

## **A White Paper: New Rules Affecting Transactions & Closings**

(August 3, 2009) -- There have been several new developments in real estate at a national level which will impact Realtors® in writing offers. These include the Home Valuation Code of Conduct (“HVCC”) which is applicable to appraisers, the Truth in Lending Act (“TILA”), the Home Ownership and Equity Protection Act (“HOEPA”) and Regulation Z which implements the new provisions contained in the TILA and HOEPA. The TILA, HOEPA and Regulation Z apply to lenders. The key thing for Realtors® to keep in mind with all of these is that the deadlines contained in the contracts may have to be modified or set farther out due to the new rules.

The HVCC is a new code of conduct for appraisers, adopted by Fannie Mae and Freddie Mac in conjunction with the Federal Housing Finance Agency (FHFA) and the New York Attorney General’s Office, which went into effect for all single family loans (Fannie Mae and Freddie Mac) originated on or after May 1, 2009. It was adopted in an effort to prevent appraisal fraud and undue influence on appraisers. This new Code of Conduct applies to any and all loans which involve Fannie Mae and Freddie Mac or which will be sold to either of these companies. It does NOT apply to FHA loans, VA loans, Rural Development’s Single Family Housing Guarantee Program or the Federal Home Loan Bank mortgages.

Understandably, most of the changes under the HVCC will only affect lenders and appraisers. However, there are a few things for Realtors® to keep in mind. Realtors® are no longer able to order an appraisal or hire, select, or pay for an appraiser in Fannie Mae and Freddie Mac loans. These things must be done either by the lender or

a third party which is specifically authorized by the lender to do these things on their behalf. These third parties are often appraisal management companies. The lender will NOT accept an appraisal report provided by an appraiser who was not selected, hired or paid in this manner. Therefore, in these transactions, it is important that the Realtor® understand that he cannot provide these services for his client.

Another important thing for Realtors® to understand is that a potential third party has been added to the mix – the appraisal management company. This may result in a higher cost for the appraisal and a longer turn around time for the report. This could potentially delay time frames in the Purchase and Sales Contract. Realtors® should be aware of this possibility when completing any offer or advising sellers on offers received. NAR has reported that there have been delays during the past several months that the new rules have been in effect. Hopefully, these delays will lessen as everyone becomes accustomed to the new procedures.

Two different additional concerns of Realtors® regarding the new HVCC guidelines are (1) out of area appraisers who are unfamiliar with the local market, and (2) whether agents can speak to appraisers. The Federal Housing Finance Agency, Fannie Mae and Freddie Mac have all recently clarified that the appraisers MUST have knowledge of that market area in question to be able to perform appraisals. This should rectify any problems which Realtors® and their clients were having which arose because appraisers were completely unfamiliar with the area in which they were performing the appraisals. The second question often raised is whether Realtors® can speak to the appraisers. Yes, Realtors® may speak to the appraisers, but any information received by the lender MUST be independently verified by the appraiser. Just remember that

Realtors® have a fiduciary duty to your clients to keep confidential information confidential.

The second wave of new requirements recently passed which will affect Realtors® are those concerning the new lending laws. The TILA, the HOEPA and Regulation Z were recently amended to increase the protections to borrowers. These laws are quite complex and lengthy, but the important thing for Realtors® to understand is that there are specific time periods which lenders must follow when processing loans. These time frames may impact a closing and require it to be postponed. In some instances, this could result in a failed closing.

Generally speaking, these new laws pertain to all residential home loans which are secured by the home and are subject to RESPA. These would include home refinances, loan assumptions, and new mortgages. The goal behind the new laws is to provide the consumer with greater disclosures, more time in which to review the disclosed information and greater flexibility in comparing one lender's offer to another.

The main provisions which Realtors® need to familiarize themselves are the time frames to which lenders are now subjected. Under the new requirements, lenders are required to provide consumers with good faith estimates within three business days after they have applied for the loan by either delivering them to the consumer or placing them in the mail. In addition to this three business day requirement, the lenders are NOT permitted to charge or collect ANY fees other than a reasonable fee for conducting a credit check, until these initial good faith estimates have been received by the consumer.

Once the initial good faith estimates have been received by the consumer, there is another mandatory waiting period under the new requirements. The lender cannot

consummate (i.e., close) the loan for seven business days following delivery of the initial disclosures. This could slow the process for the rapid closing loans which some agents and clients have conducted in the past.

If there are any changes in the annual percentage rate (APR) from the amount listed on the initial disclosures to the ones in place at the time of closing, then corrected disclosures may be required which would start another waiting period. The APR includes the interest rate as well as other costs of the loan. If the APR at closing is more than 1/8 of a percentage point (0.125) above or below that originally quoted, then new disclosures are required. This is true in regular, traditional transactions. In irregular transactions (think ARM transactions, balloon payments, etc), corrected disclosures are required if the APR has changed more than 1/4 of a percentage point (0.25) above or below that of the original disclosures. If corrected disclosures are required, then there is another three business day waiting period for the new disclosures to be delivered and then an additional seven business day waiting period following that. This could stop a closing in its tracks and could delay it for an additional 10 business days! If you need to extend the closing and all parties agree, you can use TAR Form F7 (Closing Date/Possession Date Amendment).

Another important thing to keep in mind is that under these new regulations, there are TWO different definitions of business days. For the three day initial disclosure rule following application, business day is defined as “days on which a creditor’s offices are open to the public for carrying on substantially all of its business functions.” 74 Fed Reg. 23289, 23291 (Nat 19, 2009). This could be difficult to calculate, because depending upon the financial institution, Saturdays may or may not be included. To further

complicate matters, there is a *different* definition of business days when referring to the seven business day waiting period before the loan can be closed. For this calculation of time, a business day is defined as “all calendar days except Sundays and the legal holidays specified in 5 USC 6103(a), such as New Year’s Day, the Birthday of Martin Luther King, Jr., Washington’s Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, and Christmas Day.” Id., 23300-01. Please make sure that you understand these differences.

It is possible for the consumer to waive these required waiting periods, but this practice is not expected to be the norm. Consumers can waive EITHER the three day waiting period or the seven day waiting periods after the original disclosures have been made, but only to meet a “bona fide personal financial emergency”. What constitutes a “bona fide personal financial emergency” will be determined on a case by case basis and it will be difficult to establish. In order to request such a waiver, the consumer must provide the lender with a dated, written statement which explains the emergency, specifically waives the waiting period or modifies it in some way, and is signed by ALL of the consumers who will be primarily liable on the debt.

The bottom line on all of these changes is that the date of closing may be longer than originally expected in order to comply with all of the new requirements. You should speak with your clients to make them aware of this possibility and “build in” additional time if your transactions involves a Fannie Mae or Freddie Mac transaction (HVCC) or any residential home loan which uses the home as security and is subject to RESPA. Please keep in mind that if the transaction does not close by the closing date specified in the contract, it will require the approval of BOTH parties in writing to extend the closing

date or the contract will die. All it takes is one side to refuse to extend the closing and the deal is over.

*– Submitted by TAR's Legal & Ethics Hot Line Attorneys*