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MEMORANDUM

TO: STEPHEN J. BOCHENEK
FROM: LISA HARMS HARTZLER
DATE: 7/7/2009
SUBJECT: TIMING OF MORTGAGE LOAN DISCLOSURE STATEMENTS AND
APPRAISAL REPORTS

Recent federal regulations modify lending procedures for closed-end loans secured by a dwelling. The new regulations require additional time for a borrower to review Truth in Lending disclosure statements. They apply to loan applications submitted after July 30, 2009. In addition, Fannie Mae and Freddie Mac have adopted the Home Valuation Code of Conduct ("HVCC") as of May 1, 2009, which also places an additional timing requirement on appraisal reports.

QUESTION: How do these developments affect real estate brokers and agents?

SUMMARY ANSWERS:

Truth in Lending. Real estate brokers and agents need to assist the development of terms for sales contracts by recommending that adequate time be allowed between the buyer's application for a mortgage loan and the closing date, encouraging buyers to quickly apply for financing, and making sure the lender is aware of changes that could affect the annual percentage rate in the initial early disclosure forms. At least 7 days (excluding Sundays and federal holidays) will be needed from the time a lender delivers its good faith estimate of the cost of credit and the closing, but changes to the APR require corrected disclosures to be given and will extend the waiting period at least another 3 days. This requirement can be waived only for a borrower's financial emergency.

Home Valuation Code of Conduct. For loans delivered to Fannie Mae and Freddie Mac, a copy of the appraisal ordered by the lender must be given to the borrower at least three business days prior to the closing. This requirement can be waived by the borrower. In addition, under the HVCC a real estate agent or broker may not select, retain or compensate in any manner an appraiser providing an appraisal to the lender.

DISCUSSION

Truth in Lending Amendments

Regulation Z (12 CFR Part 226) implements the Truth in Lending Act (“TILA”) and the Home Ownership and Equity Protection Act (“HOEPA”). In July of 2008, the Federal Reserve Board amended Regulation Z by requiring creditors to give consumers transaction-specific cost disclosures shortly after application for closed-end loans secured by a consumer’s principal dwelling. At the same time, Congress enacted the Housing and Economic Recovery Act of 2008, which included amendments to TILA known as the Mortgage Disclosure Improvement Act of 2008 (“MDIA”). Subsequently, in October of 2008, Congress further amended MDIA in connection with the Emergency Economic Stabilization Act of 2008. The final regulations issued on May 19, 2009, implement MDIA as amended. They become effective on July 30, 2009, about two months earlier than the initial amendments adopted last year.

Consistent with MDIA, the final amended Regulation Z requires creditors to make good faith estimates of the cost of credit as a dollar amount (the “finance charge”) and as an annual percentage rate (“APR”). The purpose is to promote the informed use of consumer credit and to assist consumers in comparison shopping. The final rule includes:

1. Good faith estimates of the required disclosures (“early disclosures”) must be made within 3 business days after the consumer has submitted an application for any extension of credit secured by the borrower’s dwelling. This includes the purchase, initial construction, and any non-purchase closed-end loan (such as a refinance loan). The prior rule applied only to a borrower’s principal dwelling. That limitation was removed. For purposes of calculating these 3 days, business days include all days on which the creditor is generally open for business.
2. Early disclosures must be delivered or mailed to the borrower at least 7 business days prior to closing. For purposes of calculating this 7-day waiting period, a business day includes every day except Sunday and federal holidays.
3. If the APR contained in the early disclosures becomes inaccurate outside of a certain tolerance (as little as 0.125%), creditors must re-disclose and provide corrected disclosures that the borrower must receive at least three business days before the closing. For purposes of calculating this 3-day waiting period, a business day includes every day except Sunday and federal holidays.
4. If corrected disclosures are mailed, the borrower is considered to receive the disclosures three business days after mailing, making the additional waiting period 6 days. However, a creditor is not required to use this presumption of receipt and may rely on evidence of actual delivery, such as documentation that the disclosure was delivered by certified mail, overnight delivery or e-mail to determine when the three-business-day waiting period

begins. Clearly, however, updated disclosure statements can no longer be given to the borrower at the closing.

5. The waiting periods can be waived by the borrower only upon a *bona fide* personal financial emergency that must be met.

So consider, for example, a lender who delivered early disclosures or placed them in the mail to the borrower on Monday, June 1. Corrected disclosures were then made and were *received* by the borrower on Wednesday, June 3. Although the three-business-day waiting period after corrected disclosures would end on Saturday, June 6, the *seven*-business day waiting period after the initial early disclosures would not end until Tuesday, June 9. Further, if additional corrected disclosures were received by the borrower on Monday, June 8, another three-business-day waiting period would push the closing back to Thursday, June 11.

What do these changes mean for real estate brokers and agents? They need to be familiar with these new delays and plan ahead.

- First, they need to consider the additional time that might be needed for financial disclosure waiting periods and suggest appropriate closing dates for residential sales.
- Second, they should encourage, where appropriate, buyers to immediately apply for financing so that the waiting periods do not disrupt a scheduled closing date.
- Third, they should be aware of changes in the loan amount or interest rate or of additional closing costs that could change the APR and require corrected disclosures. Those changes need to be communicated to the lender, who must deliver corrected disclosure statements to the borrower at least three days prior to closing.
- Finally, they should consider additional terms in real estate sales contracts that anticipate and provide for closing delays due to waiting period requirements. For example, terms might provide for penalties paid to the seller when the closing is delayed by a corrected disclosure or they might allow for an automatic three day extension without penalty.

Home Valuation Code of Conduct

Fannie Mae and Freddie Mac entered into an agreement with the Federal Housing Finance Agency and the New York Attorney General's office to adopt certain policies relating to appraisals for loans delivered to them. Single-family mortgage loans (except government-insured loans) applied for on or after May 1, 2009, and delivered to Fannie Mae or Freddie Mac will be subject to the HVCC as modified.

The HVCC primarily attempts to prevent lenders and other parties from influencing the outcome of an appraisal. Provisions relevant to real estate brokers and agents include:

1. A lender is required to provide to the borrower a copy of the appraisal promptly upon completion, but not less than three business days prior to closing. The copy may be provided by mail, e-mail, overnight delivery, etc., as long as the borrower receives the copy three business days prior to closing.
2. The three-day requirement may be waived by the borrower. The lender is responsible for documenting this waiver.
3. The lender may require the borrower to pay for the appraisal, but a “copy” of the appraisal must be provided free of charge.
4. HVCC does not specifically prohibit a real estate broker or agent from communicating with an appraiser, but a real estate agent or broker may not select, retain or compensate in any manner an appraiser providing an appraisal to the lender.
5. HVCC applies only to appraisals. It does not apply to other valuation methods like automated valuation models, broker price opinions, tax assessments, etc.
6. Small banks may qualify for an exemption from some requirements, but not from those listed above.

The delivery of a copy of an appraisal three days prior to closing adds another deadline for real estate brokers and agents to add to their checklist for purchases involving Fannie Mae or Freddie Mac loans. A failure to deliver a copy of the appraisal can delay a closing. However, the requirement can be waived without any conditions, so this burden is not as severe as the Truth in Lending waiting periods.

CONCLUSION

Residential real estate closing schedules will become more complicated as these new rules become effective. Real estate brokers and agents will need to plan ahead, keep informed of changing conditions, and be prepared for delays.