sum fees on line 1107 on HUD instead of breaking out on line 1101 and 1107, because fees on line 1101 are considered finance charges by FDIC?

Answer by Dan Persfull:

The following question and answer is from the U.S. Department of Housing and Urban Development's Response to Questions from the Massachusetts Bankers Association* . (<http://www.fdic.gov/news/news/financial/2000/fil0045a.html>) I believe it will answer your question.

Question 3. If a closing agent bundles services under line 1107, must they indicate under line 1107 the items 1101-1106 that were included in the fee shown in 1107?

Answer: Yes, the HUD-1 form is clear in this regard. (See Instructions).

Answer by David Dickinson:

The General Instructions in Appendix A to 24 CFR 3500 state:

"The settlement agent shall complete the HUD-1 to itemize all charges imposed upon the Borrower and the Seller by the Lender and all sales commissions, whether to be paid at settlement or outside of settlement, and any other charges which either the Borrower or the Seller will pay for at settlement."

You cannot "lump fees" together anywhere on the Settlement Statement. There is one exception:

*Lines 1100 through 1113. This series covers title charges and charges by attorneys. The title charges include a variety of services performed by title companies or others and includes fees directly related to the transfer of title (title examination, title search, document preparation) and fees for title insurance. The legal charges include fees for Lender's, Seller's or Buyer's attorney, or the attorney preparing title work. The series also includes any fees for settlement or closing agents and notaries. **In many jurisdictions the same person (for example, an attorney or a title insurance company) performs several of the services listed in this series and makes a single overall charge for such services. In such cases, enter the overall fee on Line 1107 (for attorneys), or Line 1108 (for title companies), and enter on that line the item numbers of the services listed which are covered in the overall fee. If this is done, no individual amounts need be entered into the borrower's and seller's columns for the individual items which are covered by the overall fee. In***

transactions involving more than one attorney, one attorney's fees should appear on Line 1107 and the other attorney's fees should be on Line 1111, 1112 or 1113. If an attorney is representing a buyer, seller, or lender and is also acting as a title agent, indicate on line 1107 which services are covered by the attorney fee and on line 1113 which services are covered by the insurance commission.

HUD-1 Line for Payoff of Other Debts

Question: If you use a HUD-1 form for home equity or refinancings with funds used to pay off other debts, what line item should they be reported on?

Answer by Dan Persfull: Those will be shown on line 104 or 105.

Must Final "Application" Agree with HUD-1?

Question: Is there a requirement that the Details of Transaction on the final application to be signed at closing, mirror the HUD closing statement?

Answer by Dan Persfull: No regulatory requirement, but your investor more than likely will require the two to agree.

Refi of Construction Loan and RESPA

Question: We have a customer who has a construction loan with us. They are refinancing this to finish construction and we will not be doing permanent financing. Does RESPA apply?

Answer by David Dickinson: If you are providing temporary financing only, RESPA does not apply.

A Couple of Mortgage Lending Questions

Question: I have been receiving conflicting information about ARM disclosures. I realize no regulation indicates they have to sign it but should there be a copy of this disclosure in the file? We have a check-off list indicating it was given, but this check off list has been proven time and time again to be filled out after closing the loan. My second question is although I as a compliance officer know that an appraisal should be completed and put in the file prior to closing, I have found some loans that do not have appraisals at all and we have charged the customer for the third party service. To take it one step further, I have found two loans that have been already closed out. Isn't this a RESPA Violation?

Answer by Dan Persfull:

If you are charging for an appraisal and not obtaining one you do have serious problems. Unfair and deceptive practice, RESPA, possible Reg. B violations under 202.14, possible appraisal rule violations, etc. I would advise those fees be refunded. IMO they were collected under false pretenses (whether intentional or not).

Most loan officers do not complete their "check off" sheets until after the loan

closes. To avoid potential violations for the ARM disclosures we have developed application packets that contain all necessary disclosures with the exception of the GFE and ETIL. By doing this we can demonstrate to the examiner that the disclosures are given as a matter of procedure.

Courier Fees, HUD-1, and Finance Charges

Question: Our bank charges our borrowers for any courier charges that result during their transaction. Currently, this reflects the exact amount of the courier fee and is disclosed on line 1305 of the HUD-1, itemized to the vendor. This process is cumbersome as each doc package goes to a different locale and is a different weight thus a different cost.

I propose a flat fee charge that covers the courier fee (i.e. \$25) which would simplify the cost structure, cover our real cost and make life easier for our closing staff. Provided we charge the \$25 as an APR item, are we within regulatory boundaries?

In some cases, there are also courier fees charged by the settlement agent which are itemized to the closing agent and not an APR item. Is this disclosure correct for the settlement agent courier fees?

Answer by Dan Persfull:

If the courier fee is being paid to you, and you then in turn pay the courier, the fee should be disclosed in the 800 series. You would only disclose in the 1300 series if you are paying (cutting a check) directly to the courier at the time of closing.

Up-charging fees is frowned upon by HUD. Make sure you are performing an additional service for the up-charge and that you live in a district where the courts have upheld being able to up-charge fees.

I definitely would not up-charge the courier fees from the closing agents.

RESPA Error Uncovered

Question: If we figured the percentage incorrectly for 2003 on the servicing disclosure statement is there anything we need to do (i.e. redisclose, inform the customer, etc.)? Also could we suffer any penalties for this error?

Answer by David Dickinson:

I believe that this is a very low risk error. I would document the error, make sure it is corrected going forward and move on. I would not redisclose or in any way inform customers.