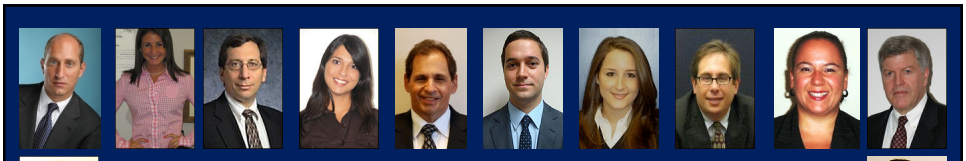
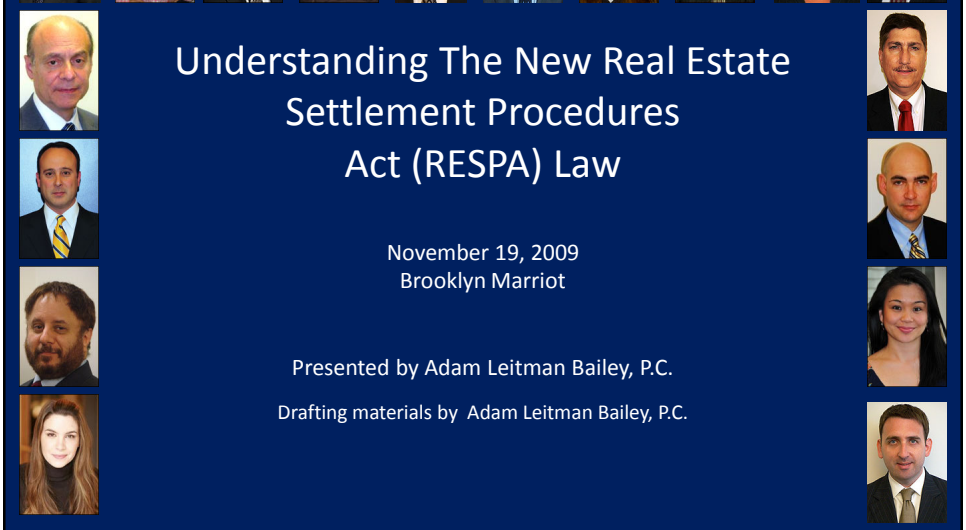


Understanding The New Real Estate Settlement Procedures Act (RESPA) Law

November 19, 2009
Brooklyn Marriot

Presented by Adam Leitman Bailey, P.C.

Drafting materials by Adam Leitman Bailey, P.C.



The New Regulations

- Originally becoming law in 1974 and after 20 years of relatively minor changes and over 12,000 comment letters on the proposed new law, Congress overhauled the Real Estate Settlement Procedures Act (RESPA), 12 USC 2601-2617 in 1996. That congressional mandate caused the United States Department of Housing and Urban Development (HUD) to conduct no fewer than seven studies to the end of implementing the 1996 amendments. The new regulations effected as a result of those studies debut on January 1, 2010, claiming a victory for borrowers and imposing on lenders and their allies more pricing and product accountability.

Purpose and Goals

- Applying only to federally related mortgage loans, to the exclusion of private investor and commercial transactions, the amended law required the HUD to develop and prescribe rules and standard forms governing the purchase of real estate.

Purpose and Goals

- The chief tools the law uses to achieve its goals are the mandatory Good Faith Estimate (GFE) and HUD-1 Closing Statement forms.
- GFE's and HUD-1's already existed under the 1974 law, although they bore almost no resemblance to the new forms. The new regulations vastly overhaul both these forms and make the HUD-1 designed from the ground up to enable the borrower to compare line by line to make sure that the GFE figures are the same ones, within legal tolerances, as are actually charged at the closing.

Purpose and Goals

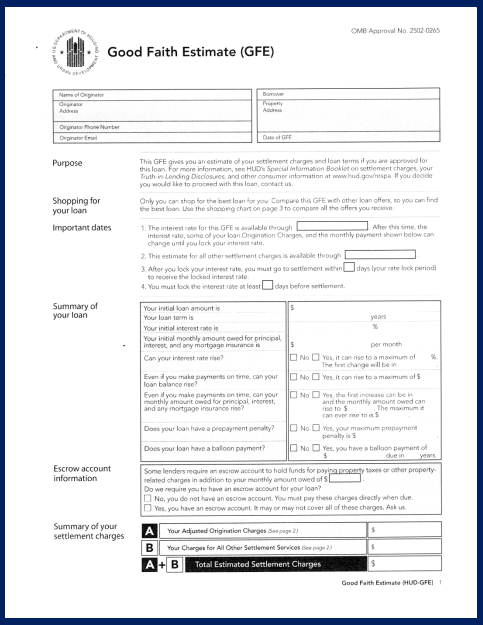
- The new law's lofty goals, combined with its rules and regulations seek to
  1. Require greater disclosure of loan terms and closing fees;
  2. Encourage consumers to do comparison shopping for loans and closing cost vendors;
  3. Cause transparency and real competition to drive loan and closing costs down;
  4. Protect consumers from unnecessarily high closing costs; and
  5. Provide a balanced and competitive market for all closing cost vendors.

Achieving These Goals

- Under the new regulations, borrowers will, shortly after the application's completion,
  - better understand the loan product being offered
  - as well as the real cost of a loan and relevant closing fees.
- The chief tools the law uses to achieve its goals are the mandatory Good Faith Estimate (GFE) and HUD-1 Closing Statement forms.

Achieving These Goals

- The new regulations vastly overhaul both these forms and make the HUD-1 designed from the ground up to enable the borrower to compare line by line to make sure that the GFE figures are the same ones, within legal tolerances, as are actually charged at the closing.



OMB Approval No. 2502-0265

Good Faith Estimate (GFE)

Name of Originator	Borrower
Originator Address	Property Address
Originator Phone Number	
Originator Email	Date of GFE

Purpose — This GFE gives you an estimate of your settlement charges and loan terms if you are approved for this loan. For more information, see HUD's *Special Information Booklet* on settlement charges, your Truth-in-Lending Disclosures, and other consumer information at www.hud.gov/respa. If you decide you would like to proceed with this loan, contact us.

Shopping for your loan — Only you can shop for the best loan for you. Compare this GFE with other loan offers, so you can find the best loan. Use the shopping chart on page 3 to compare all the offers you receive.

Important dates

1. The interest rate for this GFE is available through _____. After this time, the interest rate, some of your loan Origination Charges, and the monthly payment shown below can change until you lock your interest rate.
2. This estimate for all other settlement charges is available through _____.
3. After you lock your interest rate, you must go to settlement within ☐ days (your rate lock period) to receive the locked interest rate.
4. You must lock the interest rate at least ☐ days before settlement.

Summary of your loan

Your initial loan amount is	$
Your loan term is	years
Your initial interest rate is	%
Your initial monthly amount owed for principal, interest, and any mortgage insurance is	$ per month
Can your interest rate rise?	☐ No ☐ Yes, it can rise to a maximum of %. The first change will be in
Even if you make payments on time, can your loan balance rise?	☐ No ☐ Yes, it can rise to a maximum of $
Even if you make payments on time, can your monthly amount owed for principal, interest, and any mortgage insurance rise?	☐ No ☐ Yes, the first increase can be in and the monthly amount owed can rise to $. The maximum it can ever rise to is $
Does your loan have a prepayment penalty?	☐ No ☐ Yes, your maximum prepayment penalty is $
Does your loan have a balloon payment?	☐ No ☐ Yes, you have a balloon payment of $ due in years

Escrow account information

Some lenders require an escrow account to hold funds for paying property taxes or other property-related charges in addition to your monthly amount owed of $_____.
Do we require you to have an escrow account for your loan?
☐ No, you do not have an escrow account. You must pay these charges directly when due.
☐ Yes, you have an escrow account. It may or may not cover all of these charges. Ask us.

Summary of your settlement charges

A	Your Adjusted Origination Charges (See page 2.)	$
B	Your Charges for All Other Settlement Services (See page 2.)	$
A + B	Total Estimated Settlement Charges	$

Good Faith Estimate (HUD-GFE) 1

Good Faith Estimate (GFE)

Achieving These Goals

- Yesterday's toothless, incomprehensible and relatively useless good faith estimate has been replaced with this three page compressive GRE form – one which was adopted by HUD only after the kinds of market studies one would normally expect from a major corporation looking to launch a new product line.

Achieving These Goals

- By means of the lender's completion of the new GFE form, the consumer can now accurately understand the loan product offered and make an easy comparison to other loan products offered by competing lenders.

Achieving These Goals

- The new GFE includes:
  - the loan amount
  - term
  - the interest rate
  - terms under which the loan's interest rate may increase
  - payment penalties
  - balloon payments

Achieving These Goals

- The new GFE requires all fees that will be charged at the closing to be listed at the time the lender issues the good faith estimate. Naturally, interest rates may change depending on promises in the GFE.

Good Faith Estimate
Explanation of Loan Terms

Summary of your loan

Your initial loan amount is	$
Your loan term is	years
Your initial interest rate is	%
Your initial monthly amount owed for principal, interest, and any mortgage insurance is	$ per month
Can your interest rate rise?	☐ No ☐ Yes, it can rise to a maximum of %. The first change will be in .
Even if you make payments on time, can your loan balance rise?	☐ No ☐ Yes, it can rise to a maximum of $
Even if you make payments on time, can your monthly amount owed for principal, interest, and any mortgage insurance rise?	☐ No ☐ Yes, the first increase can be in and the monthly amount owed can rise to $. The maximum it can ever rise to is $.
Does your loan have a prepayment penalty?	☐ No ☐ Yes, your maximum prepayment penalty is $.
Does your loan have a balloon payment?	☐ No ☐ Yes, you have a balloon payment of $ due in years.

Source: Good Faith Estimate

Good Faith Estimate Loan Charges

Understanding your estimated settlement charges

Your Adjusted Origination Charges

1. **Our origination charge**
   This charge is for getting this loan for you.
2. **Your credit or charge (points) for the specific interest rate chosen**
   - ☐ The credit or charge for the interest rate of [ ] % is included in "Our origination charge." (See item 1 above.)
   - ☐ You receive a credit of $ [ ] for this interest rate of [ ] %. This credit **reduces** your settlement charges.
   - ☐ You pay a charge of $ [ ] for this interest rate of [ ] %. This charge (points) **increases** your total settlement charges.

   The tradeoff table on page 3 shows that you can change your total settlement charges by choosing a different interest rate for this loan.

Source: Good Faith Estimate

Good Faith Estimate Loan Charges

Some of these charges can change at settlement. See the top of page 3 for more information.

A Your Adjusted Origination Charges $

Your Charges for All Other Settlement Services

3. **Required services that we select**
   These charges are for services we require to complete your settlement. We will choose the providers of these services.

Service	*Charge*

4. **Title services and lender's title insurance**
   This charge includes the services of a title or settlement agent, for example, and title insurance to protect the lender, if required.
5. **Owner's title insurance**
   You may purchase an owner's title insurance policy to protect your interest in the property.
6. **Required services that you can shop for**
   These charges are for other services that are required to complete your settlement. We can identify providers of these services or you can shop for them yourself. Our estimates for providing these services are below.

Service	*Charge*

Source: Good Faith Estimate

Good Faith Estimate Loan Charges

7. Government recording charges These charges are for state and local fees to record your loan and title documents.	
8. Transfer taxes These charges are for state and local fees on mortgages and home sales.	
9. Initial deposit for your escrow account This charge is held in an escrow account to pay future recurring charges on your property and includes ☐ all property taxes, ☐ all insurance, and ☐ other [ ].	
10. Daily interest charges This charge is for the daily interest on your loan from the day of your settlement until the first day of the next month or the first day of your normal mortgage payment cycle. This amount is $[ ] per day for [ ] days (if your settlement is [ ]).	
11. Homeowner's insurance This charge is for the insurance you must buy for the property to protect from a loss, such as fire. *Policy* *Charge*	
B Your Charges for All Other Settlement Services	$
A + B Total Estimated Settlement Charges	$

Source: Good Faith Estimate

Achieving These Goals

- While the GFE must set forth the lender's attorneys' fees amount, it is not required that it set forth any expenses the borrower has that have essentially nothing to do with the lender such as, for example, the borrower's privately retained counsel.

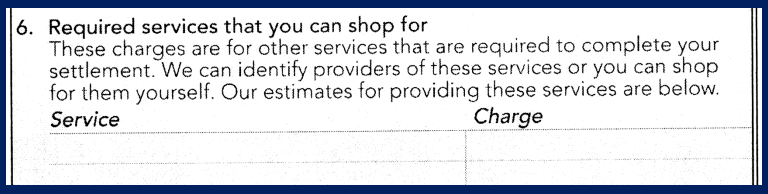
Good Faith Estimate

- Primarily an instruction page
- Lists of which charges can change
- Tradeoff table
- Shopping cart

Source: Department of Housing and Urban Development, Office of RESPA & Interstate Land Sales

Good Faith Estimate

- Room for borrower to choose between different title companies.



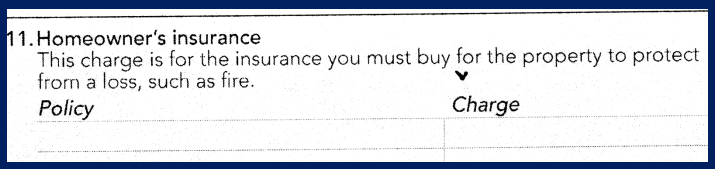
6. Required services that you can shop for

These charges are for other services that are required to complete your settlement. We can identify providers of these services or you can shop for them yourself. Our estimates for providing these services are below.

Service	*Charge*

Good Faith Estimate

- Room for borrower to choose between different homeowner's insurance companies.



11. Homeowner's insurance
This charge is for the insurance you must buy for the property to protect from a loss, such as fire.

Policy	*Charge*

Achieving These Goals

- Similarly, the GFE may include a suggested title company, but if the borrower chooses to independently select a title company, the fees involved are outside of the RESPA restrictions.

Complying with the New Good Faith Estimate

- The Department of Housing and Urban Development requires the GFE to issue by mail, email, fax or other high speed method within three days of receiving the applicant's name, monthly income, social security number, property address and an estimate of the value of the property.
- No GFE becomes necessary when a loan is denied before the third business day after the receipt of an application.
- All GFE's automatically expire within 10 days, when the loan commitment expires, or upon the passing of another date given by the lender. The most notable exception to this timing rule applies to newly constructed properties, where the GFE may change within 60 days of closing.

Comparison Chart

- Compares charges listed on GFE & actual charges listed on the HUD-1/1A
- Identifies tolerance compliance or violation
- 3 categories:
  1. Charges that cannot increase
  2. Sum of charges that cannot increase more than 10%
  3. Charges that can increase

Source: Department of Housing and Urban Development, Office of RESPA & Interstate Land Sales

Good Faith Estimate
Using the Tradeoff Table

Using the tradeoff table

In this GFE, we offered you this loan with a particular interest rate and estimated settlement charges. However:

- If you want to choose this same loan with **lower settlement charges,** then you will have a **higher interest rate.**
- If you want to choose this same loan with a **lower interest rate,** then you will have **higher settlement charges.**

If you would like to choose an available option, you must ask us for a new GFE.

Loan originators have the option to complete this table. Please ask for additional information if the table is not completed.

	The loan in this GFE	The same loan with lower settlement charges	The same loan with a lower interest rate
Your initial loan amount	$	$	$
Your initial interest rate[1]	%	%	%
Your initial monthly amount owed	$	$	$
Change in the monthly amount owed from this GFE	No change	You will pay $ **more** every month	You will pay $ **less** every month
Change in the amount you will pay at settlement with this interest rate	No change	Your settlement charges will be **reduced** by $	Your settlement charges will **increase** by $
How much your total estimated settlement charges will be	$	$	$

[1] *For an adjustable rate loan, the comparisons above are for the initial interest rate before adjustments are made.*

Source: Good Faith Estimate

Good Faith Estimate
Estimated Charges

The total of these charges **can increase up to 10%** at settlement:

- Required services that we select
- Title services and lender's title insurance *(if we select them or you use companies we identify)*
- Owner's title insurance *(if you use companies we identify)*
- Required services that you can shop for *(if you use companies we identify)*
- Government recording charges

Source: Good Faith Estimate

Instructions:
Understanding which charges can change at settlement

This GFE estimates your settlement charges. At your settlement, you will receive a HUD-1, a form that lists your actual costs. Compare the charges on the HUD-1 with the charges on this GFE. Charges can change if you select your own provider and do not use the companies we identify.

The Price Guarantee

- Once issuing the GFE, the lender must guarantee to the borrower the accuracy of the amounts listed for transfer taxes and for the costs of the loan, including origination fees, points and the charge for the specific interest rates selected.

Good Faith Estimate Estimated Charges

These charges **cannot increase** at settlement:

- Our origination charge
- Your credit or charge (points) for the specific interest rate chosen *(after you lock in your interest rate)*
- Your adjusted origination charges *(after you lock in your interest rate)*
- Transfer taxes

Source: Good Faith Estimate

Instructions:
Understanding which charges can change at settlement

This GFE estimates your settlement charges. At your settlement, you will receive a HUD-1, a form that lists your actual costs. Compare the charges on the HUD-1 with the charges on this GFE. Charges can change if you select your own provider and do not use the companies we identify.

Charges That Cannot Increase

Comparison of Good Faith Estimate (GFE) and HUD-1 Charges		Good Faith Estimate	HUD-1
Charges That Cannot Increase	HUD-1 Line Number		
Our origination charge	# 801	$6,250.00	$6,250.00
Your credit or charge (points) for the specific interest rate chosen	# 802	-$3,000.00	-$3,000.00
Your adjusted origination charges	# 803	$3,250.00	$3,250.00
Transfer taxes	#1203	$1,368.00	$1,368.00

Source: Department of Housing and Urban Development, Office of RESPA & Interstate Land Sales

The Price Guarantee

- The overall sum of the amounts listed for the purchaser's and lender's title insurance and services and governmental recording charges can only increase 10 percent at closing when the borrower uses companies recommended by the lender.

10% Tolerance

Charges That in Total Cannot Increase More Than 10%		Good Faith Estimate	HUD-1/1A
Appraisal	#804	$250.00	$250.00
Credit Report	#805	$40.00	$40.00
Tax Service	#806	$76.00	$76.00
Flood Certification	#807	$12.00	$12.00
Up-front Mortgage Insurance Premium	#902	$4,500.00	$4,500.00
	#		
	#		
	#		
Total		$4,878.00	$4,878.00
Increase between GFE and HUD-1/1A Charges		$0 or	0 %

Source: Department of Housing and Urban Development, Office of RESPA & Interstate Land Sales

10% Tolerance

Charges That in Total Cannot Increase More Than 10%		Good Faith Estimate	HUD-1/1A
Appraisal	#804	$250.00	$250.00
Credit Report	#805	$40.00	$40.00
Tax Service	#806	$76.00	$76.00
Flood Certification	#807	$12.00	$12.00
Up-front Mortgage Insurance Premium	#902	$4,500.00	$4,500.00
	#		
	#		
	#		
Total		$4,878.00	$4,878.00
Increase between GFE and HUD-1/1A Charges		$0 or	0 %

Source: Department of Housing and Urban Development, Office of RESPA & Interstate Land Sales

The Price Guarantee

- When the borrower chooses a title company not recommended by the lender, no limitation exists limiting an increase in fees. Other fees without price increase restrictions include the cost of homeowner's insurance, the daily interest charges, and sums deposited for the escrow account.

Good Faith Estimate Estimated Charges

These charges **can change** at settlement:

- Required services that you can shop for *(if you do not use companies we identify)*
- Title services and lender's title insurance *(if you do not use companies we identify)*
- Owner's title insurance *(if you do not use companies we identify)*
- Initial deposit for your escrow account
- Daily interest charges
- Homeowner's insurance

Source: Good Faith Estimate

Instructions:
Understanding which charges can change at settlement

This GFE estimates your settlement charges. At your settlement, you will receive a HUD-1, a form that lists your actual costs. Compare the charges on the HUD-1 with the charges on this GFE. Charges can change if you select your own provider and do not use the companies we identify.

Achieving These Goals

- To hold lender's accountable, the lender must complete the new HUD-1 form at the closing (otherwise known as settlement) by filling in the chart to demonstrate the fees promised at the time of application equate to the fees actually charged at closing – but with limited exceptions. This form should ensure that key final terms of the loan are disclosed to the borrower at closings. Via itemization, borrowers will now know who got how much money at closing, including the lender, and each vendor, such as title companies, bank attorneys and tax closing servicers.

Charges That Can Change

Charges That Can Change				Good Faith Estimate	HUD-1/1A
Initial deposit for reserves or escrow	#1001			$306.60	$306.60
Daily interest charges	# 901	$50	/day	$100.00	$100.00
Homeowner's insurance	# 903			$600.00	$600.00
	#				
	#				
	#				

Source: Department of Housing and Urban Development, Office of RESPA & Interstate Land Sales

Good Faith Estimate Using the Shopping Cart

Using the shopping chart

Use this chart to compare GFEs from different loan originators. Fill in the information by using a different column for each GFE you receive. By comparing loan offers, you can shop for the best loan.

	This loan	Loan 2	Loan 3	Loan 4
Loan originator name				
Initial loan amount				
Loan term				
Initial interest rate				
Initial monthly amount owed				
Rate lock period				
Can interest rate rise?				
Can loan balance rise?				
Can monthly amount owed rise?				
Prepayment penalty?				
Balloon payment?				
Total Estimated Settlement Charges				

If your loan is sold in the future

Some lenders may sell your loan after settlement. Any fees lenders receive in the future cannot change the loan you receive or the charges you paid at settlement.

Source: Good Faith Estimate

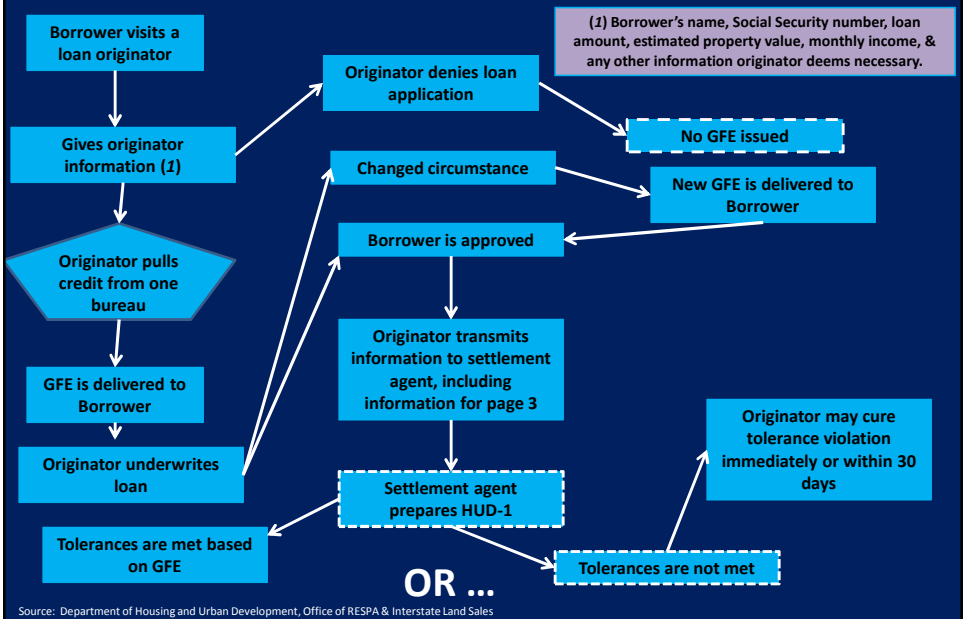
When the Good Faith Estimate Can Be Amended: Changed Circumstances

- Despite these rigid restrictions, the regulations under the name of "changed circumstances" provide a reasonable menu of ways the lender can amend or deviate from the GFE. A GFE may be amended upon changed circumstances which include:
  1. A change in the loan as a result of an act of God, war, disaster or other emergency;
  2. When the borrower provides inaccurate information relied upon by lender;
  3. When new information surfaces that had not been relied upon when the lender completed the GFE; or
  4. Other information learned, such as a boundary disputes, the need for flood insurance or environmental problems that impact the loan.

When the Good Faith Estimate Can Be Amended: Changed Circumstances

- When a "changed circumstance" occurs, the lender must issue a new GFE within three business days of receiving the new information and this information must be retained for three years. Lenders may only change those parts pertaining to the specific changed circumstance causing the amended GFE.

GFE Process Flowchart



Source: Department of Housing and Urban Development, Office of RESPA & Interstate Land Sales

Application to Newly Constructed Properties

- Construction loans may or may not be covered by RESPA. If they are for two years or more, they are covered. If they are bridge loans or swing loans, they are not covered. Temporary financing is generally outside of the scope of RESPA, but if it is to be converted to permanent financing, then it is covered.

The New HUD-1 Gains a More Important Purpose

- Because of its linkage to the GFE, the HUD-1 will no longer be a document merely to be filled out at closing, signed and filed in the closing file. The new HUD-1 totals the cost of the loan and compares it to the requirements of the GFE, allowing for the notice of any discrepancy between the GFE and the HUD-1.

HUD-1: Comparing GFE to HUD-1, Page 3

Comparison of Good Faith Estimate (GFE) and HUD-1 Charges		Good Faith Estimate	HUD-1
Charges That Cannot Increase	**HUD-1 Line Number**		
Our origination charge	# 801		
Your credit or charge (points) for the specific interest rate chosen	# 802		
Your adjusted origination charges	# 803		
Transfer taxes	#1203		
Charges That in Total Cannot Increase More Than 10%		**Good Faith Estimate**	**HUD-1**
Government recording charges	#1201		
	#		
	#		
	#		
	#		
	#		
	#		
	#		
	Total		
	Increase between GFE and HUD-1 Charges	$ or %	
Charges That Can Change		**Good Faith Estimate**	**HUD-1**
Initial deposit for your escrow account	#1001		
Daily interest charges	# 901 $ /day		
Homeowner's insurance	# 903		
	#		
	#		
	#		

Source: HUD-1

The New HUD-1 Gains a More Important Purpose

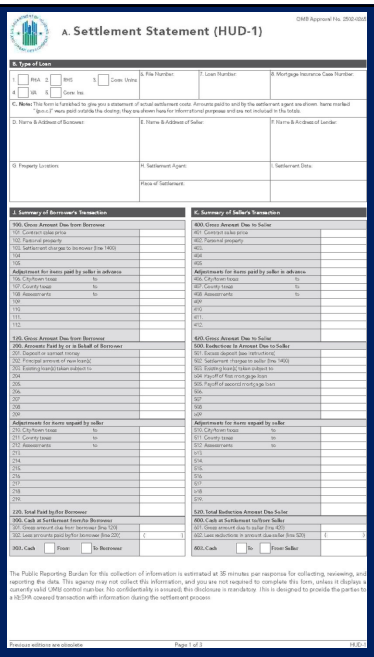
- However, there is some degree of flexibility in the GFE/HUD-1. To allow lenders some flexibility when obtaining pricing from third party vendors, lenders may use so-called "average charges" for closing services.

HUD-1
In General

- Revised to compare with GFE
- Categorized – eliminate fee proliferation
- 3rd party charges listed outside column
- Added page to HUD-1/1A
- Highlights key loan terms

Source: Department of Housing and Urban Development, Office of RESPA & Interstate Land Sales

HUD-1
Settlement Statement



A. Settlement Statement (HUD-1)

Source: HUD-1

HUD-1 Settlement Statement Type of Loan

B. Type of Loan			
1 ☐ FHA 2 ☐ RHS 3 ☐ Conv. Unins 4 ☐ VA 5 ☐ Conv. Ins.	6. File Number:	7. Loan Number:	8. Mortgage Insurance Case Number:
C. **Note:** This form is furnished to give you a statement of actual settlement costs. Amounts paid to and by the settlement agent are shown. Items marked "(p.o.c.)" were paid outside the closing; they are shown here for informational purposes and are not included in the totals.			
D. Name & Address of Borrower:	E. Name & Address of Seller:		F. Name & Address of Lender:
G. Property Location:	H. Settlement Agent:		I. Settlement Date:
	Place of Settlement:		

Source: HUD-1

HUD-1 Settlement Statement Summary of Borrower's Transaction

J. Summary of Borrower's Transaction		
100. Gross Amount Due from Borrower		
101. Contract sales price		
102. Personal property		
103. Settlement charges to borrower (line 1400)		
104		
105		
Adjustment for items paid by seller in advance		
106. City/town taxes	to	
107. County taxes	to	
108. Assessments	to	
109		
110.		
111.		
112.		
120. Gross Amount Due from Borrower		
200. Amounts Paid by or in Behalf of Borrower		
201. Deposit or earnest money		
202. Principal amount of new loan(s)		
203. Existing loan(s) taken subject to		
204		
205.		
206.		
207		
208		
209		
Adjustments for items unpaid by seller		
210. City/town taxes	to	
211. County taxes	to	
212. Assessments	to	
213.		
214.		
215.		
216		
217		
218		
219.		
220. Total Paid by/for Borrower		
300. Cash at Settlement from/to Borrower		
301. Gross amount due from borrower (line 120)		
302. Less amounts paid by/for borrower (line 220)		( )
303. Cash ☐ From ☐ To Borrower		

Source: HUD-1

K. Summary of Seller's Transaction	
400. Gross Amount Due to Seller	
401. Contract sales price	
402. Personal property	
403.	
404	
405	
Adjustments for items paid by seller in advance	
406. City/town taxes to	
407. County taxes to	
408. Assessments to	
409	
410	
411.	
412.	
420. Gross Amount Due to Seller	
500. Reductions In Amount Due to Seller	
501. Excess deposit (see instructions)	
502. Settlement charges to seller (line 1400)	
503. Existing loan(s) taken subject to	
504. Payoff of first mortgage loan	
505. Payoff of second mortgage loan	
506.	
507	
508	
509	
Adjustments for items unpaid by seller	
510. City/town taxes to	
511. County taxes to	
512. Assessments to	
513.	
514.	
515.	
516.	
517.	
518.	
519.	
520. Total Reduction Amount Due Seller	
600. Cash at Settlement to/from Seller	
601. Gross amount due to seller (line 420)	
602. Less reductions in amount due seller (line 520)	( )
603. Cash ☐ To ☐ From Seller	

Source: HUD-1

HUD-1 Settlement Statement Summary of Seller's Transaction

Use of Average Charge

- The amount stated on the HUD-1 for any itemized service cannot exceed the amount actually received by the settlement service provider for that itemized item unless the charge is an "average charge."
- Average charges are amounts paid for a closing service provider to another on behalf of borrowers and sellers for a particular class of transactions involving federally related mortgage loans. The totals of the average charges may not exceed the total amounts paid to the providers of that service for the particular class of transactions.

Average Charge

- Calculations based on specific class of transactions
- During a specific time period
  - Not less than 30 days
  - Not more than 6 months
- For a specific geographical area

Source: Department of Housing and Urban Development, Office of RESPA & Interstate Land Sales

Average Charge

- Charge may not exceed average calculation
- Charge may not exceed TOTAL price paid to 3rd party provider
- Originator must retain all documentation determining accuracy of pricing method for at least 3 years

Source: Department of Housing and Urban Development, Office of RESPA & Interstate Land Sales

Average Charge

- May not average on charges based on loan amount or property value

  (e.g. transfer taxes, interest charges, escrow reserves & all insurances including title insurance)

Source: Department of Housing and Urban Development, Office of RESPA & Interstate Land Sales

Use of Average Charge

- Credit reports, flood certifications, appraisals, title searches and third party attorneys, per page recording fees all allow for average charge calculations. For example, Title companies have the option to use "average charge" when obtaining a service from a third party on behalf of Borrower or Seller.

Use of Average Charge

- Average charges are not permitted if the service is based on the loan amount or property value. For example, transfer taxes, interest, escrow reserves, and title insurance premiums may not use average pricing. This ensures that the lender will not be supposedly reimbursing the borrower for charges that are not actually real.

Use of Average Charge

- To be deemed effective, the "average charge" must relate to a period of time not less than 30 days and not more than 6 months from the date of the closing.
- During this time, the third party vendor determines the average pricing for its closing services within a determined geographic area and based on a certain type of loan.
- The lender must retain third party vendors average charge documentation for three years.

HUD-1
Items Payable in Connection with Loan

800. Items Payable in Connection with Loan				
801. Our origination charge	$	(from GFE #1)		
802. Your credit or charge (points) for the specific interest rate chosen	$	(from GFE #2)		
803. Your adjusted origination charges		(from GFE A)		
804. Appraisal fee to		(from GFE #3)		
805. Credit report to		(from GFE #3)		
806. Tax service to		(from GFE #3)		
807. Flood certification		(from GFE #3)		
808.				

Source: HUD-1

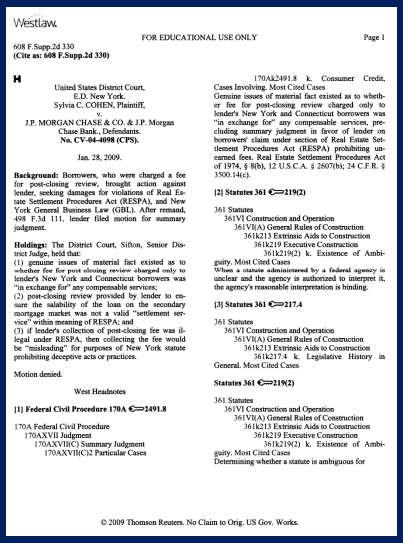
Stopping Fee Proliferation

- The new regulations' goal of ending fee proliferation finds expression through an effective plan to stop unsubstantiated and numerous extra fees padded to the closing bill.
- By abolishing the itemization of excess charges such as overnight couriers, preparation fee, closing fee, mailings and administrative and processing fees and by lumping them into the total lender and title insurance bills, the GFE/HUD-1 ensures that the borrower will not have any unexpected fees at closing.
- This should also result in a reduction in the total closing costs.

Stopping Fee Proliferation

- This is especially true with regard to the fees charged by title companies.
- While title fees generally come within the 10% permissible flex, that flex *includes* title companies along with certain other charges and must therefore be shared.
- If the overall flex is over 10%, the lender has to absorb it.
- The title company cannot list a bunch of miscellaneous fees, but must, under the new regulations, group it all together as a single charge, ending proliferating charges showing up at the closing.

Sylvia C. Cohen v. J.P. Morgan Chase & Co. & J.P. Morgan Chase Bank



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608 F.Supp.2d 330
(Cite as: 608 F.Supp.2d 330)

H

United States District Court,
E.D. New York.
Sylvia C. COHEN, Plaintiff,
v.
J.P. MORGAN CHASE & CO. & J.P. Morgan Chase Bank., Defendants.
No. CV-04-4098 (CPS).

Jan. 28, 2009.

Background: Borrowers, who were charged a fee for post-closing review, brought action against lender, seeking damages for violations of Real Estate Settlement Procedures Act (RESPA), and New York General Business Law (GBL). After remand, 498 F.3d 111, lender filed motion for summary judgment.

Holdings: The District Court, Sifton, Senior District Judge, held that:
(1) genuine issues of material fact existed as to whether fee for post closing review charged only to lender's New York and Connecticut borrowers was "in exchange for" any compensable services;
(2) post-closing review provided by lender to ensure the salability of the loan on the secondary mortgage market was not a valid "settlement service" within meaning of RESPA; and
(3) if lender's collection of post-closing fee was illegal under RESPA, then collecting the fee would be "misleading" for purposes of New York statute prohibiting deceptive acts or practices.

Motion denied.

West Headnotes

[1] Federal Civil Procedure 170A ⟸2491.8

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(C) Summary Judgment
170AXVII(C)2 Particular Cases

170Ak2491.8 k. Consumer Credit, Cases Involving. Most Cited Cases
Genuine issues of material fact existed as to whether fee for post-closing review charged only to lender's New York and Connecticut borrowers was "in exchange for" any compensable services, precluding summary judgment in favor of lender on borrowers' claim under section of Real Estate Settlement Procedures Act (RESPA) prohibiting unearned fees. Real Estate Settlement Procedures Act of 1974, § 8(b), 12 U.S.C.A. § 2607(b); 24 C.F.R. § 3500.14(c).

[2] Statutes 361 ⟸219(2)

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k213 Extrinsic Aids to Construction
361k219 Executive Construction
361k219(2) k. Existence of Ambiguity. Most Cited Cases
When a statute administered by a federal agency is unclear and the agency is authorized to interpret it, the agency's reasonable interpretation is binding.

[3] Statutes 361 ⟸217.4

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k213 Extrinsic Aids to Construction
361k217.4 k. Legislative History in General. Most Cited Cases

Statutes 361 ⟸219(2)

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k213 Extrinsic Aids to Construction
361k219 Executive Construction
361k219(2) k. Existence of Ambiguity. Most Cited Cases
Determining whether a statute is ambiguous for

Penalties

- RESPA is not generally intended to create a new area of business for litigators. It sets up private causes of action and is also intended to be enforced by the federal and state agencies. Authorized private causes of action under RESPA entitle a successful plaintiff to attorneys' fees.

HUD-1
Title Charges

1100. Title Charges				
1101. Title services and lender's title insurance		(from GFE #4)		
1102. Settlement or closing fee	$			
1103. Owner's title insurance		(from GFE #5)		
1104. Lender's title insurance	$			
1105. Lender's title policy limit $				
1106. Owner's title policy limit $				
1107. Agent's portion of the total title insurance premium	$			
1108. Underwriter's portion of the total title insurance premium	$			

Source: HUD-1

HUD-1
Government Recording and Transfer Charges

1200. Government Recording and Transfer Charges					
1201	Government recording charges		(from GFE #7)		
1202	Deed $	Mortgage $	Releases $		
1203	Transfer taxes		(from GFE #8)		
1204	City/County tax/stamps	Deed $	Mortgage $		
1205	State tax/stamps	Deed $	Mortgage $		
1206					

Source: HUD-1

Penalties

- The regulations deem certain activities to be violations of the statute. These include failure to follow any of the requirements that we have set forth earlier.
- Both the regulations and the statute are somewhat vague about what can happen to mortgage brokers and lenders who fail to abide by RESPA's requirements.
- However, amongst the remedies that the federal agencies can impose is disqualification from conducting the lending business which, to a bank, is the essential equivalent of capital punishment.

Penalties

- If upon examination of a HUD-1, it appears that there was an overcharge, it is up to the lender to make good on that within thirty days. If the lender fails to do so, treble damages can be imposed and collected in a private cause of action, but the plaintiff can also file a complaint with HUD and seek administrative remedies against the lender and/or mortgage broker.
- If there is a kickback scheme, it can result in a year's incarceration and/or a $10,000 fine (12 USC 2607).
- RESPA also authorized injunctive actions by the Secretary of HUD and the Attorneys General of all the states. (12 USC 2067)

Sample Written Complaint to Lender

Attention Customer Service:

Subject: [Your loan number]
[Names on loan documents]
[Property and/or mailing address]

This is a "qualified written request" under Section 6 of the Real Estate Settlement Procedures Act (RESPA).

I am writing because:

- Describe the issue or the question you have and/or what action you believe the lender should take.
- Attach copies of any related written materials.
- Describe any conversations with customer service regarding the issue and to whom you spoke.
- Describe any previous steps you have taken or attempts to resolve the issue.
- List a day time telephone number in case a customer service representative wishes to contact you.

I understand that under Section 6 of RESPA you are required to acknowledge my request within 20 business days and must try to resolve the issue within 60 business days.

Sincerely,

[Your name]

Discounts

- The new RESPA regulations are very strict on the subject of discounts.
- While generally speaking, a lender can offer a discount, that is not true when it comes to new construction.
- At the heart of RESPA is the concept of genuineness.
- Therefore, in its layout of the new regulations, HUD wanted to make sure that smoke and mirrors vanished from these transactions.
- Therefore, the regulations are so structured that a lender that is claiming to give a discount cannot create an offsetting fee somewhere else so as to make the discount entirely illusory (24 CFR 3500.2 (Required Service defined).

Discounts

- Where the GFE claims that a particular service as set forth on the GFE represents a discount when provided by a particular vendor, the regulations specify, “The discount must be a true discount below the prices that are otherwise generally available, and must not be made up by higher costs elsewhere in the settlement process.”
- The use of such discounts to induce borrowers to use particular services in not forbidden by the RESPA regulations.
- What is forbidden is that the service provider kicks back to the lender anything more than the lender’s equity interest in the service provider if, in fact, there is an ownership interest of the provider by the lender.

Discounts

- There is no requirement that the GFE sets forth a list of alternative providers the borrower may use.
- It can recommend only one.
- However, it must set forth what if any relationship it has with the vendor and to what extent it has in the recent past recommended that vendor.
- The old rules had no requirement for any such disclosure.

Discounts

- Obviously, the consumer is overwhelmingly more likely to select the vendor indicated on the GFE, if for no other reason than that the GFE provides a form of cap on how much that vendor will finally be able to charge.
- Of course, as otherwise noted, the consumer is encouraged to look at the bottom line of the GFE to figure out what the bottom line of the loan expense is to be.
- Whatever legerdemain there may be in arriving at the figures, under the new RESPA regulations, the total loan cost shows up loud and clear.

Perhaps RESPA Might Drive Some Costs Up

- This, however, raises the stakes for purchasers' attorneys as well.
- Only a foolhardy one would simply accept the lender's figures.
- Instead, the purchaser's attorney is going to want to put the HUD-1 side by side with the GFE and go line by line, making sure that the numbers are matching.
- While that kind of task can be delegated to a paralegal, it is the attorney who will be answerable to the client in malpractice if there is a discrepancy.
- This puts a whole new spin on the ancient doctrine of caveat emptor.

Mortgage Brokers Up In Arms

- Under the newly revised GFE, mortgage brokers who have no affiliation with the actual lender must set forth in the form and in the HUD-1 just what their profit is on the deal.
- However, the in-house brokers employed by the lenders have to make no such disclosure.
- This is seen, correctly enough, as lopsided by the brokers.

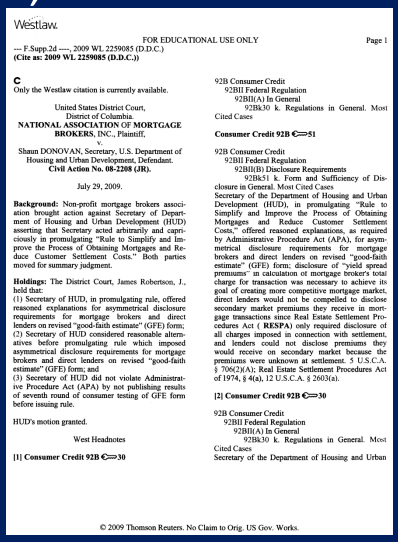
Mortgage Brokers Up In Arms

- However, as we noted, there was a substantial passage of time between the passage of the amendments to the RESPA statute and the promulgation by HUD of the latest (so-called "final") regulations implementing it.
- During that time, HUD conducted numerous market studies to determine how real life consumers would treat the various proposed forms of GFE.
- According to those studies, as reported at length in the excellently written and highly informative *National Association of Mortgage Brokers, Inc. v. Donovan*, 2009 WL 2259085, in some 80% of cases, consumers using the new CFE were able to realize that when it comes to comparison shopping, the bottom line is the *bottom* line and the figures on the way to getting there, while informative, are no determinative of how big a check one has to write.
- So even though the brokers had to separately disclose their profit, if they were cheaper than a brokerless transaction, the consumer selected them.

Mortgage Brokers Up In Arms

- Those studies notwithstanding, the brokers remain unconvinced and in all fairness to their position, the consumers only had an 80% accuracy rate in spotting the bargain, not the 100% the brokers would want.

National Association of Mortgage Brokers, Inc. v. Shaun Donovan



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--- F.Supp.2d ----, 2009 WL 2259085 (D.D.C.)
(Cite as: 2009 WL 2259085 (D.D.C.))

C
Only the Westlaw citation is currently available.

United States District Court,
District of Columbia.
NATIONAL ASSOCIATION OF MORTGAGE BROKERS, INC., Plaintiff,
v.
Shaun DONOVAN, Secretary, U.S. Department of Housing and Urban Development, Defendant.
Civil Action No. 08-2208 (JR).

July 29, 2009.

Background: Non-profit mortgage brokers association brought action against Secretary of Department of Housing and Urban Development (HUD) asserting that Secretary acted arbitrarily and capriciously in promulgating "Rule to Simplify and Improve the Process of Obtaining Mortgages and Reduce Customer Settlement Costs." Both parties moved for summary judgment.

Holdings: The District Court, James Robertson, J., held that:
(1) Secretary of HUD, in promulgating rule, offered reasoned explanations for asymmetrical disclosure requirements for mortgage brokers and direct lenders on revised "good-faith estimate" (GFE) form;
(2) Secretary of HUD considered reasonable alternatives before promulgating rule which imposed asymmetrical disclosure requirements for mortgage brokers and direct lenders on revised "good-faith estimate" (GFE) form; and
(3) Secretary of HUD did not violate Administrative Procedure Act (APA) by not publishing results of seventh round of consumer testing of GFE form before issuing rule.

HUD's motion granted.

West Headnotes

[1] Consumer Credit 92B ⇐30

92B Consumer Credit
92BII Federal Regulation
92BII(A) In General
92Bk30 k. Regulations in General. Most Cited Cases

Consumer Credit 92B ⇐51

92B Consumer Credit
92BII Federal Regulation
92BII(B) Disclosure Requirements
92Bk51 k. Form and Sufficiency of Disclosure in General. Most Cited Cases
Secretary of the Department of Housing and Urban Development (HUD), in promulgating "Rule to Simplify and Improve the Process of Obtaining Mortgages and Reduce Customer Settlement Costs," offered reasoned explanations, as required by Administrative Procedure Act (APA), for asymmetrical disclosure requirements for mortgage brokers and direct lenders on revised "good-faith estimate" (GFE) form; disclosure of "yield spread premiums" in calculation of mortgage broker's total charge for transaction was necessary to achieve its goal of creating more competitive mortgage market, direct lenders would not be compelled to disclose secondary market premiums they receive in mortgage transactions since Real Estate Settlement Procedures Act (**RESPA**) only required disclosure of all charges imposed in connection with settlement, and lenders could not disclose premiums they would receive on secondary market because the premiums were unknown at settlement. 5 U.S.C.A. § 706(2)(A); Real Estate Settlement Procedures Act of 1974, § **4(a)**, 12 U.S.C.A. § 2603(a).

[2] Consumer Credit 92B ⇐30

92B Consumer Credit
92BII Federal Regulation
92BII(A) In General
92Bk30 k. Regulations in General. Most Cited Cases
Secretary of the Department of Housing and Urban

Conclusion

- While it is generally unfashionable to applaud something done by the government and the new RESPA regulations are not being greeted by cheering crowds, on the whole, it looks like HUD got this thing right.
- They put a lot of work into studying how consumers would react to the new forms and rules in the real world and it appears that the work was well worth the effort.
- For some, it will take some work to get accustomed to the new honesty, but rather like for controls on the securities industry, it had become long obvious that it was not a good idea to simply leave people to their own devices.

OMB Approval No. 2502-0265

Good Faith Estimate (GFE)

Name of Originator	Borrower
Originator Address	Property Address
Originator Phone Number	
Originator Email	Date of GFE

Purpose

This GFE gives you an estimate of your settlement charges and loan terms if you are approved for this loan. For more information, see HUD's *Special Information Booklet* on settlement charges, your *Truth-in-Lending Disclosures,* and other consumer information at www.hud.gov/respa. If you decide you would like to proceed with this loan, contact us.

Shopping for your loan

Only you can shop for the best loan for you. Compare this GFE with other loan offers, so you can find the best loan. Use the shopping chart on page 3 to compare all the offers you receive.

Important dates

1. The interest rate for this GFE is available through _____. After this time, the interest rate, some of your loan Origination Charges, and the monthly payment shown below can change until you lock your interest rate.
2. This estimate for all other settlement charges is available through _____.
3. After you lock your interest rate, you must go to settlement within ____ days (your rate lock period) to receive the locked interest rate.
4. You must lock the interest rate at least ____ days before settlement.

Summary of your loan

Your initial loan amount is	$	
Your loan term is		years
Your initial interest rate is		%
Your initial monthly amount owed for principal, interest, and any mortgage insurance is	$	per month
Can your interest rate rise?	☐ No	☐ Yes, it can rise to a maximum of %. The first change will be in .
Even if you make payments on time, can your loan balance rise?	☐ No	☐ Yes, it can rise to a maximum of $
Even if you make payments on time, can your monthly amount owed for principal, interest, and any mortgage insurance rise?	☐ No	☐ Yes, the first increase can be in and the monthly amount owed can rise to $. The maximum it can ever rise to is $.
Does your loan have a prepayment penalty?	☐ No	☐ Yes, your maximum prepayment penalty is $.
Does your loan have a balloon payment?	☐ No	☐ Yes, you have a balloon payment of $ due in years.

Escrow account information

Some lenders require an escrow account to hold funds for paying property taxes or other property-related charges in addition to your monthly amount owed of $ _____.

Do we require you to have an escrow account for your loan?

☐ No, you do not have an escrow account. You must pay these charges directly when due.

☐ Yes, you have an escrow account. It may or may not cover all of these charges. Ask us.

Summary of your settlement charges

A	Your Adjusted Origination Charges *(See page 2.)*	$
B	Your Charges for All Other Settlement Services *(See page 2.)*	$
A + B	Total Estimated Settlement Charges	$

Understanding your estimated settlement charges

Your Adjusted Origination Charges

1. **Our origination charge** This charge is for getting this loan for you.	
2. **Your credit or charge (points) for the specific interest rate chosen** ☐ The credit or charge for the interest rate of [ ] % is included in "Our origination charge." (See item 1 above.) ☐ You receive a credit of $ [ ] for this interest rate of [ ] %. This credit **reduces** your settlement charges. ☐ You pay a charge of $ [ ] for this interest rate of [ ] %. This charge (points) **increases** your total settlement charges. The tradeoff table on page 3 shows that you can change your total settlement charges by choosing a different interest rate for this loan.	
A Your Adjusted Origination Charges	$

Your Charges for All Other Settlement Services

Some of these charges can change at settlement. See the top of page 3 for more information.

3. **Required services that we select** These charges are for services we require to complete your settlement. We will choose the providers of these services. *Service* / *Charge*	
4. **Title services and lender's title insurance** This charge includes the services of a title or settlement agent, for example, and title insurance to protect the lender, if required.	
5. **Owner's title insurance** You may purchase an owner's title insurance policy to protect your interest in the property.	
6. **Required services that you can shop for** These charges are for other services that are required to complete your settlement. We can identify providers of these services or you can shop for them yourself. Our estimates for providing these services are below. *Service* / *Charge*	
7. **Government recording charges** These charges are for state and local fees to record your loan and title documents.	
8. **Transfer taxes** These charges are for state and local fees on mortgages and home sales.	
9. **Initial deposit for your escrow account** This charge is held in an escrow account to pay future recurring charges on your property and includes ☐ all property taxes, ☐ all insurance, and ☐ other [ ].	
10. **Daily interest charges** This charge is for the daily interest on your loan from the day of your settlement until the first day of the next month or the first day of your normal mortgage payment cycle. This amount is $[ ] per day for [ ] days (if your settlement is [ ]).	
11. **Homeowner's insurance** This charge is for the insurance you must buy for the property to protect from a loss, such as fire. *Policy* / *Charge*	
B Your Charges for All Other Settlement Services	$
A + B Total Estimated Settlement Charges	$

Instructions

Understanding which charges can change at settlement

This GFE estimates your settlement charges. At your settlement, you will receive a HUD-1, a form that lists your actual costs. Compare the charges on the HUD-1 with the charges on this GFE. Charges can change if you select your own provider and do not use the companies we identify. (See below for details.)

These charges **cannot increase** at settlement:	The total of these charges **can increase up to 10%** at settlement:	These charges **can change** at settlement:
■ Our origination charge ■ Your credit or charge (points) for the specific interest rate chosen *(after you lock in your interest rate)* ■ Your adjusted origination charges *(after you lock in your interest rate)* ■ Transfer taxes	■ Required services that we select ■ Title services and lender's title insurance *(if we select them or you use companies we identify)* ■ Owner's title insurance *(if you use companies we identify)* ■ Required services that you can shop for *(if you use companies we identify)* ■ Government recording charges	■ Required services that you can shop for *(if you do not use companies we identify)* ■ Title services and lender's title insurance *(if you do not use companies we identify)* ■ Owner's title insurance *(if you do not use companies we identify)* ■ Initial deposit for your escrow account ■ Daily interest charges ■ Homeowner's insurance

Using the tradeoff table

In this GFE, we offered you this loan with a particular interest rate and estimated settlement charges. However:

- If you want to choose this same loan with **lower settlement charges,** then you will have a **higher interest rate.**
- If you want to choose this same loan with a **lower interest rate,** then you will have **higher settlement charges.**

If you would like to choose an available option, you must ask us for a new GFE.

Loan originators have the option to complete this table. Please ask for additional information if the table is not completed.

	The loan in this GFE	The same loan with lower settlement charges	The same loan with a lower interest rate
Your initial loan amount	$	$	$
Your initial interest rate[1]	%	%	%
Your initial monthly amount owed	$	$	$
Change in the monthly amount owed from this GFE	No change	You will pay $ **more** every month	You will pay $ **less** every month
Change in the amount you will pay at settlement with this interest rate	No change	Your settlement charges will be **reduced** by $	Your settlement charges will **increase** by $
How much your total estimated settlement charges will be	$	$	$

[1] *For an adjustable rate loan, the comparisons above are for the initial interest rate before adjustments are made.*

Using the shopping chart

Use this chart to compare GFEs from different loan originators. Fill in the information by using a different column for each GFE you receive. By comparing loan offers, you can shop for the best loan.

	This loan	Loan 2	Loan 3	Loan 4
Loan originator name				
Initial loan amount				
Loan term				
Initial interest rate				
Initial monthly amount owed				
Rate lock period				
Can interest rate rise?				
Can loan balance rise?				
Can monthly amount owed rise?				
Prepayment penalty?				
Balloon payment?				
Total Estimated Settlement Charges				

If your loan is sold in the future

Some lenders may sell your loan after settlement. Any fees lenders receive in the future cannot change the loan you receive or the charges you paid at settlement.

OMB Approval No. 2502-0265

A. Settlement Statement (HUD-1)

B. Type of Loan

1. ☐ FHA 2. ☐ RHS 3. ☐ Conv. Unins. 4. ☐ VA 5. ☐ Conv. Ins.	6. File Number:	7. Loan Number:	8. Mortgage Insurance Case Number:

C. Note: This form is furnished to give you a statement of actual settlement costs. Amounts paid to and by the settlement agent are shown. Items marked "(p.o.c.)" were paid outside the closing; they are shown here for informational purposes and are not included in the totals.

D. Name & Address of Borrower:	E. Name & Address of Seller:	F. Name & Address of Lender:
G. Property Location:	H. Settlement Agent: Place of Settlement:	I. Settlement Date:

J. Summary of Borrower's Transaction

100. Gross Amount Due from Borrower	
101. Contract sales price	
102. Personal property	
103. Settlement charges to borrower (line 1400)	
104.	
105.	
Adjustment for items paid by seller in advance	
106. City/town taxes to	
107. County taxes to	
108. Assessments to	
109.	
110.	
111.	
112.	
120. Gross Amount Due from Borrower	
200. Amounts Paid by or in Behalf of Borrower	
201. Deposit or earnest money	
202. Principal amount of new loan(s)	
203. Existing loan(s) taken subject to	
204.	
205.	
206.	
207.	
208.	
209.	
Adjustments for items unpaid by seller	
210. City/town taxes to	
211. County taxes to	
212. Assessments to	
213.	
214.	
215.	
216.	
217.	
218.	
219.	
220. Total Paid by/for Borrower	
300. Cash at Settlement from/to Borrower	
301. Gross amount due from borrower (line 120)	
302. Less amounts paid by/for borrower (line 220)	( )
303. Cash ☐ From ☐ To Borrower	

K. Summary of Seller's Transaction

400. Gross Amount Due to Seller	
401. Contract sales price	
402. Personal property	
403.	
404.	
405.	
Adjustments for items paid by seller in advance	
406. City/town taxes to	
407. County taxes to	
408. Assessments to	
409.	
410.	
411.	
412.	
420. Gross Amount Due to Seller	
500. Reductions In Amount Due to Seller	
501. Excess deposit (see instructions)	
502. Settlement charges to seller (line 1400)	
503. Existing loan(s) taken subject to	
504. Payoff of first mortgage loan	
505. Payoff of second mortgage loan	
506.	
507.	
508.	
509.	
Adjustments for items unpaid by seller	
510. City/town taxes to	
511. County taxes to	
512. Assessments to	
513.	
514.	
515.	
516.	
517.	
518.	
519.	
520. Total Reduction Amount Due Seller	
600. Cash at Settlement to/from Seller	
601. Gross amount due to seller (line 420)	
602. Less reductions in amount due seller (line 520)	( )
603. Cash ☐ To ☐ From Seller	

The Public Reporting Burden for this collection of information is estimated at 35 minutes per response for collecting, reviewing, and reporting the data. This agency may not collect this information, and you are not required to complete this form, unless it displays a currently valid OMB control number. No confidentiality is assured; this disclosure is mandatory. This is designed to provide the parties to a RESPA covered transaction with information during the settlement process.

L. Settlement Charges

			Paid From Borrower's Funds at Settlement	Paid From Seller's Funds at Settlement
700.	**Total Real Estate Broker Fees**			
	Division of commission (line 700) as follows:			
701.	$ to			
702.	$ to			
703.	Commission paid at settlement			
704.				
800.	**Items Payable in Connection with Loan**			
801.	Our origination charge	$ (from GFE #1)		
802.	Your credit or charge (points) for the specific interest rate chosen	$ (from GFE #2)		
803.	Your adjusted origination charges	(from GFE A)		
804.	Appraisal fee to	(from GFE #3)		
805.	Credit report to	(from GFE #3)		
806.	Tax service to	(from GFE #3)		
807.	Flood certification	(from GFE #3)		
808.				
900.	**Items Required by Lender to Be Paid in Advance**			
901.	Daily interest charges from to @ $ /day	(from GFE #10)		
902.	Mortgage insurance premium for months to	(from GFE #3)		
903.	Homeowner's insurance for years to	(from GFE #11)		
904.				
1000.	**Reserves Deposited with Lender**			
1001.	Initial deposit for your escrow account	(from GFE #9)		
1002.	Homeowner's insurance months @ $ per month	$		
1003.	Mortgage insurance months @ $ per month	$		
1004.	Property taxes months @ $ per month	$		
1005.	months @ $ per month	$		
1006.	months @ $ per month	$		
1007.	Aggregate Adjustment	–$		
1100.	**Title Charges**			
1101.	Title services and lender's title insurance	(from GFE #4)		
1102.	Settlement or closing fee	$		
1103.	Owner's title insurance	(from GFE #5)		
1104.	Lender's title insurance	$		
1105.	Lender's title policy limit $			
1106.	Owner's title policy limit $			
1107.	Agent's portion of the total title insurance premium	$		
1108.	Underwriter's portion of the total title insurance premium	$		
1200.	**Government Recording and Transfer Charges**			
1201.	Government recording charges	(from GFE #7)		
1202.	Deed $ Mortgage $ Releases $			
1203.	Transfer taxes	(from GFE #8)		
1204.	City/County tax/stamps Deed $ Mortgage $			
1205.	State tax/stamps Deed $ Mortgage $			
1206.				
1300.	**Additional Settlement Charges**			
1301.	Required services that you can shop for	(from GFE #6)		
1302.		$		
1303.		$		
1304.				
1305.				
1400.	**Total Settlement Charges (enter on lines 103, Section J and 502, Section K)**			

Comparison of Good Faith Estimate (GFE) and HUD-1 Charges		Good Faith Estimate	HUD-1
Charges That Cannot Increase	**HUD-1 Line Number**		
Our origination charge	# 801		
Your credit or charge (points) for the specific interest rate chosen	# 802		
Your adjusted origination charges	# 803		
Transfer taxes	#1203		

Charges That in Total Cannot Increase More Than 10%		Good Faith Estimate	HUD-1
Government recording charges	# 1201		
	#		
	#		
	#		
	#		
	#		
	#		
	#		
Total			
Increase between GFE and HUD-1 Charges		**$**	**or** **%**

Charges That Can Change			Good Faith Estimate	HUD-1
Initial deposit for your escrow account	#1001			
Daily interest charges	# 901	$ /day		
Homeowner's insurance	# 903			
	#			
	#			
	#			

Loan Terms

Your initial loan amount is	$
Your loan term is	years
Your initial interest rate is	%
Your initial monthly amount owed for principal, interest, and and any mortgage insurance is	$ includes ☐ Principal ☐ Interest ☐ Mortgage Insurance
Can your interest rate rise?	☐ No. ☐ Yes, it can rise to a maximum of %. The first change will be on and can change again every after . Every change date, your interest rate can increase or decrease by %. Over the life of the loan, your interest rate is guaranteed to never be **lower** than % or **higher** than %.
Even if you make payments on time, can your loan balance rise?	☐ No. ☐ Yes, it can rise to a maximum of $.
Even if you make payments on time, can your monthly amount owed for principal, interest, and mortgage insurance rise?	☐ No. ☐ Yes, the first increase can be on and the monthly amount owed can rise to $. The maximum it can ever rise to is $.
Does your loan have a prepayment penalty?	☐ No. ☐ Yes, your maximum prepayment penalty is $.
Does your loan have a balloon payment?	☐ No. ☐ Yes, you have a balloon payment of $ due in years on .
Total monthly amount owed including escrow account payments	☐ You do not have a monthly escrow payment for items, such as property taxes and homeowner's insurance. You must pay these items directly yourself. ☐ You have an additional monthly escrow payment of $ that results in a total initial monthly amount owed of $. This includes principal, interest, any mortgage insurance and any items checked below: ☐ Property taxes ☐ Homeowner's insurance ☐ Flood insurance ☐ ☐ ☐

Note: If you have any questions about the Settlement Charges and Loan Terms listed on this form, please contact your lender.

Source: Department of Housing and Urban Development
http://www.hud.gov/offices/hsg/ramh/res/resparulefaqs.pdf

New RESPA Rule FAQs

(New items are in **bold**)

Table of Contents

LAST UPDATE: October 23, 2009

General

1) **Q:** When does the new RESPA Rule take effect?

A: The November 2008 RESPA Rule was effective January 16, 2009. Implementation of the provisions are as follows:

Provision	Implementation Date
Average Charge (optional)	January 16, 2009
Servicing Disclosure Statement	January 16, 2009
Other technical changes	January 16, 2009
New GFE	January 1, 2010
New HUD-1/HUD-1A (for all transactions in which the new GFE is used)	January 1, 2010
Tolerances	January 1, 2010
Elimination of FHA Cap On Origination Fees	January 1, 2010

2) **Q:** When does the revised required use definition take effect?

A: The revised required use definition was withdrawn by a separate final rule published May 15, 2009.

3) **Q:** Can a loan originator e-mail a GFE to a borrower?

A: Yes; as long as the borrower consents and the other specific requirements for consumer disclosures under the Electronic Signatures in Global and National Commerce Act (ESIGN) are met, a loan originator may e-mail, fax, or send by other electronic means the GFE (and other RESPA disclosures, such as the HUD-1/1A). See section 101(c) of ESIGN, 15 U.S.C. § 7001(c); also see 24 CFR § 3500.23. The loan originator may also continue to deliver the GFE to the borrower by hand delivery or by placing it in the mail, as provided by RESPA.

4) **Q:** RESPA and HUD's RESPA regulations require that certain records be retained for a period of time. Can those records be retained electronically?

A: Yes, if the person responsible for retaining records under RESPA and HUD's RESPA regulations meets the specific requirements and limitations applicable to the retention of electronic documents set out in the Electronic Signatures in Global and National Commerce Act (ESIGN), that person's responsibility will be satisfied by the retention of electronic records. See sections 101(d) and (e) of ESIGN, 15 U.S.C. § 7001(d) and (e); also see 24 CFR § 3500.23.

5) **Q:** Can we translate the GFE and the HUD-1 into languages other than English?

A: Yes, it is permissible to translate the GFE and the HUD-1 as long as the form has been translated accurately.

6) **Q:** The term "monthly" is used throughout the GFE and HUD-1 forms. The requirements stated in terms of "monthly" do not work well for loans on which payments are not made monthly

(e.g., are made biweekly or quarterly). In such transactions, can an appropriate payment period be substituted whenever requirements on the forms are stated in terms of "monthly"?

A: No, the GFE and HUD-1 are prescribed forms. The instructions for the GFE provide that the standardized form is the required form. HUD's regulations provide that language and terms used on the HUD-1 may not be changed, except in limited circumstances which do not include changes to the standardized language (see 24 CFR § 3500.9). The intent of the standardized GFE and HUD-1 is to provide borrowers an easier means of comparing loan offers, and to determine that they are getting the loan at settlement that they were offered in the GFE. For loans with payment plans that are not monthly, the periodic payments should be converted to a monthly basis (e.g., payments for a biweekly plan with 26 payments per year would be multiplied by 26/12, quarterly payments would be divided by 3, etc.).

7) **Q:** If a borrower applies for a first and second mortgage before January 1, 2010 and the loan originator issues a GFE using the new form for the first mortgage, does the loan originator have to issue the second mortgage GFE on the new GFE form also?

A: No, the loan originator does not have to issue the GFE for the second mortgage on the new GFE form prior to January 1, 2010 even if the loan originator issues the GFE for the first mortgage on the new GFE form. To avoid consumer confusion, the loan originator may choose to issue new GFEs for both the first and second mortgage, or old GFEs for both the first and second mortgages. If the loan originator issues the old GFE, the old HUD-1 must be used. If the loan originator issues the new GFE, the new HUD-1 must be used.

8) **Q:** What is a "no cost" loan for purposes in the new RESPA Rule?

A: Information about "no cost" loans may be found in Appendix A, Instructions for Completing HUD-1 and HUD-1A Settlement Statements and 24 CFR part 3500, Appendix C – GFE Instructions.

9) **Q:** The definition of "Origination service" does not explicitly include all of the services provided by mortgage brokers in the definition of "Settlement services". Are all "Settlement services" considered "Origination services"?

A: No, all "Settlement services" are not considered "Origination services". However, all "Origination services" are "Settlement services".

10) **Q:** How may applications under a preapproval program as defined by Section 203.2(b)(2) of Regulation C be treated?

A: For the purposes of RESPA, "application" is defined at 24 CFR § 3500.2(b). The RESPA rule does not address preapprovals or the information required in relation to preapprovals. The Federal Reserve is responsible for promulgating, interpreting and enforcing Regulation C.

11) **Q:** May a loan originator require the use of its affiliate for the tax service or flood certificate?

A: No, a loan originator may not require the use of its affiliate for tax service or flood certificate.

12) **Q:** If I suspect someone is violating RESPA, is there a phone number I can call to make a complaint to HUD?

A: We encourage anyone that suspects someone is potentially violating RESPA to contact us. You may either call 1-202-708-0502 or you may send your complaint to:

Director, Office of RESPA and Interstate Land Sales
US Department of Housing and Urban Development
Room 9154
451 7th Street, SW
Washington, DC 20410

For more information, please visit our website at www.hud.gov/respa or email our office at hsg-respa@hud.gov.

GFE

GFE – General

1) **Q:** What happens if a GFE is not provided to a borrower?

A: In a transaction involving a federally related mortgage, the loan originator is required to provide a GFE to the borrower. Failure to provide a GFE as required is a violation of Section 5 of RESPA.

2) **Q:** When will the use of the new GFE and HUD-1 forms be required?

A: The new GFE and HUD-1 forms must be used as of January 1, 2010. The new GFE and HUD-1 forms may be used before this date. Please note that if a loan originator issues a GFE on the new form, then the settlement agent must use the new HUD-1 form and the tolerances and other requirements in the revised RESPA regulations will apply.

3) **Q:** If a GFE is issued on the old form prior to January 1, 2010, and the loan will close after January 1, 2010, which HUD-1 form is to be completed by the settlement agent?

A: If a GFE is issued on the old form prior to January 1, 2010, then the old HUD-1 form must be used even if closing will occur after January 1, 2010. For GFEs issued on the old form, the loan originator has the option to reissue the GFE (with the same terms and charges) on the new form, in which case the settlement agent must complete the new HUD-1 form.

4) **Q:** When does a loan originator have to issue a GFE?

A: A loan originator must issue a GFE no later than 3 business days after the loan originator receives an application or information sufficient to complete an application. Application is defined as the submission of a borrower's financial information in anticipation of a credit decision relating to a federally related mortgage loan, which shall include the following: (1) borrower's name, (2) borrower's monthly income; (3) borrower's social security number to obtain a credit report; (4) property address; (5) estimate of value of the property; (6) loan amount and (7) any other information deemed necessary by the loan originator.

5) **Q:** What is a loan originator?
A: "Loan originator" means a lender or a mortgage broker.

6) **Q:** What fees can a loan originator charge before issuing a GFE?
A: Prior to issuing a GFE, the loan originator may, at its option, collect a fee limited to the cost of a credit report.

7) **Q:** I am a mortgage broker. Can I provide the GFE?
A: Yes, a mortgage broker can provide the GFE, however the lender is ultimately responsible for ascertaining that the GFE was provided to the applicant.

8) **Q:** There are not enough lines on the GFE or the HUD-1 to show all of the charges that are appropriate for some of the categories. Where should these charges be listed?
A: Additional lines may be added to Blocks 3, 6 and 11 of the GFE. Additional lines may also be added to the HUD-1.

9) **Q:** Is a GFE a loan commitment?
A: No, the GFE is not a loan commitment. A GFE is an estimate of settlement charges a borrower is likely to incur to obtain a specific loan.

10) **Q:** At what point can a loan originator charge a loan applicant fees for services other than the cost of obtaining a credit report?
A: After a loan applicant both receives a GFE and indicates an intention to proceed with the loan covered by the GFE, the loan originator may collect fees beyond the cost of a credit report for origination-related services.

11) **Q:** If the borrower is taking out two loans to finance the purchase, how should the loan originator disclose the charges from each loan on the GFE and the HUD-1?
A: Each loan must have a separate GFE and a separate HUD-1. However, the principal amount of the second loan and a brief explanation of the second loan should be listed on Lines 204 – 209 of the HUD-1 for the first loan.

12) **Q:** What are processing and administrative services?
A: Processing and administrative services are those services required to perform the functions involved in title service and origination service. Processing and administrative services include, but are not limited to the following: document delivery, document preparation, copying, wiring, preparing endorsements, document handling and notarization.

13) **Q:** Can items be listed as "Paid Outside of Closing" or "P.O.C." on the GFE?
A: No, the totals included in the column on page 2 of the GFE must be the sums of the prices or fees, by category, for all settlement services that are required to be shown on the GFE. Where individual components of these totals are required to be itemized, each third party settlement service must be identified and the estimated total price or fee to be paid for that service must be stated to the left of the column. The standardized GFE form does not allow information to be included on any part of those totals that would be paid outside of closing. Such information

would not help borrowers to shop for loans and would not facilitate comparison of the charges on the GFE with the charges on the HUD-1.

14) **Q:** The definition of application includes the social security number as one of six pieces of information. Foreign nationals do not have social security numbers. Is a Tax Identification Number (TIN) an acceptable substitution?

A: Before a loan originator issues a GFE, the loan originator will often evaluate the credit worthiness of a potential borrower by pulling an "in-file" or a credit report. The social security number is typically the unique identifier used to pull a credit report. If the social security number is not the appropriate unique identifier necessary to determine a borrower's credit worthiness, another unique identifier may be substituted.

15) **Q:** Is an approved loan correspondent approved under 24 CFR § 202.8 for Federal Housing Administration programs considered a lender or a mortgage broker?

A: A loan correspondent approved under 24 CFR § 202.8 for the Federal Housing Administration programs is considered a mortgage broker.

16) **Q:** If the mortgage broker receiving the application is an exclusive agent of the lender (similar to the requirements of Regulation Z per Comment 19(b)-3), will the lender be considered to have received the application when its exclusive agent received it?

A: The loan originator must issue a GFE when it receives information sufficient to be considered an application under RESPA. The mortgage broker may issue the GFE, but the lender is responsible to ascertain whether the GFE has been provided. Timely communication between the lender and the mortgage broker is essential to assure compliance.

HUD cannot interpret regulations promulgated by another federal agency, such as Regulation Z (12 CFR part 226). Please refer to the Board of Governors of the Federal Reserve System for interpretations of Regulation Z.

17) **Q:** If the mortgage broker purports to permit a borrower to lock in a rate, but the mortgage broker does not lock that rate with the lender, what tolerances apply to the lender for the credit or charge for the interest rate chosen and the adjusted origination charge?

A: If the lender accepts the GFE issued by the mortgage broker, the lender is subject to the loan terms and settlement charges. Charges for the credit or credit for the interest rate chosen and the adjusted origination charge may not change (zero tolerance). Timely communication between the lender and the mortgage broker is essential to assure compliance.

18) **Q:** If the mortgage broker has failed to provide the GFE on a timely basis, may the lender issue its own GFE?

A: The lender is responsible for ascertaining whether or not the GFE has been provided. If the GFE has not been provided by the mortgage broker, the lender must provide the GFE. The failure to provide a GFE to a borrower within 3 business days of receipt of the borrower's application is a violation of Section 5 of RESPA.

19) **Q:** If a GFE has been provided and the interest rate has not been locked, can the loan originator provide a revised GFE when the borrower later locks the interest rate?

A: If a borrower who has been provided a GFE later locks the interest rate and there are any changes to interest rate dependent charges or loan terms, a revised GFE must be issued.

20) **Q:** If a GFE has been provided and the interest rate has been locked, may the loan originator provide a revised GFE if the borrower requests a different rate lock period?

A: If a borrower requests a change to the mortgage loan identified in a GFE and that request will change the terms of the loan, the loan originator may provide a revised GFE to the borrower.

21) **Q:** If there is more than one potential borrower in a transaction, may additional lines be added to the "Borrower" field on the GFE to include all potential borrower names?

A: Yes, additional lines may be added to the "Borrower" field on the GFE.

22) **Q:** A broker-submitted application may contain all the information the lender requires, but the lender may not want to be bound by the mortgage broker's GFE. If the lender were to reject the application for this reason, would that rejection be subject to ECOA adverse action requirements and HMDA reporting?

A: HUD cannot interpret regulations promulgated by another federal agency. Please refer to the Federal Reserve Board for its regulations and staff commentary on the Equal Credit Opportunity Act (ECOA) ("Regulation B," 12 CFR part 202) and the Home Mortgage Disclosure Act (HMDA) ("Regulation C," 12 CFR part 203). The Federal Trade Commission (FTC) may also provide assistance with ECOA questions involving mortgage companies.

23) **Q:** May a loan originator issue a GFE if the loan originator has not received one of the six pieces of information included in the definition of an application (borrower's name, borrower's monthly income, borrower's social security number, property address, estimate of the value of the property and mortgage loan amount sought)?

A: An application includes information the loan originator requires the borrower to submit in anticipation of a credit decision. If a loan originator issues a GFE, the loan originator is presumed to have received all six pieces of information.

24) **Q:** Are loan originators permitted to process a loan without all six pieces of information included in the definition of an application?

A: Yes. Loan originators may process a loan after they have issued a GFE and the borrower has received the GFE and has decided to proceed with the loan. It is presumed that, prior to issuing a GFE, a loan originator has received all six pieces of information.

25) Q: When a mortgage broker receives an application or information sufficient to complete an application, when does the lender who agrees to go forward on the application have to provide the GFE?

A: Not later than 3 business days after the mortgage broker received the application or information sufficient to complete the application, either the lender or the mortgage broker must provide a GFE. The lender is responsible for ascertaining whether the GFE has been provided.

26) Q: If a lender agrees to proceed with a transaction for which a mortgage broker has provided the GFE to the borrower, may the lender provide a revised GFE?

A: The lender may provide a revised GFE consistent with the provisions of 24 CFR § 3500.7(f).

GFE – Seller paid items

1) **Q:** If at the time a GFE is issued it is known that the seller will pay settlement charges typically paid by the borrower, how are the charges disclosed on the GFE?

A: All charges typically paid by the borrower must be disclosed on the GFE regardless of whether the charges will be paid for by the borrower, the seller, or other party.

2) **Q:** Are charges to the seller listed on the GFE?

A: RESPA requires that only the borrower receive a GFE. The GFE is defined as an estimate of settlement charges a borrower is likely to incur in connection with the settlement. Charges that typically would not be charged to the borrower, but would be charged to another party—such as the seller—do not have to be included on the GFE. If the borrower typically would incur charges for title services and lender's and owner's title insurance, the GFE instructions make it clear that those charges are required to be listed regardless of whether, for example, the contract requires the seller to pay for the service. If there is a question about whether the borrower or seller is to pay for a particular settlement service, the charge for that service should be disclosed on the GFE.

GFE – Interest rate expiration

1) **Q:** If the availability of the interest rate (shown in item 1 of "Important dates" on page 1 of the GFE) expires, does a revised GFE have to be issued if the borrower locks a different interest rate before the expiration of the estimate for the settlement charges (shown in item 2 of "Important dates")?

A: If the interest rate offer on the GFE expires and the borrower later locks the interest rate, before the expiration of the estimate for the settlement charges, a revised GFE must be issued if any interest rate dependent charges and terms change. If a revised GFE is issued only the following changes may be made: (1) "Charge or credit (points) for interest rate chosen"; (2) "Adjusted origination charges"; (3) "Daily interest charges"; and (4) other interest rate related loan terms. "Our origination charge" and all other charges must remain the same from the prior GFE.

GFE – Expiration

1) **Q:** When does a GFE expire?

A: If a borrower does not express an intent to continue with an application within ten business days after the GFE is provided (or such longer time period specified by the loan originator), the loan originator is no longer bound by the GFE.

GFE – Denial

1) **Q:** If a loan originator denies the loan before the end of the three business day period after application, does the loan originator need to issue a GFE?

A: No, the loan originator is not required to issue a GFE if, before the end of the three business day period, the loan originator denies the application or the loan applicant withdraws the application.

2) **Q:** Section 3500.7 of RESPA states that the GFE need not be provided if mortgage broker or lender declines the application or the applicant withdraws the application within the three business day period after application. The provisions for the Special Information Booklet state that the lender need not provide the Special Information Booklet if the lender denies the application before the end of the three business day period. Does the Special Information Booklet need to be provided if the mortgage broker declines the application or the applicant withdraws the application within the three business day period?

A: No, the Special Information Booklet does not need to be provided if the loan originator declines the application or the applicant withdraws the application within the three business day period.

GFE – Written list of providers

1) **Q:** When do loan originators have to provide the borrower with a written list of identified providers?

A: When a loan originator permits a borrower to shop for third-party settlement services, the loan originator must provide the borrower with a written list of settlement services providers at the time of the GFE, on a separate sheet of paper.

2) **Q:** Does the borrower have to select a settlement service provider from the loan originator's written list of settlement service providers?

A: No. If the loan originator permits a borrower to shop for a settlement service provider, the borrower may choose a qualified provider that is not on the originator's written list.

3) **Q:** If the borrower chooses a settlement service provider that is not on the written list, does the tolerance apply?

A: No, if the borrower chooses a settlement service provider that is not on the loan originator's written list of providers, the amount paid for that service is not subject to a tolerance.

4) **Q:** The GFE Instructions require that where a loan originator permits a borrower to shop for third party settlement services covered in Blocks 4, 5, or 6, the loan originator must provide the borrower with a separate written list of settlement service providers at the time of the GFE. Is inclusion on the written list of identified providers considered a referral under Section 3500.14?

A: Yes, the inclusion of a specifically identified settlement service provider on the "written list" is considered to be a referral under 24 CFR § 3500.14(f).

5) **Q:** If a mortgage broker provides the GFE and the "written list" of settlement service providers and the borrower chooses to use a provider identified on the "written list" for a service, is the lender subject to tolerances for those services?

A: Yes, if the lender permits a mortgage broker to issue the GFE and the "written list" of providers, the lender is subject to the tolerances for the services in which the borrower chooses to use the identified provider.

6) **Q:** In lieu of providing the "written list" of providers, may the loan originator disclose to the borrower that if they specifically wish to shop for their own provider, but have difficulty finding a provider for a service at the disclosed price that they may contact the loan originator to ask the loan originator to identify a provider?

A: No. Where a loan originator permits a borrower to shop for third party settlement services, the loan originator must provide the borrower with a written list of settlement service providers at the time of the GFE, on a separate sheet of paper.

7) **Q:** Must the loan originator provide names only of those settlement service providers known to do business in the locality of the mortgage property or may the loan originator provide a list of national settlement service providers who may or may not do business in the locality of the mortgaged property?

A: The requirements for the new GFE form provide that "[w]here the loan originator permits a borrower to shop for third party settlement services, the loan originator must provide the borrower with a written list of settlement services providers." The list should contain settlement service providers that are likely available to provide the settlement service for the borrower.

GFE – "Changed circumstances"

1) **Q:** Once a GFE is issued are there any circumstances under which the loan terms or charges can change?

A: Yes. The loan terms or charges can change in the event that there are changed circumstances. "Changed circumstances" is now defined in § 3500.2 as: (1) Acts of God, war, disaster, or other emergency; (2) Information particular to the borrower or transaction that was relied on in providing the GFE and that changes or is found to be inaccurate after the GFE has been provided, which information may include information about the credit quality of the borrower, the amount of the loan, the estimated value of the property, or any other information that was used in providing the GFE; (3) New information particular to the borrower or transaction that was not relied on in providing the GFE; or (4) Other circumstances that are particular to the borrower or transaction, including boundary disputes, the need for flood insurance, or environmental problems.

None of the information collected by the loan originator prior to issuing the GFE may later become the basis for a "changed circumstance" upon which a loan originator may offer a revised GFE, unless the loan originator can demonstrate that there was a change in the particular information or that it was inaccurate, or that the loan originator did not rely on that particular information in issuing the GFE. In addition, the loan originator is presumed to have relied on the borrower's name, the borrower's monthly income, the property address, an estimate of the value of the property, the mortgage loan amount sought, and any information contained in any credit report obtained by the loan originator before providing the GFE. The loan originator cannot base a revision of the GFE on this information, unless it changed or is later found to be inaccurate.

2) **Q:** Would the discovery of additional documents (such as releases) that must be recorded causing an increase in government recording fees be considered a "changed circumstance" allowing the loan originator to provide a revised GFE?

A: The discovery of previously undisclosed circumstances affecting settlement costs such as unreleased liens could be considered a "changed circumstance." A loan originator may choose to issue a revised GFE reflecting only the increased charges resulting from the "changed circumstance" or may choose not to reissue a GFE if the increase is minimal. If the loan originator chooses to issue a revised GFE, only the increase in recording fees may change on the GFE: all other charges must remain the same.

3) **Q:** If there is a "changed circumstance," when does the loan originator issue a new GFE?

A: When there is a "changed circumstance" and the loan originator intends to issue a revised GFE, the loan originator must do so within three business days of receiving the information sufficient to establish changed circumstances.

4) **Q:** If a loan originator issues a revised GFE based on changed circumstances, how long must the loan originator retain documentation for providing a revised GFE?

A: The documentation that establishes changed circumstances must be retained for no less than three years after settlement of the loan.

5) **Q:** If circumstances change, may a loan originator issue a revised GFE with changes to all of the charges and terms related to the loan?

A: No, the loan originator may only change those charges and terms that are affected by the specific changed circumstance.

6) **Q:** If a revised GFE is provided due to changed circumstances or a borrower requested change, then how would line 1 of the Important Dates section be completed if the borrower has already locked the rate shown on the revised GFE?

A: The revised GFE must only reflect the affected loan terms and settlement charges from the changed circumstance. If the rate lock period has not been affected, the same information from the preceding GFE should be entered in Line 1 in the "Important dates" section on the GFE.

7) **Q:** If a revised GFE is provided due to changed circumstances affecting the loan or a borrower requested change, how would line 1 of the Important Dates section be completed if the borrower has not locked the rate shown on the revised GFE?

A: For changed circumstances affecting the loan or borrower-requested changes, if the borrower has not locked in the interest rate, Line 1 in the "Important dates" section on the GFE may be updated to accurately reflect the correct dates and time periods.

8) **Q:** Are the following sufficient to establish "changed circumstances" consistent with 24 CFR § 3500.7(f)?

i) A mortgage broker issues a GFE that a lender does not accept and the lender does not receive the application within three days of the date the broker received the application.

A: This does not constitute a changed circumstance.

ii) If a GFE is issued without a property address, the later identification of a property address.

A: If a loan originator issues a GFE without identifying a property address, the subsequent identification of the property address is not considered a changed circumstance.

iii) The borrower does not proceed to closing quickly upon final approval or does not act diligently in providing information to the lender.

A: The particular facts of each situation must be examined to determine if the facts constitute a changed circumstance.

iv) GSE, FHA or Mortgage Insurance program changes.

A: This could constitute a changed circumstance if the loan originator did not have notice of the GSE, FHA or other mortgage insurance program change prior to the issuance of the GFE.

v) The property address provided by the applicant, turns out to not be the correct, legal address.

A: This could constitute a changed circumstance.

vi) After the GFE is issued, parties are added to or removed from title or the property is moved into or out of trust.

A: These situations could be considered changed circumstances.

vii) During or as part of the transaction, it is determined that the property use may change, such as from owner-occupied to rental property.

A: This could constitute a changed circumstance. It should be noted that business purpose loans are not covered by RESPA. See 24 CFR §3500.5.

viii) After the GFE is issued, it is determined that a party will be using a POA to sign, which may require additional work and additional fees.

A: This could be considered a changed circumstance.

ix) Credit policy is required to change after the GFE is issued due to regulatory changes such as fees charged by government agencies for recording fees or taxes change after the GFE is issued.

A: This could constitute a changed circumstance if the loan originator did not have notice of the regulatory change prior to the issuance of the GFE.

x) The loan does not close by the close date in the original Purchase Agreement or Construction Agreement provided to the lender.

A: The particular facts of each situation must be examined to determine if the facts constitute a changed circumstance.

xi) The vendor originally selected to perform a settlement service goes out of business or stops offering the service.

A: The particular facts of each situation must be examined to determine if the facts constitute a changed circumstance.

xii) AVMs are commonly used for the property type and loan amount requested, but the AVM request comes back with a "no hit," necessitating the use of a more expensive valuation method.

A: This could constitute a changed circumstance.

xiii) After the GFE is issued, it is determined that an additional service such as an additional pest, structural or other inspection, upgraded appraisal, certification, survey or other requirement is required by the loan originator in connection with the transaction.

A: This could constitute a changed circumstance.

xiv) The borrower's credit score changes.

A: This could constitute a changed circumstance.

xv) A mortgage broker issues a GFE based on one lender's loan products and origination fees, but places the loan with a different lender.

A: No, this would not constitute a changed circumstance.

9) **Q:** If a GFE is revised to reflect a changed circumstance, may other charges on the GFE be made to reflect market fluctuations?

A: No. A GFE may not be revised to reflect market fluctuations.

10) **Q:** If there is a changed circumstance and the mortgage broker issued the GFE, may the lender issue the revised GFE reflecting the changed circumstances?

A: Yes. If there is a changed circumstance that allows for a revised GFE, either the mortgage broker or the lender may issue the revised GFE, but must also comply with the requirements for documenting and retaining documentation of the reason for the revised GFE.

11) **Q:** Information constituting a changed circumstance or borrower-requested changes might become available to the broker and lender at different times. When is the time for providing a revised GFE triggered?

A: If a revised GFE is to be provided, the loan originator must do so within 3 business days of receiving information sufficient to establish the changed circumstance. The 3 business days is triggered from the time of receipt by whichever loan originator, either the mortgage broker or the lender, receives the information first. Timely communication between the mortgage broker and the lender is essential to assure compliance.

GFE – New construction

1) **Q:** If a transaction involves new construction in which the loan may not close for months, how does this affect the issuance of a GFE?

A: In transactions involving new home purchases, where settlement is anticipated to occur more than 60 calendar days from the time a GFE is provided, the loan originator may provide the GFE to the borrower with a clear and conspicuous disclosure stating that at any time up until 60 calendar days prior to closing, the loan originator may issue a revised GFE. If no such separate disclosure is provided, the loan originator may not issue a revised GFE in the absence of changed circumstances or another event as provided in 24 CFR § 3500.7(f).

2) **Q:** For a loan originator to issue the separate disclosure to the GFE allowing a loan originator to revise the GFE at any time up to 60 days before settlement, must the new home be constructed specifically for the borrower or will any newly constructed home previously not occupied be eligible?

A: A new home purchase is the purchase of a home either to be constructed or under construction. In a transaction involving a new home purchase, if it is anticipated that settlement will not occur for more than 60 days after the GFE is provided, then a loan originator may provide a separate disclosure to the GFE that clearly states that the loan originator may revise the GFE at any time up to 60 days before settlement.

As an example of a means to determine if the home is under construction: if a use and occupancy permit has been issued for the home prior to the issuance of the GFE, then the home is not considered to be under construction and the transaction would not be a new home purchase for the purposes of 24 CFR § 3500.7(f)(6).

GFE – Page 1

GFE – Name of originator

1) **Q:** Should the name of the individual loan originator or the name of the loan origination entity go in the "Name of Originator" box at the top of page 1 of the GFE?

A: The name of the loan originator entity (such as ABC Loan Originator) must go in the box at the top of page 1 of the GFE. In addition to the name of the entity, the name of the individual loan originator may also be added.

2) **Q:** If an application is submitted through a mortgage broker but the lender is issuing the GFE, may either the mortgage broker or the lender be listed in the "Name of Originator" box at the top of page 1 on the GFE?

A: The loan originator that issues the GFE is the loan originator listed in the "Name of Originator" box at the top of page 1 of the GFE.

GFE – Important dates

1) **Q:** In the "Important dates" section of the GFE, where it states "The interest rate for this GFE is available through _____", does the loan originator have to leave the interest rate open for a specific amount of time, like 10 days?

A: There are no restrictions on the amount of time the interest rate must remain available. The interest rate can be available for any period of time that the loan originator chooses, including for example, a period of time within one day or for several days.

2) **Q:** In the "Important dates" section of the GFE, line 2, for how long must the estimate for all other settlement charges be available?

A: The estimate for "all other settlement charges" in the "Important dates" section of the GFE must be available for at least ten business days.

3) **Q:** What charges can change before the interest rate is locked?

A: With the exception of interest rate-dependent charges and terms, the charges and terms for all settlement services on the GFE must be available for 10 business days from when the GFE is provided, or for such longer period of time as the loan originator provides in item 2 of the "Important dates" section of the GFE. The interest rate-dependent charges and terms cannot change before the expiration of the period indicated by the loan originator in item 1 of the "Important dates" section of the GFE. Between the period of time indicated in item 1 and item 2 of the "Important dates" section, only interest rate-dependent charges may change until the interest rate is locked. After the expiration of the period indicated in item 2 of the "Important dates" section, the loan originator is permitted to change all of the charges and terms on the GFE (assuming that the interest rate is no longer available, as indicated in item 1 of the "Important dates" section). Interest rate-dependent charges and terms include: (1) "Your charge or credit (points) for the specific interest rate chosen," in Block 2 on page 2 of the GFE; (2) "Your adjusted origination charges" on Line A on page 2 of the GFE; (3) "Daily interest charges" in Block 10 of the GFE; and (4) interest rate-related loan terms, such as monthly amount owed.

4) **Q:** If the interest rate is locked at the time the GFE is issued, how should the loan originator complete Lines 1, 3, and 4 in the "Important dates" section on the GFE?

A: Pursuant to the GFE Instructions in Appendix C, if the interest rate is locked before the GFE is issued, the information in Lines 1, 3 and 4 in the "Important dates" section on the GFE must be completed with the information that corresponds to the locked rate.

5) **Q:** If a lender does not offer a rate lock, how should Line 1 in the "Important dates" section on the GFE be completed?

A: In Line 1, the loan originator must state the date, and if applicable, time until which the interest rate for the GFE will be available. If the rate is not available for any period of time, then Line 1 should state "Not Available" or "NA."

6) **Q:** If a lender does not offer a rate lock, how should Lines 3 and 4 in the "Important dates" section on the GFE be completed?

A: If the lender does not offer a rate lock, then Lines 3 and 4 of the "Important dates" section should state "Not Available" or "NA."

7) **Q:** If a revised GFE is provided due to changed circumstances or a borrower requested change, is it necessary to complete Line 3 of the "Important Dates" section of the GFE if the borrower has already locked the rate shown on the revised GFE?

A: Yes, the loan originator must complete Line 3 in the "Important dates" section with the information that was on the preceding GFE, unless the rate lock period was the basis for the issuance of a revised GFE.

8) **Q:** The estimate of "all other settlement charges" in the "Important dates" section on the GFE must be available for at least 10 business days. When a GFE is mailed, are the 10 business days measured from when it is mailed?

A: Yes. The estimate of "all other settlement charges" in the "Important dates" section on the GFE must be available for at least 10 business days from when the GFE is provided, which, in this instance, is the date the GFE is placed in the mail to the borrower. The originator should put the date the GFE is provided into the box for "Date of GFE".

9) **Q:** If state law does not permit a mortgage broker to provide an interest rate, how should the mortgage broker complete the "Important dates" section on the GFE?

A: RESPA and HUD's regulations do not exempt any person from complying with consistent laws of any state. HUD's regulations provide a process for addressing questions of consistency between state laws and RESPA. See 24 CFR § 3500.13.

10) **Q:** If a loan originator offers a "float-down" lock option, how would the loan originator complete the "Important dates" section on the GFE?

A: A "float-down" option should not affect any of the lines in the "Important dates" section on the GFE.

11) **Q:** The loan originator must state how many calendar days within which the applicant must go to settlement once the interest rate is locked. The number of days cannot be determined until the lock period is determined. May the loan originator enter a range of days for allowable lock periods? Must the loan originator account for the rescission period if the loan is rescindable?

A: No, the loan originator may not enter a range of rate lock options on the GFE. Line 3 requires the disclosure of the number of days in which the borrower must go to settlement. Line 3 in the "Important dates" section on the GFE must be completed with one rate lock period and may need to take into account factors affecting the settlement date.

12) **Q:** If a revised GFE is provided due to changed circumstances or a borrower requested change, is it necessary to complete Line 2 of the "Important Dates" section on the revised GFE if the shopping period has ended and the borrower has already expressed intent to continue with the application?

A: Yes, the loan originator must complete Line 2 in the "Important dates" section. The date entered must be at least 10 business days from the date the revised GFE is provided to the borrower.

13) **Q:** If a lender accepts a GFE issued by a mortgage broker, may the lender revise the information contained in the "Important dates" section on the GFE?

A: No, after the lender has accepted the GFE issued by a mortgage broker, the lender may not revise the information contained in the "Important dates" section on the GFE, unless the revised GFE is issued in compliance with 24 CFR § 3500.7(f).

GFE – Summary of your loan

1) **Q:** In a refinance, does the prepayment penalty in the "Summary of your loan" section of the GFE refer to the loan being paid off or the new loan being applied for?

A: The prepayment penalty refers to the new loan the borrower is applying for.

2) **Q:** How should the loan originator complete the "Your initial monthly amount owed for principal, interest, and any mortgage insurance is" in the "Summary of your loan" section of the GFE for a loan that begins as an interest-only and then becomes fully amortized?

A: Regardless of the type of loan, the loan originator must fill in the initial monthly amount owed for principal, interest, and any mortgage insurance. The amount shown must be the greater of: (1) The required monthly payment for principal and interest for the first regularly scheduled payment, plus any monthly mortgage insurance payment; or (2) the accrued interest for the first regularly scheduled payment, plus any monthly mortgage insurance payment.

3) **Q:** May discretionary charges such as credit insurance be included in the "Your initial monthly amount for principal, interest, and any mortgage insurance is _____"?

A: No. "Your initial monthly amount for principal, interest and any mortgage insurance is _____" may not contain discretionary amounts such as credit insurance. It should only contain the combined charges of principal, interest, and mortgage insurance.

4) **Q:** What is meant by "initial loan amount."?

A: The initial loan amount is the amount of the principal loan balance on the date of closing.

5) **Q:** Why did HUD use the term "initial loan amount"?

A: HUD used the term "initial loan amount" because some loans allow for negative amortization that will increase the loan balance over time. Negative amortization occurs when the interest accrued during a payment period is greater than the scheduled payment and the excess amount is added to the outstanding loan balance.

6) **Q:** What is meant by "initial interest rate"?
A: The initial interest rate is the interest rate that is applicable on the date of closing.

7) **Q:** If a loan contains a conditional preferred rate feature (such as a lower interest rate to an employee as long as the employee still works for the same employer), what is the "initial interest rate"? What is the first change date on loans containing conditional preferred rate features?
A: The initial interest rate is the interest rate that is applicable on the date of closing. If the first interest rate change date is not known due to a conditional preferred rate feature, the first change date box should state "unknown."

8) **Q:** Are programs such as payment assistance programs, which can increase the borrower's loan balance, to be taken into consideration in answering the question, "Even if you make payments on time, can your loan balance rise"?
A: No, this question on the HUD-1 is intended to educate borrowers about certain potentially high risk loans, such as negative amortization loans. A borrower making monthly payments on these loans needs to be aware, e.g., that to the extent that the monthly payments do not cover the full amount of the interest owed during that month, the unpaid interest will be added to the loan balance. The instructions for completing this item on the GFE provide that repayment of assistance from federal, state, local, or tribal housing programs should be excluded from consideration in completing this item on the GFE.

9) **Q:** When an FHA loan is paid off, a borrower may have to pay interest on the loan from the day of payoff until the end of that month. Does this mean that a loan originator should check "Yes" to the question "Does your loan have a prepayment penalty?"
A: No. This is not considered a prepayment penalty. By letter dated September 29, 2009, the Federal Reserve Board of Governors stated to HUD that lenders which use the monthly interest accrual method required by FHA ". . . would not be required to treat the interest charged from the date of prepayment until the next installment due date as a prepayment penalty for any purpose under Regulation Z."

GFE – Escrow account information

1) **Q:** How does the loan originator complete the "Escrow account information" section on the GFE?
A: On the GFE, in the "Escrow account information" section, the first box is for the monthly payment that the borrower will owe for principal, interest, and mortgage insurance (i.e., the same amount shown above on the GFE as "Your initial monthly amount owed for principal, interest, and any mortgage insurance is"). If the lender does not require an escrow account, the loan originator should check the box for "No, you do not have an escrow account. You must pay these charges directly when due." If the lender does require an escrow account, the loan originator should check the box for "Yes, you have an escrow account. It may or may not cover all of these charges. Ask us."

2) **Q:** On the GFE, in the "Escrow account information" section, does the first block for the monthly amount owed include the amount of the estimated escrow payment?

A: No, the first block is for the monthly amount that will be owed for principal, interest, and mortgage insurance only. Additional information on charges relating to the escrow account is in Block 9 on page 2 of the GFE.

GFE – Page 2

1) Q: If a governmental loan program requires a borrower to select an "approved" service provider, such as a HUD approved housing counselor, should the service be disclosed in Block 3 or Block 6 on the GFE?

A: Even if a governmental loan program requires a borrower to select from only "approved" service providers (such as HUD approved housing counselors) the service must be disclosed in Block 6 on the GFE. If the loan originator selects a particular settlement service provider, the service must be disclosed in Block 3.

(Please note that the answer above also applies to reverse mortgage programs, see Reverse Mortgages #8.)

GFE – Block 1

1) **Q:** If there is a lender and a mortgage broker in the same transaction, where does the loan originator put the lender and mortgage broker charges?

A: The total of all charges for all loan originators (lenders and mortgage brokers) must be contained in Block 1, "Our origination charge" on page 2 of the GFE, except for any charge for the specific interest rate chosen.

2) **Q:** Where does the loan originator put the lender's processing fee on the GFE?

A: All loan originator charges—including processing, application, administration fees, underwriting, document preparation, wire, lender inspection, mortgage broker, loan handling, and other miscellaneous fees—are contained in Block 1, "Our origination charge".

3) **Q:** Can the charge shown on the GFE, Block 1, "Our origination charge", increase after the GFE has been issued?

A: No. Block 1, "Our origination charge" cannot increase unless there is a "changed circumstance" as defined in 24 CFR § 3500.2.

4) **Q:** Where should fees such as loan originator's Processing Fee, Underwriting Fee, and Wire Transfer Fee be disclosed on the GFE?

A: All origination charges for lenders and mortgage brokers, including fees for administrative and processing services, are included in the charge in Block 1 of the GFE, "Our origination charge" and should not be itemized separately.

5) **Q:** If a loan originator contracts loan document preparation to a third party, is this a separate charge on the GFE and the HUD-1?

A: No, loan document preparation is a processing and administrative service in the origination of a loan and is included in Block 1 of the GFE, "Our origination charge" (and in Line 801 of the HUD-1), and may not be separately itemized. See 24 CFR § 3500.8(b)(1).

6) **Q:** Are attorney's fees charged to prepare loan documents for the lender considered part of the charge for origination services disclosed on Block 1 of the GFE?

A: Yes, attorney's fees charged to prepare loan documents for the lender are considered part of the charge for origination services disclosed on Block 1 of the GFE and should not be separately itemized.

7) **Q:** Where would a loan originator's commitment fee be disclosed on the GFE?

A: Any fee charged by a loan originator for the commitment period, including a fee to extend the commitment period, is included in Block 1 of the GFE, "Our origination charge". "Our origination charge" includes processing, application, administration fees, underwriting, document preparation, wire, lender inspection, mortgage broker, loan handling and other loan originator miscellaneous fees.

GFE – Block 2

1) **Q:** How does a loan originator show a "no cost" loan on the GFE?

A: Where a "no cost" loan encompasses the loan origination charge and some or all third party fees, a credit should be listed in Block 2 of the GFE to offset all fees encompassed in the "no cost" loan resulting in a negative number in Block A to cover the intended third party fees, listed in Blocks 3 thru 11 as appropriate.

2) **Q:** I am a mortgage broker. If a lender is paying a yield spread premium through the loan, how do I show the charge for discount points on the GFE?

A: There may not be a credit for a yield spread premium and a charge for discount points in the same transaction. Only one box in GFE Block 2, "Your credit or charge for the specific interest rate chosen," may be checked.

3) **Q:** How is a fee paid by the borrower to temporarily buy down the interest rate disclosed on the GFE? For example: how is a 3-2-1 buy down, in which the interest rate is below the note rate by 3 points for the first year, 2 points for the second year and 1 point for the third year, disclosed on the GFE?

A: A temporary buy-down of the interest rate is a charge to the borrower for the interest rate chosen on the loan and as shown in Block 2 of the GFE. A lender could check either the first or the third box in Block 2 of the GFE. A mortgage broker must check the third box in Block 2 of the GFE. If entered in the third box, the charge for the buy-down is entered in the blank space for the charge, and, whether entered in either the first or third box, the initial interest rate should be entered in the blank space for the interest rate.

GFE – Block 3

1) **Q:** Where should a VA funding fee be disclosed on the GFE?
A: Fees specific to government loan programs, such as a VA Funding Fee, should be disclosed in Block 3, "Required services that we select."

2) **Q:** What services belong in Block 3, "Required services that we select"?
A: Block 3 of the GFE contains the charges for all third-party settlement services (except title services) for which the loan originator requires and selects the provider of the service. Examples of these charges for services generally include but are not limited to, appraisal, credit report, tax service, flood certification and up-front mortgage insurance premiums.

GFE – Block 4

1) **Q:** Where should the quote for the Lender's title insurance policy premium be disclosed on the GFE?
A: The Lender's title insurance premium is part of Block 4, "Title services and lender's title insurance" on the GFE, along with any fees for title searches, examinations, endorsements and all charges associated with the title services and settlement (closing) agent services.

2) **Q:** Are delivery fees included in "Title services" and therefore included in Block 4 of the GFE?
A: Yes, delivery fees are included in the definition of "title services" and are included in the charge shown in Block 4 of the GFE.

3) **Q:** Are notary fees included in "Title services" and therefore included in GFE Block 4?
A: Yes, notary fees are included in the definition of "title services" and are included in the charge shown in Block 4 of the GFE.

4) **Q:** Does "title services" include the settlement fee?
A: Yes, "Title services" is defined to include the service of conducting a settlement. See 24 CFR § 3500.2.

5) **Q:** How is the charge for conducting the settlement disclosed on the GFE?
A: The charge to the borrower for conducting the settlement must be included in the total of the charges in Block 4 for "Title services and lender's title insurance".

6) **Q:** Where do I put the charge for the title commitment on the GFE?
A: The term "title services" is defined to include any service involved in the preparation and issuance of the title insurance policies. See 24 CFR § 3500.2. On the GFE, the charge for title services is part of the total charge in Block 4 of the GFE.

7) **Q:** If it is common practice in the locality to charge both the seller and the borrower a separate charge for the service for conducting the settlement, how should the charges for that service be disclosed on the GFE?

A: The charge to the borrower for conducting the settlement must be included in the total for Block 4 of the GFE. Charges that the seller pays as a matter of common practice and experience are not disclosed on the GFE.

GFE – Block 5

1) **Q:** Do loan originators have to provide a price for Owner's title insurance on the GFE?

A: Loan originators must provide an estimate of the charge for an Owner's title insurance policy in Block 5, "Owner's title insurance" on the GFE on all purchase transactions. For non-purchase transactions, the loan originator may enter "NA" or "Not Applicable" in this Block.

2) **Q:** If a seller typically pays for the Block 5, "Owner's title insurance", does the charge still have to be shown on the GFE?

A: Yes, an estimate of the cost must be shown in Block 5, "Owner's title insurance" for all purchase transactions regardless of who is selecting or paying for it.

3) **Q:** If a borrower was quoted a basic owner's title insurance policy, but requests an enhanced owner's title insurance policy or an endorsement to the owner's title insurance policy, should the loan originator issue a revised GFE?

A: If the borrower requests an enhanced owner's title insurance policy or an endorsement to an owner's title insurance policy after the loan originator issues the GFE, the loan originator may choose to treat such a request by the borrower as a changed circumstance. The loan originator may then choose to provide a revised GFE to the borrower to disclose the increased charges. If the increased charges do not exceed tolerances, the loan originator may opt not to issue a revised GFE.

4) **Q:** Should the loan originator quote the charge for a basic owner's title insurance policy or an enhanced owner's title insurance policy on the GFE?

A: The GFE is a disclosure of charges the borrower is likely to incur in connection with the settlement. The loan originator should quote the rate for a basic owner's title insurance policy. If the borrower chooses an enhanced owner's title insurance policy before the loan originator issues the GFE, the loan originator should quote the rate for an enhanced owner's title insurance policy.

GFE – Block 11

1) **Q:** What types of insurance are included on the GFE, Block 11, "Homeowner's insurance"?

A: Block 11 of the GFE contains estimates for premiums for all types of insurance (other than title insurance) that must be purchased to meet the loan originator's requirements to protect the property from loss, such as hazard insurance (homeowner's insurance), flood insurance, and earthquake insurance.

2) **Q:** Where should the charge for flood insurance go on the new GFE?

A: Flood insurance is a type of insurance that would protect the property from loss. The charge for flood insurance should be itemized in Block 11 on the GFE and included in the Block 11 total.

GFE – Page 3

GFE – Tradeoff table

1) **Q:** Are loan originators required to complete the Tradeoff table?

A: The loan originator must complete the left-hand column ("The loan in this GFE") of the Tradeoff table with the information pertaining to the loan as shown on page 1 of the GFE. The loan originator, at its option, may also complete the remaining sections in the Tradeoff table with the same information showing an alternate loan with a higher interest rate and one with a lower interest rate, if the loan originator has those loans available and would issue a GFE based on the same information provided by the applicant. The alternative loans must use the same loan amount and be identical to the loan in the GFE except for the interest rate and closing costs.

2) **Q:** If a loan originator offers an adjustable interest rate (ARM) loan in which interest rate related charges may also be used to affect the margin of the loan; will the loan originator be prohibited from using the tradeoff table because of the different margin?

A: The loan originator is required to complete only the left hand column on the tradeoff table, with information respective to the loan terms and settlement charges contained on the GFE. If the loan originator chooses to complete the remaining columns in the tradeoff table, the alternative loans must use the same loan amount and must be otherwise identical to the loan offered, including the margin.

<u>Reverse Mortgages</u>

1) Q: Reverse mortgages do not have a "loan amount." Rather there is an initial principal limit. In the loan summary section on the GFE and on page 3 of the HUD-1, what is considered the initial loan amount on a reverse mortgage?

A: The initial loan amount on a reverse mortgage is the initial principal limit.

2) Q: Reverse mortgages do not have a "loan amount"; rather there is an initial principal limit. What is considered the loan amount for purposes of Line 202 on page 1 of the HUD-1?

A: The initial principal limit is considered to be the loan amount for purposes of completing Line 202 on page 1 of the HUD-1 and should be listed outside of the borrower's

column. If there is an initial draw, the description of the initial draw may be listed on a blank line in Lines 204- 209 with the amount in the borrower's column.

The example below illustrates how this answer would appear:

202. Principal amount of new loan(s) $120,000.00	
203. Existing loan(s) taken subject to	
204. Initial draw	$32,000.00

3) Q: In a reverse mortgage, the loan becomes due upon the occurrence of a specified event, such as the death of the borrower or the borrower no longer occupying the property for a certain period of time. What should be entered on the GFE and HUD-1/1A forms for the loan term?

A: If the loan term is conditioned upon a specific event in the future and the timing of that event is not known at the time the GFE is issued and the HUD-1 is prepared, (e.g. a reverse mortgage), the loan originator may enter "Not Applicable" or "N/A" for the loan term.

4) Q: Typically, there are no payments due on a reverse mortgage until the termination event occurs and the entire amount becomes due. What should reverse mortgage lenders fill in for "Your initial monthly amount owed for principal, interest, and any mortgage insurance is _____"?

A: If no loan payment for principal, interest or mortgage insurance is due for a reverse mortgage until a termination event occurs, the loan originator may enter either "Not Applicable" or "N/A" for the initial monthly payment in the appropriate spaces on the GFE and the HUD-1.

5) Q: In a reverse mortgage, how should the loan originator complete the answer to the question, "Even if you make payments on time, can your loan balance rise?"

A: In a typical reverse mortgage the loan balance will rise through accrued interest and future disbursements, if any, to the borrower. In these types of loans the box checked must indicate that the loan balance could rise. However, the maximum to which the loan balance can rise is not typically known with a reverse mortgage, and this maximum may be reported as "Unknown".

The example below illustrates how this answer would appear:

Even if you make payments on time, can your loan balance rise?	☐ No ☒ Yes, it can rise to a maximum of $ Unknown

6) Q: In a reverse mortgage, how should the loan originator complete the answer to the question on the GFE, "Even if you make payments on time, can your monthly amount owed for principal, interest, and any mortgage insurance rise?"

A: If no loan payment is due for principal, interest and mortgage insurance until a termination event occurs on a reverse mortgage, the loan originator may check the box "No" as the answer to the question, "Even if you make payments on time, can your monthly amount owed for principal, interest, and any mortgage insurance rise?" on the GFE.

7) Q: In a reverse mortgage, the loan is typically repaid after a termination event occurs and is repaid in one payment. Does the repayment of a reverse mortgage constitute a balloon payment for purposes of answering the question, "Does your loan have a balloon payment?" in the "Summary of your loan terms" on the GFE?

A: No, the repayment of a reverse mortgage, if the payment is due solely because a termination event occurred, is not considered a balloon payment for purposes of the GFE and HUD-1 disclosure.

8) Q: If a governmental loan program requires a borrower to select an "approved" service provider, such as a HUD approved housing counselor, should the service be disclosed in Block 3 or Block 6 on the GFE?

A: Even if a governmental loan program requires a borrower to select from only "approved" service providers (such as HUD approved housing counselors) the service must be disclosed in Block 6 on the GFE. If the loan originator selects a particular settlement service provider, the service must be disclosed in Block 3.

(Please note that the answer above also applies to other loan programs, see GFE – Page 2, #1.)

9) Q: If the lender will establish an arrangement whereby the lender/servicer will pay items such as property taxes or homeowner's insurance from a portion of the principal limit on a reverse mortgage, should the loan originator check the "Yes, you have an escrow account. It may or may not cover all of these charges. Ask us." in the escrow account information section on page 1 of the GFE?

A: Yes. If the lender will establish an arrangement whereby the lender/servicer will pay items such as property taxes or homeowner's insurance from a portion of the principal limit on a reverse mortgage, the loan originator should check "Yes, you have an escrow account. It may or may not cover all of these charges. Ask us." in the escrow account information section on page 1 of the GFE.

The example below illustrates how this answer would appear:

Some lenders require an escrow account to hold funds for paying property taxes or other property-related charges in addition to your monthly amount owed of $ "N/A" .
Do we require you to have an escrow account for your loan?
☐ No, you do not have an escrow account. You must pay these charges directly when due.
☒ Yes, you have an escrow account. It may or may not cover all of these charges. Ask us.

10) Q: For a reverse mortgage, should the loan originator complete the GFE with the initial interest rate to be contained in the Note or the expected rate in the "Important dates" section on page 1 of the GFE, "The interest rate for this GFE is available through _____. After this time, the interest rate, some of your loan Origination Charges and the monthly payment shown below can change until you lock your interest rate."?

A: The loan originator should disclose the initial interest rate to be contained in the Note in the "Important dates" section on page 1 of the GFE, "The interest rate for this GFE is available through _____. After this time, the interest rate, some of your loan Origination Charges and the monthly payment shown below can change until you lock your interest rate."

11) Q: For a reverse mortgage in which there is no monthly payment anticipated, how should the statement, "Your initial monthly amount owed for principal, interest and any mortgage insurance is," on the "Loan terms" section on page 3 of the HUD-1?

A: If no loan payment is due for principal, interest and mortgage insurance until a termination event occurs on a reverse mortgage, the initial monthly amount owed in the "Loan terms" section on page 3 of the HUD-1 should be completed with "Not Applicable" or "N/A" for the statement "Your initial monthly amount owed for principal, interest and any mortgage insurance is," and the boxes for principal, interest and mortgage insurance should not be checked.

The example below illustrates how this answer would appear:

Your initial monthly amount owed for principal, interest, and any mortgage insurance is	$ "N/A" includes ☐ Principal ☐ Interest ☐ Mortgage Insurance

12) Q: How should the "Total monthly amount owed including escrow payments" section on page 3 of the HUD-1 be completed for a reverse mortgage in which the lender or servicer will pay items such as property taxes or homeowner's insurance from a portion of the principal limit?

A: In a reverse mortgage where the lender has established an arrangement that will pay for items such as property taxes or homeowner's insurance through draws from the principal limit, the second box in the "Total monthly amount owed including escrow payments" section on page 3 of the HUD-1 must be checked. The blank following the first $ sign must be completed with "0" and an asterisk, and all items the draw will be used for, such as property taxes, must also be checked. An asterisk must also be placed under the statement, "Total monthly amount owed including escrow account payments," with a description such as, "Paid by or through draws from the principal limit."

The example below illustrates how this answer would appear:

Total monthly amount owed including escrow account payments * Paid by or through draws from the principal limit	☐ You do not have a monthly escrow payment for items, such as property taxes and homeowner's insurance. You must pay these items directly yourself. ☒ You have an additional monthly escrow payment of $ 0 * that results in a total initial monthly amount owed of $ 0 . This includes principal, interest, any mortagage insurance and any items checked below: ☒ Property taxes ☒ Homeowner's insurance ☐ Flood insurance ☐ ☐ ☐

Average Charge

1) **Q:** What services can be estimated and charged using an average charge?

A: Third party charges for services that are not based on the property value or loan amount may be estimated, charged, and reported using an average charge. These third party charges are permitted for services that include but are not limited to: appraisals, credit reports, flood certificates, tax service, and recording documents (such as charges by a locality on a per page basis).

Average charges may not be used for items such as transfer taxes, interest charges, escrow reserves and insurances (including title insurance).

2) **Q:** How long does the settlement service provider have to keep documentation on how it calculated an average charge?

A: A settlement service provider must keep documentation used to calculate an average charge for at least three years after any settlement for which that average charge was used.

3) **Q:** What if the use of an average charge is not permitted under state law?

A: The use of an average charge is optional. HUD's average charge provision does not preempt state law. If a state in which a settlement service provider does business prohibits average charges, the settlement service provider may not use an average charge in that state.

4) **Q:** How is an average charge calculated?

A: The settlement service provider using an average charge must define a specific class of transactions for a specific time period (not less than 30 calendar days, nor more than 6 months), for a specific geographical area, and for a specific loan type. The average charge is based on a calculation of the average amount paid for the settlement service for the particular class of transaction. HUD does not prescribe a particular method for calculating the average charge, but it must be determined in such a way that the total amounts paid by borrowers and sellers through use of an average charge will not exceed the total amounts paid to the applicable settlement service providers in the particular class of transactions.

5) **Q:** If in using the average charge method of calculating and disclosing settlement charges, a settlement service provider charges borrowers and sellers (in the aggregate) too much for the settlement service, does the excess amount need to be refunded or is it permissible for the provider to keep the excess amount?

A: The excess amount does not have to be refunded, but it is not permissible to retain the excess amount. The excess may be applied to the next average charge period, for example. When such a procedure is followed, the average charge applied for the subsequent class of transactions must be adjusted, so that the sum of the previous excess amount and the total amount paid by the borrowers and sellers in the subsequent class does not exceed the total amount paid to the applicable settlement service providers.

6) **Q:** If the charge for a settlement service is calculated using average charge, may the charge be waived or discounted?

A: Yes. The regulations prohibit charging *more* than the calculated average charge, but discounting or waiving a charge to a borrower is permitted.

7) **Q:** If a settlement service charge for a particular class is calculated using an average charge, may the average charge amount vary?

A: The average charge amount across a defined class of transactions may not increase from the calculated average charge for the predetermined time period. Discounts to the borrower are permitted.

8) **Q:** Are bona fide and reasonable charges under Regulation Z necessarily an 'average charge' that complies with RESPA's specific restrictions on average charges? Are 'average charges' under RESPA necessarily bona fide and reasonable under Regulation Z?

A: The use of average charges under RESPA is governed by 24 CFR 3500.8(b)(2). HUD cannot interpret regulations promulgated by another federal agency such as Regulation Z (12 CFR part 226). Please refer to the Board of Governors of the Federal Reserve System for interpretations of Regulation Z.

Section 4 and 5 – Right to cure and tolerance violations

1) **Q:** If there is an inadvertent or technical error on the HUD-1, is this considered a violation of Section 4 of RESPA?

A: As long as a revised HUD-1 is provided to all parties within 30 calendar days after settlement, it would not be considered a violation of RESPA Section 4.

2) **Q:** Who is responsible for any tolerance violation?

A: The lender is responsible for curing tolerance violations.

3) **Q:** Does the settlement agent have to stop the closing if a tolerance would be violated?

A: No, the settlement agent does not need to stop the closing. While HUD recommends that the lender cure the tolerance violation at closing, the lender has 30 calendar days to cure.

4) **Q:** If a charge on the HUD-1 is less than the charge on the GFE, is this a tolerance violation?

A: No. It is permissible for charges to the borrower to decrease. This is not considered a violation.

5) **Q:** What happens if the charges are not properly calculated on the GFE and later result in a tolerance violation? Will the settlement agent be responsible for paying the difference to the consumer?

A: The lender is responsible for curing all tolerance violations; not the settlement agent. The lender must cure the violation at closing or within 30 days after settlement.

6) **Q:** If a loan originator pressures a settlement agent to reduce their charges or to 'cover the difference' to bring the costs into compliance with the tolerances, is that considered a violation of RESPA Section 8(a)?

A: If a loan originator (or other settlement service provider) pressures a settlement agent (or other settlement service provider) to reduce their charges or otherwise 'cover the difference' to bring the costs into compliance with the tolerances as a condition of receiving future referrals of business, it may be considered a potential violation of RESPA Section 8(a). Please contact the Office of RESPA and ILS to file a complaint.

7) **Q:** If the lender does not cure a tolerance violation at closing but does cure the violation within the 30-day right-to-cure period, who sends the borrower the reimbursement? Who prepares the revised HUD-1?

A: The lender is responsible for making the reimbursement, but either the lender or a third party authorized by the lender (including the settlement agent) may send the reimbursement to the borrower. RESPA and § 3500.8 of HUD's regulations require the settlement agent (person conducting the settlement) to complete the HUD-1 Settlement Statement. Therefore, a HUD-1 that is revised to adjust charges, such as to cure a tolerance violation, is also completed by the settlement agent.

8) **Q:** If the lender refunds money to a borrower to correct a tolerance violation and does not inform the settlement agent, has the settlement agent violated Section 4 of RESPA by not providing a revised HUD-1?

A: If the lender does not inform the settlement agent of the changes, the settlement agent is not in violation of Section 4 of RESPA for not providing an accurate HUD-1. The lender is responsible for informing the settlement agent of any changes that would necessitate a revised HUD-1 because the lender is responsible for transmitting to the settlement agent all information necessary to provide an accurate HUD-1. After the lender informs the settlement agent of changes, the settlement agent must correct the HUD-1 and provide copies of the corrected HUD-1 to the borrower, seller, and lender, as applicable.

9) **Q:** How is a potential tolerance violation that is corrected by the lender shown on the HUD-1?

A: The settlement agent must prepare a revised HUD-1 that states the actual charges paid by the borrower and seller. If the lender pays for a portion of a charge to cure a potential tolerance violation, the amounts for the charge shown on pages 2 and 3 of the HUD-1 must be corrected to show the actual amount charged to the borrower. The settlement agent should include on a blank line in the applicable series a notation that the lender has made a P.O.C. payment of a specified amount to correct a potential tolerance violation. After the revised HUD-1 has been prepared by the settlement agent, the settlement agent must provide the revised HUD-1 to the borrower, the lender, and the seller as appropriate.

The example below illustrates how a cure for $200.00 of transfer tax charges should be listed:

1200. Government Recording and Transfer Charges					
1201. Government recording charges			(from GFE #7)		
1202. Deed $	Mortgage $	Release $			
1203. Transfer taxes			(from GFE #8)	$800.00	
1204. City/County tax/stamps	Deed $ 1000.00	Mortgage $			
1205. State tax/stamps	Deed $	Mortgage $			
1206. Transfer taxes	$200 P.O.C (lender) to meet tolerance				

10) **Q:** Is the tolerance threshold for HUD-1 Lines 801, 802 and 803 separate or is the tolerance threshold the aggregate of the three lines?

A: HUD-1 Lines 801, 802 and 803 each have a separate tolerance threshold.

HUD-1

HUD-1 – General

1) **Q:** How are courier and overnight delivery fees shown on the HUD-1 Settlement Statement?

A: Courier and overnight delivery fees are considered to be fees for administrative or processing services. They are part of a primary service, such as the origination service or title service, and may not be separately itemized.

2) **Q:** Does voluntarily using the HUD-1 in a transaction that otherwise is not subject to RESPA result in RESPA applying to the transaction?

A: No, using the HUD-1 form does not subject a transaction to coverage under RESPA.

3) **Q:** Does "conducting a settlement" (from the definition of "title service") have the same meaning as "conducting the closing"?

A: Yes. The terms "conducting a settlement" and "conducting the closing" have the same meaning under HUD's RESPA regulations and are subject to identical requirements under the regulations.

4) **Q:** May separate HUD-1s be given to the seller and the borrower with only their own information on each HUD-1?

A: Yes. It is permissible to have two separate HUD-1s in a transaction; one with the buyer's credits and charges only, and one with the seller's credits and charges only. The settlement agent must provide the lender with a copy of both HUD-1s when the borrower's and the seller's copies differ.

5) **Q:** If an addendum is used, can the following text be added to the HUD-1: "See attached addendum for additional information."?

A: It is acceptable to insert such a reference where appropriate on the HUD-1 for the purpose of making it clear to the parties what the complete HUD-1 comprises.

6) **Q:** How should payments by the seller or real estate agent that are for settlement services included on the GFE be shown on the HUD-1?

A: If a seller or real estate agent pays for a charge that was included on the GFE, the charges should be listed in the borrower's column, with an offsetting credit reported in Lines 204-209 of the HUD-1, identifying the party paying the charge. For a seller-paid charge, the charge should also be listed in Lines 506-509. For a charge paid by the real estate agent, the name of the person paying the charge must also be listed.

7) **Q:** The instructions in Appendix A to Part 3500 for completing the HUD-1 indicate how fees that are paid outside of closing should be designated on the HUD-1. Can the convention "P.O.C. (B*)" be used instead, with the following footnote at the bottom of the page: "*Paid outside of closing by borrower"?

A: Yes, the HUD-1 Instructions require that P.O.C. items be listed on the HUD-1 by the settlement agent with an indication whether P.O.C. items are paid by the borrower, seller, or other party by marking the items paid for by whoever made the payment identified in parentheses, such as P.O.C. (borrower) or P.O.C. (seller). P.O.C. (B*) may also represent P.O.C. (borrower) and P.O.C. (S*) may also represent P.O.C. (seller) as long as a footnote is added to the HUD-1 clearly noting the party paying for the item such as *Paid outside of closing by borrower or *Paid outside of closing by seller.

8) **Q:** Where should fees for processing and administrative services be listed on the HUD-1 Settlement Statement?

A: Processing and administrative services are services to perform origination and title services functions. For the loan origination function, charges for such services are included in the total on Line 801. For the title services function, charges for such services must be included in the title underwriter's or title agent's charge and are shown in the total on Line 1101. Examples of processing and administrative services include, but are not limited to, the following: document delivery, document preparation, copying, wiring, preparing endorsements, document handling, and notarization.

9) **Q:** Where should the survey fee be disclosed on the HUD-1?

A: The location of the survey fee on the HUD-1 is determined as follows:

(a) if the loan originator required a survey as a condition of the loan and selected the settlement service provider, the charge for the survey must be listed on a blank line in the 800 series in the borrower's column;

(b) if the loan originator required a survey as a condition of the loan and the borrower selected the settlement service provider, the charge for the survey must be listed as part of the total in Line 1301 of the HUD-1 and itemized as applicable;

(c) if a survey was required to issue a lender's or owner's title insurance policy, the charge for the survey is part of the charge in Line 1101 and must be further itemized if performed by a third party;

(d) if the borrower elected to obtain a survey that was neither required by the loan originator nor required to issue a lender's or owner's title insurance policy, then the charge is listed in the borrower's column on a blank line in the 1300 series.

10) **Q:** May an addendum be added to the HUD-1 to list additional fees and other information?

A: Yes, an additional page may be attached to the HUD-1 to add sequentially numbered lines as needed to accommodate the complete listing of all items required to be shown on the HUD-1, and for the purpose of including customary recitals and information used locally in real estate settlements (for example, breakdown of payoff figures, a breakdown of borrower's total monthly mortgage payments, check disbursements, a statement indicating receipt of funds, applicable special stipulations between buyer and seller, and the date funds are transferred).

11) **Q:** The General Instructions indicate that if a charge has been shown on the GFE as payable by the borrower but at closing it is paid by another person, including by the loan originator in a loan other than a no-cost loan, the fee should be shown in the borrower's column on the HUD-1 and be offset by listing a credit to the borrower on lines 204-209 of the HUD-1. If a HUD-1A form is being used, lines 204-209 do not exist. How should the credit be shown on a HUD-1A form?

A: Use of the HUD-1A form is an optional form to be used by the settlement agent in a transaction in which there is not a seller and as otherwise appropriate. If the use of a HUD-1A form is not appropriate, such as if there is a credit given by a loan originator or other party, the settlement agent must use the HUD-1 form.

12) **Q:** In a transaction that is closed in the mortgage broker's name but is table funded by the lender, must the name and address of the funding lender be shown in Section F (consistent with definition of "lender" under 24 CFR § 3500.2(b)) or may the mortgage broker's name and address be shown?

A: The HUD-1 Instructions for Section F state that the name and address of the lender must be stated in this section. Therefore the name of the lender and not the mortgage broker must be stated in Section F on the HUD-1.

13) **Q:** What does the HUD-1 Instructions in Appendix A refer to when it states "these instructions"?

A: They refer to the instructions for completing the HUD-1 found in Appendix A pursuant to the Regulations at 24 CFR § 3500.8.

14) **Q:** What do the initials "RHS" stand for on page 1 of the HUD-1, B. Type of Loan, number 2?

A: The initials "RHS" on page 1 of the HUD-1, B. Type of Loan, number 2 stands for Rural Housing Service.

HUD-1 – Page 1

HUD-1 – Seller-paid items

1) **Q:** What if at closing the seller is paying for a settlement service that was listed on the GFE, such as the Owner's title insurance policy? How is this shown on the HUD-1?

A: If the seller is paying for a service that was on the GFE, such as Owner's title insurance, the charge remains in the borrower's column on the HUD-1. A credit from the seller to the borrower to offset the charge should be listed on the first page of the HUD-1 in Lines 204-209 and Lines 506-509 respectively.

2) **Q:** If the seller has agreed to pay charges that were disclosed on the borrower's GFE, how are these charges listed on the HUD-1?

A: The charge for any service which is disclosed on the borrower's GFE is listed in the borrower's column on the HUD-1. The amount charged to the borrower is offset by a credit in

that amount in Lines 204-209 and by a charge to the seller in that amount in Lines 506-509 on page 1 of the HUD-1.

HUD-1 – 200 series

1) **Q:** When the borrower is using a second loan to help finance the purchase of a home, may both loans go on one HUD-1?

A: No, each loan must have a separate GFE and a separate HUD-1. The principal amount of the second loan must be listed outside the borrower's column with a brief explanation on Line 204-209 of the HUD-1 for the primary loan. If the net proceeds of the second loan are less than the principal amount, the net proceeds may be listed on the same line in the borrower's column.

The example below illustrates how the fields in this question may be completed.

204. Second loan (principal balance $30,000)	$29, 400.00

2) **Q:** What types of loans can be shown in Line 202 of the HUD-1?

A: Line 202 of the HUD-1 is used to state the amount of the loan in the mortgage transaction. The loan could be a purchase money loan, refinance, home equity loan, construction loan, or a manufactured home purchase loan.

3) **Q:** Where should the transferred escrow balance in a refinance transaction be listed on the HUD-1?

A: The transferred escrow balance should be listed as a credit in lines 204-209 of the HUD-1.

HUD-1 – Page 2

1) **Q:** On which lines of page 2 of the HUD-1 is a person *not* required to be identified?

A: The general rule is that the names of all persons that received payment for each separately identified settlement service must be identified on page 2 of the HUD-1. There is not a requirement to identify persons on the following lines: 801, 802, 803, 901, the 1000 series, 1101, 1105, 1106, 1201, 1202, 1203, 1204, 1205 and 1301.

HUD-1 – 700 series

1) **Q:** Where do I put the percentage of commission to the real estate agents on the HUD-1?

A: The percentage used to compute the sales commission has been removed from the HUD-1 to better reflect current practices in the real estate industry. The total amount of the commission to each real estate broker or agent must be shown on Lines 701 and 702. The amount of the commissions disbursed at settlement must be shown inside the columns on Line 703.

2) **Q:** If a real estate agent is retaining some of the borrower's earnest money deposit as part of the agent's commission, is that amount listed in the 700-series on the HUD-1?

A: Yes, if a real estate agent is holding the borrower's earnest money deposit, the amount of the earnest money deposit applied towards the commission and the party holding the earnest money must be identified on Line 704 of the HUD-1 as Paid Outside of Closing or P.O.C. Only the amount of the commission disbursed at settlement is entered in the columns on Line 703.

HUD-1 – 800 series

1) **Q:** What charges are included in "Our origination charge" on Line 801 of the HUD-1?

A: Line 801 includes all charges received by a loan originator, except for any additional charge ("points") for the interest rate chosen on the loan. The amount on Line 801 also includes all amounts received for any service, including administrative and processing services, performed by or on behalf of the lender or any mortgage broker. (The amount on Line 801 is not listed in the columns.)

2) **Q:** If an attorney prepares loan documents for a lender, where does that charge go on the HUD-1?

A: Loan document preparation done on behalf of the loan originator is a processing and administrative service in the origination of a loan and is included in the charge on Line 801 of the HUD-1, and may not be separately itemized. See 24 CFR § 3500.8(b)(1).

3) **Q:** How does a settlement agent show a "no cost" loan on the HUD-1?

A: In the case of "no cost" loans where "no cost" refers only to the loan originator's fees, a credit equal to the amount shown in Line 801 on the HUD-1 must be given in Line 802 of the HUD-1 so that the adjusted origination charge in Line 803 of the HUD-1 equals zero. In the case of "no cost" loans where "no cost" encompasses some or all third party fees and the origination charge, a credit should be listed in Line 802 of the HUD-1 to offset all fees encompassed in the "no cost" loan, resulting in a negative number for the adjusted origination charge on Line 803 of the HUD-1. The third party services covered by this offset must be itemized and listed in the borrower's column.

4) **Q:** If a borrower pays some of the origination charge prior to closing, how should it be disclosed on the HUD-1?

A: The full charge for origination, except for any charge for the specific interest rate chosen (points), must be shown on Line 801 of the HUD-1 to the left of the borrower's column. If the borrower pays some of the origination charge before settlement, an offsetting credit in that amount is shown on the first page of the HUD-1 in Lines 204 – 209. Lines 801, 802, and 803 of the HUD-1 may not contain any "Paid Outside of Closing" (P.O.C.) items.

5) **Q:** How is a payment from the lender to the mortgage broker that will be "paid outside of closing" (P.O.C.) shown on the GFE and HUD-1?

A: All payments from a lender to a mortgage broker must be shown as a credit to the borrower in Block 2 of the GFE and on Line 802 of the HUD-1. These payments may not be shown as P.O.C.

6) **Q:** What fees are to be recorded in the 800 series of the HUD-1, beginning on Line 804?

A: When the loan originator selects the settlement service provider, fees for third party settlement services that are required by the loan originator are recorded in the 800 series beginning on Line 804. These third party services and fees most often include appraisals, credit reports, flood searches, tax service, and governmental loan program charges, such as VA, FHA, Rural Housing Service, or state bond loan programs. Processing or administrative services are part of "Our origination charge" and may not be separately itemized. The HUD-1 Instructions for the 800 series explain which fees go on which lines.

7) **Q:** If state law requires further itemization of loan originator fees such as a commitment or underwriting fee, how should these fees be listed on the HUD-1?

A: If state law requires further itemization of loan originator fees than required under RESPA, those fees may be treated as other required disclosures and itemized on Line 808 and additional lines in the 800 series on the HUD-1 with the charge listed outside the borrower's column.

8) **Q:** If the loan originator performs loan origination services typically performed by a third-party for the appraisal, credit report and/or flood certificate, are the charges for these services listed in Lines 804 thru 807 or are the charges included in the loan originator's charge in Line 801 on the HUD-1?

A: Charges for the appraisal, credit report and/or flood certificate performed by the loan originator in a transaction must be included in the loan originator's charge listed in Line 801 on the HUD-1.

9) **Q:** Is the charge for the Mortgage Electronic Registration System (MERS) registration fee a charge that may be separately itemized in the 800 series on the HUD-1?

A: No, the charge for the MERS registration is considered to be part of the charge for origination service and may not be separately itemized on the HUD-1.

10) **Q:** The Internal Revenue Service (IRS) requires that reportable points be clearly designated on the HUD-1 Settlement Statement for purposes of preparing IRS Form 1098. As Line 801 on the HUD-1 discloses the total of all loan originator fees as well as the origination point(s), how can the origination point(s) be designated?

A: A loan originator may designate any origination point paid on page 2 of the HUD-1 in Line 801. The designation should follow "Our Origination Charge" either by adding the language "Includes Origination Point" (_% or $__) or by placing an asterisk (*) and adding the language at the bottom of the page.

800. Items Payable in Connection with Loan			
801. Our origination charge	(Includes Origination Point 1% or $1,000)	$ 2,500.00	(from GFE #1)

OR

800. Items Payable in Connection with Loan		
801. Our origination charge **	$	(from GFE #1)

1400. Total Settlement Charges (enter on lines 103, Section J and 502, Section K)
** Includes Origination Point (1% or $1,000)

HUD-1 – 900 series

1) **Q:** Where is the charge for flood insurance shown on the HUD-1? What if the borrower pays it prior to settlement?

A: Flood insurance should be disclosed on Line 904 of the HUD-1 with the charge in the borrower's column. If the borrower pays the insurance prior to closing, the item should be shown on Line 904 of the HUD-1 noted as "Paid Outside of Closing" or P.O.C. with the charge to the left of the column.

2) **Q:** On some loans a borrower will make a full regular payment within less than a month and receive an interest credit at closing. May the interest credit, instead of the collection of interim interest, be listed in Line 901 on the HUD-1?

A: Yes, an interest credit may be listed (as a negative number) in Line 901 on the HUD-1.

HUD-1 – 1000 series

1) **Q:** Does Line 1001 reflect the total of all other lines in the 1000 series?

A: Yes, Line 1001 is the total of all escrow items contained in the 1000 series of the HUD-1.

2) **Q:** May additional lines be added to the 1000 series on the HUD-1?

A: Yes, additional lines may be added to the 1000 series if needed. If lines are added, Line 1007, Aggregate Adjustment, must be moved down (and renumbered accordingly) so that it remains the last line item in the series.

3) **Q:** If a geographical area has more than one type of property tax, such as County and City property taxes, should each property tax be separately listed on the HUD-1 or may they be grouped together in Line 1004 on the HUD-1?

A: The total amount of all property taxes held in an escrow or reserve account may be listed in Line 1004 on the HUD-1. Further itemization of the property taxes held in reserve is not required.

HUD-1 – 1100 series

1) **Q:** What are title services?

A: The term "title services" includes:

1. Any service involved in the provision of title insurance, including but not limited to:

   - title examination and evaluation
   - preparation and issuance of commitment
   - clearance of underwriting objections
   - preparation and issuance of policies
   - all processing and administrative services required to perform these functions (e.g. document delivery, preparation and copying, wiring, endorsements, and notary); and

2. The service of conducting a settlement.

2) **Q:** Where should the settlement agent list the commitment fee, wire fee and other miscellaneous title fees on the HUD-1?

A: The commitment fee, wire fee, and other miscellaneous fees are included as processing and administrative fees that are part of the definition of "title services." All of these types of fees must be included in the charges shown on Line 1101 of the HUD-1, and are not to be itemized separately.

3) **Q:** Are document preparation fees included in "title services" or would they appear as separate line item charge in the borrower's column?

A: Document preparation fees are part of administrative or processing fees which are included in the charge in Line 1101 of the HUD-1 and may not be separately itemized.

4) **Q:** Are delivery fees included in "Title services" and therefore included in Line 1101 of the HUD-1?

A: Yes, delivery fees are included in the definition of "title services" and are included in the charge shown in Line 1101 of the HUD-1.

5) **Q:** Are notary fees included in "Title services" and therefore included in Line 1101 of the HUD-1?

A: Yes, notary fees are included in the definition of "title services" and are included in the charge shown in Line 1101 of the HUD-1.

6) **Q:** What is the Lender's title policy limit on Line 1105 of the HUD-1?

A: The Lender's title policy limit, Line 1105 of the HUD-1, is the maximum dollar amount of coverage available under the policy.

7) **Q:** Where should the quote for the Lender's title insurance policy premium be disclosed on the HUD-1?

A: The Lender's title insurance premium is part of the charge shown on Line 1101, "Title services and lender's title insurance" on the HUD-1, along with any fees for title searches, examinations, endorsements and all charges associated with the title services and settlement (closing) agent services.

8) **Q:** Do the disclosures of the title agent's and the title underwriter's portions of the title insurance premium on Lines 1107 and 1108 of the HUD-1 Settlement Statement also contain the charges for the title policy endorsements?

A: Yes, disclosure of the agent's and the underwriter's portions of the title insurance premium on Lines 1107 and 1108 of the HUD-1 Settlement Statement also contains any charges for title policy endorsements that are retained by the title agent or title underwriter.

9) **Q:** If a title insurance underwriter is also the title agent, what should be shown on Lines 1107 and 1108 of the HUD-1?

A: If there is no premium split between the title underwriter and a separate title agent, all of the title insurance premium (including charges for endorsements) would be shown on Line 1108, and $0 would be shown on Line 1107.

10) **Q:** Where should the Lender's title insurance premium be disclosed on the HUD-1?

A: The amount of the premium for Lender's title insurance and related endorsements must be included in the total for title services and lender's title insurance on Line 1101 of the HUD-1. The charge for the Lender's title insurance policy and its related endorsements must also be itemized on Line 1104 with the charge to the left of the columns.

11) **Q:** If a borrower selects an attorney to represent the borrower's personal interests at settlement, where is this attorney's fee disclosed on the HUD-1?

A: If a borrower selects an attorney to represent the borrower's personal interests at settlement, and the service provided by that attorney is separate from the functions necessary to conduct the closing, provide title services or issue the lender's title insurance policy, this attorney's charge may be separately listed on a blank line in the 1100 series in the borrower's column along with the name of the attorney and the type of service provided. Accordingly, the amount of this attorney's fee should not be included in the charge listed on Line 1101.

12) **Q:** How is the premium recorded on the HUD-1 if the borrower purchases an enhanced owner's title insurance policy, rather than a basic policy?

A: Regardless of whether the borrower chooses to purchase a basic or an enhanced owner's title insurance policy, the premium must be listed in the borrower's column on Line 1103.

13) **Q:** If the title agent conducts the settlement, should the charge for conducting the settlement be included in Line 1101 of the HUD-1, with the itemized charge listed outside the column on Line 1102?

A: Yes, the charge for conducting the settlement must be included in the total on Line 1101. If the charge is paid to a third party, the charge must be itemized outside of the columns on Line 1102.

14) **Q:** Where do I put the charge for the title commitment on the HUD-1?

A: The term "title services" is defined to include any service involved in the preparation and issuance of the title commitment. See 24 CFR § 3500.2. On the HUD-1, the charge to the borrower for title services, including the charge for services related to the title commitment, must be included in the total in the borrower's column on Line 1101. If a third party prepares and issues the title commitment, the disbursement for this service also must be itemized outside the columns on a blank line in the 1100-series.

15) **Q:** What items are included in the amount disclosed on Line 1101 of the HUD-1?

A: Line 1101 is the total of the charges for "Title services and lender's title insurance," which includes: all charges for conducting a settlement (Line 1102); any premiums paid for lender's title insurance and its related endorsements (Line 1104); all charges for title searches and examinations; and charges for all other services itemized in the 1100 series if those services are included in the definition of "title service." The total on Line 1101 should *not* include the amount of any premium for owner's title insurance and its related endorsements, which must be listed in the columns on Line 1103.

16) **Q:** How is the charge for conducting the settlement disclosed on the HUD-1?

A: The charge to the borrower for conducting the settlement must be included in the total stated in the borrower's column on Line 1101 of the HUD-1. In addition, the total in the borrower's column on Line 1101 must include any amount for conducting the settlement that was paid by another person on behalf of the borrower. In such a case, an offsetting credit must be shown on page 1 of the HUD-1. If the seller paid the amount, a credit to the borrower in that amount must be listed in Lines 204-209, and a charge to the seller must be listed in Lines 506-509. If another person pays the amount an offsetting credit is reported in Lines 204-209, identifying the person paying the charge.

Any separate charge to a seller for conducting the settlement is listed in the seller's column in Line 1102. The borrower's charge for conducting the settlement should be itemized outside the borrower's column in Line 1102.

17) **Q:** If state law requires further itemization of title service or title insurance related fees such as a commitment fee or fees for endorsements to a title insurance policy, how should these fees be listed on the HUD-1?

A: If state law requires further itemization of title service or title insurance related fees than required under RESPA, those fees may be itemized on blank lines in the 1100 series on the HUD-1 with the charge listed outside the borrower's column. Endorsements to a title insurance policy may also be listed in Lines 1103 and 1104 as applicable, with the charge listed outside the borrower's column.

18) **Q:** Under the Truth In Lending Act, a settlement or closing fee is generally included in the finance charge, but if a settlement agent charges for a service that the lender does not require and as to which the lender retains no portion of the fee, the fee is not a finance charge. Should fees charged by a settlement agent for services that are not required by the lender or requested by the borrower be listed on Line 1101 and/or Line 1102 on the HUD-1, or separately itemized on a blank line?

A: "Title service" is defined to include "the service of conducting a settlement." If a settlement agent requires an additional service involved in the provision of title insurance, the charge for that service would be included with the total charge on Line 1101 on the HUD-1. If a fee for the additional service is not a processing or administrative service paid to a third party, it must be itemized outside the columns on a blank line in the 1100-series.

HUD cannot interpret regulations promulgated by another federal agency, such as Regulation Z (12 CFR part 226). Please refer to the Board of Governors of the Federal Reserve System for interpretations of Regulation Z.

19) **Q:** Is the amount listed in Line 1108 on the HUD-1 the amount the title underwriter receives as determined by state law?

A: The amount listed in Line 1108 on the HUD-1 discloses the title underwriter's portion of the total title insurance premium, Owner's and Lender's title insurance premium and their related endorsements. The manner in which this amount is determined has no bearing on the requirement of disclosure.

20) **Q:** Is the amount listed in Line 1107 on the HUD-1 the amount the title agent receives as determined by state law?

A: The amount listed in Line 1107 on the HUD-1 discloses the title agent's portion of the total title insurance premium, Owner's and Lender's title insurance premium and their related endorsements. The manner in which this amount is determined has no bearing on the requirement of disclosure.

21) **Q:** If the borrower is purchasing a Lender's and an Owner's title insurance policy in the same transaction and is receiving a simultaneous issue discount on the policies, is the discounted amount for the Lender's title insurance policy or the undiscounted rate for the Lender's title insurance policy listed in Line 1104 on the HUD-1?

A: The amount of the charge for the Lender's title insurance policy will vary according to state law and what is customary in a particular area. As the HUD-1 is used as a statement of

actual charges, in Line 1104, the settlement agent must record the actual charge the borrower will pay for the lender's title insurance premium and related endorsements.

22) **Q:** If a title agent is sharing a portion of the title insurance premium with an attorney, is the name of the attorney listed in Line 1107 on the HUD-1?

A: On Line 1107 the settlement agent must "record the amount of the total title insurance premium, including endorsements, *that is retained by the title agent*." If a portion of the title insurance premium will not be retained by the title agent, but will instead be paid to an attorney, then a blank line in the 1100-series should be used to itemize, outside the columns, the amount paid to the attorney, and to identify the attorney's name and type of service provided.

HUD-1 – 1200 series

1) **Q:** If there are additional government recording fees, such as to record a power of attorney or road maintenance agreement, are they included in Line 1201 of the HUD-1 or can they be charged separately?

A: Line 1201 is used to record the total government recording charges. Additional items the lender requires to be recorded, other than those already enumerated in Line 1202, must be itemized on Line 1206. The charges for these additional items must be stated outside the column.

2) **Q:** What items are included in the amount listed on Line 1201 of the HUD-1?

A: Line 1201 is the total of the government recording charges. Examples of such charges include but are not limited to state and local fees for recording the deed, mortgage, deed of trust, releases, and any other instrument or document recorded to preserve marketable title or to perfect the lender's security interest in the property.

3) **Q:** What items are included in the amount listed on Line 1203 of the HUD-1?

A: Line 1203, "Transfer taxes," is the total of state and local government fees imposed for mortgages and home sales.

4) **Q:** How can the transfer tax be properly disclosed on the HUD-1 in markets where settlement agents are allowed to purchase transfer tax stamps from the city/county/state in bulk for use in their various transactions and the settlement agent does not cut a check to the city/county/state out of each escrow or disbursement file?

A: Amounts for transfer taxes that are attributable to the transaction are listed in Lines 1203, 1204 and 1205 on the HUD-1. The name of the party that receives the payment for transfer taxes is not required to be identified in Lines 1203, 1204 and 1205 on the HUD-1.

5) **Q:** If it is typical that a seller, in a particular geographical area, pays a charge to record the deed, on what line should the charge be listed on the HUD-1?

A: In a particular geographical area, if it is typical that the seller pays a charge to record the deed, the charge to the seller must be listed in the seller's column on Line 1202 of the HUD-1. The charge to record the deed is also itemized to the left of the columns on Line 1202.

The example below illustrates how the lines in this question should be completed.

1200. Government Recording and Transfer Charges				
1201. Government recording charges		(from GFE #7)		
1202. Deed $ 40.00	Mortgage $	Release $		$40.00

HUD-1 – 1300 series

1) **Q:** What charges are shown in the 1300 series of the HUD-1 Settlement Statement?

A: The 1300 series of the HUD-1 Settlement Statement is used to record the charges for settlement services that are disclosed in Block 6 of the GFE as well as charges that are not disclosed on the GFE. Examples of some of these services may include charges for home inspections, radon inspections, and homeowner's warranty.

2) **Q:** What charges are shown on Line 1301 of the HUD-1?

A: Line 1301 is the total of all charges for third party settlement services that the loan originator required but for which the borrower was permitted to select the service provider. The charge on Line 1301 is shown in the borrower's column. All charges included in the total amount on Line 1301 must be separately itemized outside of the columns in Lines 1302 and subsequent lines, identifying the type of service, the name of the provider, and the amount of the charge.

3) **Q:** If the loan originator does not allow the borrower to shop for any required services, can the settlement agent begin the itemized list of additional miscellaneous settlement charges in the 1300 series on Line 1302?

A: Yes, if Line 1302 and additional sequentially numbered lines will not be needed to record required services that the borrower can shop for; the settlement agent may list the itemized miscellaneous settlement services on Line 1302.

4) **Q:** If a loan originator permits a borrower to shop for services typically listed in Block 3 on the GFE, such as tax service or flood certificate, where should the services be listed on the HUD-1?

A: If a loan originator permits a borrower to shop for services typically listed in Block 3 on the GFE, such as tax service or flood certificate, the services would instead be listed in Block 6 of the GFE. The total amount charged for these services is listed in the borrower's column in Line 1301, and the charges are itemized outside the columns in Line 1302 and following lines on the HUD-1.

HUD-1 – Page 3

1) **Q:** How do settlement agents get the information to prepare page 3 of the HUD-1? Do they have to search through all of the loan documents to get this information?

A: The lender is required to transmit the information necessary to complete the HUD-1. The instructions for completing the HUD-1 state that the lender must provide information to the settlement agent in a format that permits the settlement agent to simply enter the necessary information to complete the loan terms section on page 3 of the HUD-1 without having to refer to the loan documents.

2) **Q:** Is it a violation of the tolerance if some of the items in the 10% category in the Comparison Chart exceed 10%, but other items in the category do not exceed 10%?

A: The tolerance applies to the total of all charges shown in the category "Charges That in Total Cannot Increase More Than 10%." A tolerance violation of this category means that the total of all actual charges in this category exceed the total of all estimated charges in this category by more than 10%.

3) **Q:** How are items that were "paid outside of closing" (P.O.C.) shown in the Comparison Chart on page 3 of the HUD-1?

A: The HUD-1 column in the Comparison Chart must include any amounts shown on page 2 of the HUD-1 in the column as paid by the borrower, plus any amounts that are shown as P.O.C. by or on behalf of the borrower.

For example, if the borrower pays $300 towards required appraisal services, but the total charge for the appraisal is $500, then Line 804 on page 2 of the HUD-1 will show a P.O.C. amount of $300 outside the column and a charge of $200 in the borrower's column.

800. Items Payable in Connection with Loan			
801. Our origination charge	$	(from GFE #1)	
802. Your credit or charge (points) for the specific interest rate chosen	$	(from GFE #2)	
803. Your adjusted origination charges		(from GFE A)	
804. Appraisal fee to Appraisal Company	P.O.C. $300 (borrower)	(from GFE #3)	$200.00
805. Credit report to		(from GFE #3)	
806. Tax service to		(from GFE #3)	
807. Flood certification		(from GFE #3)	
808.			

The total amount of $500 would be shown in the "HUD-1" column ($300 P.O.C. + $200 at settlement) on a separate line in the comparison chart for charges that cannot increase more than 10 percent on page 3 of the HUD-1.

Charges That In Total Cannot Increase More Than 10%		Good Faith Estimate	HUD-1
Government recording charges	# 1201		
Appraisal fee	# 804	$500.00	$500.00
	#		
	#		

4) **Q:** Can cross-references to the applicable Blocks on the GFE be included for each charge itemized in the Comparison Chart on the third page of the HUD-1?

A: Cross-references to the GFE Block numbers should not be added to page 3 of the HUD-1. The appropriate HUD-1 line number is entered to the left of the columns, and this information will allow the borrower to trace the charge to page 2 of the HUD-1 and then to the GFE. The itemization of each charge in the Comparison Chart must also include a description of the service, such as "appraisal fee" or "credit report."

5) **Q:** May the yes/no check boxes be removed from the Loan Terms section on page 3 of the HUD-1?

A: No. The Loan Terms section is part of the HUD-1 form and may not be altered except for formatting, such as margins or shading, adding additional lines and other options. Please refer to 24 CFR § 3500.9 of HUD's regulations (in title 24 of the Code of Federal Regulations) for rules applicable to reproduction of the HUD-1.

6) **Q:** Is the settlement agent required to compare the "Loan Terms" section of the HUD-1 with the "Summary of your loan" section of the GFE?

A: Settlement agents are not required to compare the information contained in the GFE with the information transmitted by the lender to the settlement agent for the purpose of completing the Loan Terms section of the HUD-1. If the settlement agent becomes aware of inconsistencies between the information contained in the HUD-1 and the GFE, in the interest of all parties the discrepancy should be communicated to the lender.

7) **Q:** Does page 3 of the HUD-1 have to be given to the seller since it only contains borrower information?

A: No, Section 4 of RESPA does not require that parts of the HUD-1 that relate only to the borrower's transaction be furnished to the seller. It is permissible to have two separate HUD-1s in a transaction; one with the buyer's credits and charges only, and one with the seller's credits and charges only. Page 3 of the HUD-1 pertains only to charges to the borrower and loan information and is not required to be given to the seller.

8) **Q:** When completing the Comparison Chart on page 3 of the HUD-1, are all GFE Block 3 items ("Required services that we select") combined into one charge on one line, or should each of the items contained in GFE Block 3 be itemized separately?

A: Each item included in Block 3 on the borrower's GFE must be separately itemized in the "Charges That in Total Cannot Increase More Than 10%" section of the Comparison Chart on page 3 of the HUD-1.

9) **Q:** Why doesn't the "Loan Terms" section on page 3 of the HUD-1 duplicate the "Summary of your loan" section on the GFE?

A: The "Summary of your loan" section of the GFE is usually written before a settlement date is chosen and before the amount of any escrow payment that the borrower will have to pay is known. The "Loan Terms" section of the HUD-1 includes certain information that may not have

been known or may not have been available at the time that the GFE was prepared, but is known and included on the HUD-1.

10) **Q:** In the "Loan Terms" section on page 3 of the HUD-1, how should the information be completed for the item "Can your interest rate rise?"

A: If the interest rate cannot rise, the "No" box should be checked and no further information is required.

If the interest rate can rise, the "Yes" box must be checked and the applicable information must be entered in the blank spaces for: the maximum interest rate; the date of the first possible change in the interest rate; the frequency of subsequent changes; the date after which subsequent interest rate changes could occur; the amount, stated as a percentage, that the interest rate could increase or decrease at every change date; the lowest possible interest rate over the life of the loan; and the maximum possible interest rate over the life of the loan.

The example below illustrates how the fields in this question should be completed.

Can your interest rate rise?	☐ No. ☑ Yes, it can rise to a maximum of 11 %. The first change will be on 5/29/10 and can change again every year after 5/29/10. Every change date, your interest rate can increase or decrease by 1 %. Over the life of the loan, your interest rate is guaranteed to never be lower than 2.5 % or higher than 11 %.

11) **Q:** How should the loan originator complete the answer to the question, "Every change date your interest can increase or decrease by ____%", on the HUD-1, if the loan does not contain a cap of periodic interest changes other than by setting the overall floor and ceiling?

A: If the loan offered does not contain a cap of periodic interest change other than by setting the overall floor and ceiling, the loan originator should complete the answer to the question, "Every change date your interest can increase or decrease by ____%" with the difference between the floor and the ceiling.

12) **Q:** How should the loan originator complete the answer on the HUD-1 to the question, "Every change date your interest can increase or decrease by ____%", if there is a cap on periodic increases, but not on periodic decreases?

A: If the loan offered does not contain a cap on decrease of periodic interest, the loan originator should complete the answer to the question, "Every change date your interest can increase or decrease by ____%" with the difference between the floor and the ceiling.

13) **Q:** May a lender transmit the information necessary to prepare page 3 of the HUD-1 to the settlement agent in a streamlined document that looks similar to page 3 of the HUD-1, such as a pro-forma?

A: Yes, the lender may transmit the information necessary to prepare page 3 of the HUD-1 to the settlement agent in a streamlined document that looks similar to page 3 of the HUD-1, such as a pro-forma, but the settlement agent must prepare the HUD-1 including page 3.

14) **Q:** How is it determined what settlement charges belong in the HUD-1 column in one of the three categories in the Comparison Chart on page 3 of the HUD-1?

A: Charges for settlement services that are disclosed on the GFE or would have been appropriate to disclose on the GFE, whether the charges are paid by the borrower, paid on behalf of the borrower or paid outside of closing, must be listed in one of the three tolerance categories of the Comparison Chart on page 3 of the HUD-1.

Settlement cost booklet

1) **Q:** When will the Settlement Cost Booklet be revised?

A: HUD is currently revising the Settlement Cost Booklet. The Booklet will be available on HUD's website and will be published in the Federal Register when it is completed.

Good Faith Estimate of Settlement Costs

Lender			
Applicant(s)		Loan Type FIX30	Loan Number 0264325812
		Sales Price N/A	Date 09/24/2009
Property Address			Mortgage Amount $212,000.00
			Interest Rate 5.375%

ESTIMATED MONTHLY PAYMENT			
P&I or Int Only Payment	$ 1,187.14	Mortgage Insurance	$ .00
Hazard Insurance	$ .00	Taxes	$ .00
		Total monthly payment	$ 1,187.14

ITEMS PAYABLE IN CONNECTION WITH LOAN	
0801 LOAN ORIGINATION FEE 0.000%	$ .00
0802 LOAN DISCOUNT 0.000%	$ .00
0803 APPRAISAL	$ 370.00
0804 CREDIT REPORT	$ 25.00
0808 BROKER FEE	$ .00
0810 PROCESSING FEE	$ 500.00
0811 FLOOD LIFE OF LOAN	$ 19.00
0815 APPLICATION FEE	$ .00
0819 UNDERWRITING FEE	$ 500.00
0901 INTEREST FOR 23 DAYS @ $ 31.22 PER DAY**	$ 718.06
0902 MORTGAGE INSURANCE PREMIUM	
TITLE COMPANY CHARGES	
1101 SETTLEMENT OR CLOSING FEE	$ 850.00
1121 CLOSING PROTECTION LETTER FEE	$ 35.00
1132 MUNICIPAL SEARCH/DEPARTMENTALS	$ 325.00
GOVERNMENT RECORDING & TRANSFER CHARGES	
1201 RECORDING FEES (UCC FINANCING STATEMENT)	$ 135.00
ADDITIONAL SETTLEMENT CHARGES	
1311 CLOSING AGENT COURIER/FAX/EDD/WIRE	$ 100.00
ESTIMATED TOTAL (Excluding Escrow Reserves)	$ 3,577.06
ESCROW RESERVES (ESTIMATED)	
1002 Mortgage Insurance Escrow 1 months @ $ 0.00 per month	$ .00
1003 Tax and Assessment Reserves	$ .00
1009 Aggregate Accounting Adjustment***	$ .00

*Title Insurance. This estimate represents the costs of title insurance to protect the Lender only. If you choose to purchase an Owner's title insurance policy to protect your interests in the property, the cost of the Lender's and Owner's policy is estimated to be $382.93 and $1,645.55, respectively, for a total cost $2,028.48. These rates only apply when the Lender's and Owner's policies are purchased simultaneously from a participating title company. Contact your closing agent with questions.

** **Prepaid Interest.** *Based on the interest rate quoted at time of application, multiplied by number of days from your estimated closing date to the end of the month.*

*** **Aggregate Accounting Adjustment.** *Escrow reserves are calculated in accordance with the Real Estate Settlement Procedures Act (RESPA). RESPA methodology requires lenders to calculate each escrow deposit as a single item, then pooled as a group (in the aggregate). The Aggregate Adjustment is the difference (i.e., the credit to the consumer) between the single item analysis calculation and the aggregate methodology.*

Good Faith Estimate Providers of Service

The information provided on page 1 reflects estimates of the charges which you are likely to incur at the settlement of your loan. The fees listed are estimated – the actual charges may be more or less. Your transaction may not involve a fee for every item listed.

The numbers listed beside the estimates generally correspond to the numbered lines contained on the HUD-1 Settlement Statement which you will be receiving at settlement. The HUD-1 Settlement Statement will show you the actual cost for items paid at settlement.

These estimates are provided pursuant to the Real Estate Settlement Procedures Act of 1974, as amended. Additional information can be found in the HUD Special Information Booklet "Settlement Costs and Helpful Information" provided by your Mortgage Broker or Lender.

Particular Provider and Required Use Information. The Lender requires the use of specific providers of certain services in connection with your loan. Listed below are the service providers from which the Lender will choose for your loan. The estimates on page 1 are based on the charges for these designated providers. The Lender has repeatedly required borrowers to use these providers within the past 12 months. Rels Credit, Rels Valuation, Wells Fargo Insurance Inc., and Wells Fargo Real Estate Tax Services are Affiliates of the Lender.

Credit Reporting

RELS CREDIT
1500 NW BETHANY BLVD #300
BEAVERTON, OR 97006
(877) 216-9150

EQUIFAX INFORMATION SVCS
P.O. BOX 740341
ATLANTA, GA 30374
(800) 685-1111
(404) 885-8000

Appraisal Services

LENDER'S SERVICE, INC.
700 CHERRINGTON PARKWAY
CORAOPOLIS, PA 15108-4315
(800) 722-0300

RELS VALUATION
8009 34TH AVENUE S. #1300
BLOOMINGTON, MN 55425
(800) 825-8483

***Flood Zone Determination**

WELLS FARGO FLOOD SVCS
600 S HWY 169, SUITE 1200
ST. LOUIS PARK, MN 55426
(800) 805-9423

FLOOD DATA SERVICES INC
11902 BURNET ROAD, #400
AUSTIN, TX 78758-2902
(800) 447-1772

Document Preparation Services for Loans with a Property Address in Texas

BROWN, FOWLER & ALSUP
10333 RICHMOND AVE. #660
HOUSTON, TX 77042
(713) 468-0400

BEADLES, NEWMAN & LAWLER
3500 HULEN STREET
FORT WORTH, TX 76107
(817) 731-6469

POLUNSKY AND BEITEL, LLP
8000 I.H. 10, SUITE 1600
SAN ANTONIO, TX 78230
(210) 349-4488

for Reverse Mortgage loans only:
1ST AMER. NATIONWIDE DOCS
1 FIRST AMER. WAY, DFW2-4
WESTLAKE, TX 76262
(800) 892-6678

***Tax Service Vendors**

WELLS FARGO REAL ESTATE TAX SERVICES, LLC
1 HOME CAMPUS, X2502-011
DES MOINES, IA 50328-0001
(800) 499-4829

FIRST AMERICAN REAL ESTATE TAX
1 FIRST AMERICAN WAY
WESTLAKE, TX 76262
(800) 568-7770

Title Guaranty Certificate for loans with a Property Address in Iowa

IOWA FINANCE AUTHORITY
TITLE GUARANTY DIVISION
2015 GRAND AVENUE
DES MOINES, IA 50312
(515) 242-4989

*The Lender typically utilizes an affiliate as a provider of this service. If you choose not to use the affiliate vendor, the Lender will require use of the alternative vendor listed as a provider for this service.

If the subject property is located in New York.

The Lender will require that a New York law firm satisfactory to Lender be designated to represent the Lender and provide the closing/settlement services. The estimated settlement or closing fee is based on the estimated charges of New York firms with whom the Lender has relationships. The Lender has repeatedly required borrowers to use the services of a New York law firm within the last 12 months.

If mortgage insurance is required

The Lender will designate a mortgage insurance company from an approved list to provide private mortgage insurance. The estimated mortgage insurance premium is based on the estimated charges of the designated provider. The Lender has repeatedly required borrowers to use the services of one of the providers within the last 12 months.

A. Settlement Statement

U.S. Department of Housing and Urban Development

OMB Approval No. 2502-0265

B. Type of Loan

1. ☐ FHA 2. ☐ FmHA 3. ☒ Conv. Unins.
4. ☐ VA 5. ☐ Conv. Ins.

6. File Number:	7. Loan Number:	8. Mortgage Insurance Case Number:

C. Note: This form is furnished to give you a statement of actual settlement costs. Amounts paid to and by the settlement agent are shown. Items marked "(p.o.c.)" were paid outside the closing; they are shown here for informational purposes and are not included in the totals.

D. Name & Address of Borrower:	E. Name & Address of Seller:	F. Name & Address of Lender:
r		
G. Property Location:	H. Settlement Agent:	
	Place of Settlement: Adam Leitman Bailey, PC, 120 Broadway, 17th Floor, New York, New York 10271	I. Settlement Date:

J. Summary of Borrower's Transaction		K. Summary of Seller's Transaction	
100. Gross Amount Due From Borrower		**400. Gross Amount Due to Seller**	
101. Contract Sales Price		401. Contract Sales Price	
102. Personal Property		402. Personal Property	
103. Settlement Charges to Borrower (line 1400)	$0.00	403.	
104. Bank of America		404.	
105.		405.	
Adjustments for items paid by seller in advance		**Adjustments for items paid by seller in advance**	
106. City/ town taxes to		406. City/ town taxes to	
107. County taxes to		407. County taxes to	
108. Assessments to		408. Assessments to	
109.		409.	
110.		410.	
111.		411.	
112.		412.	
120. Gross Amount Due From Borrower	$0.00	**420. Gross Amount Due to Seller**	$0.00
200. Amounts Paid By Or On Behalf of Borrower		**500. Reductions in Amount Due to Seller**	
201. Deposit or earnest money		501. Excess deposit (see instructions)	
202. Principal amount of new loan(s)		502. Settlement charges to seller (line 1400)	$0.00
203. Existing loan(s) taken subject to		503. Existing loan(s) taken subject to	
204.		504. Payoff of first mortgage lien	
205.		505. Payoff of second mortgage lien	
206.		506.	
207.		507.	
208.		508.	
209.		509.	
Adjustments for items unpaid by seller		**Adjustments for items unpaid by seller**	
210. City/town taxes to		510. City/town taxes to	
211. County taxes to		511. County taxes to	
212. Assessments to		512. Assessments to	
213.		513.	
214.		514.	
215.		515.	
216.		516.	
217.		517.	
218.		518.	
219.		519.	
220. Total Paid By/For Borrower	$0.00	**520. Total Reduction Amount Due Seller**	$0.00
300. Cash At Settlement Due From/ To Buyer		**600. Cash at Settlement to/ From Seller**	
301. Gross Amount due from borrower (line 120)	$0.00	601. Gross amount due to seller (line 420)	$0.00
302. Less amounts paid by/ for borrower (line 220)	($0.00)	602. Less reductions in amt. Due seller (line 520)	($0.00)
303. Cash ☐ **From** ☒ **To Borrower**	$0.00	**603. Cash** ☐ **To** ☐ **From Seller**	$0.00

Section 5 of the Real Estate Settlement Procedures Act (RESPA) requires the following: • HUD must develop a Special Information Booklet to help persons borrowing money to finance the purchase of residential real estate to better understand the nature and costs of real estate settlement services; • Each lender must provide the booklet to all applicants from whom it receives of for whom it prepares a written application to borrow money to finance the purchase of residential real estate; • Lenders must prepare and distribute with the Booklet a Good Faith Estimate of the settlement costs that the borrower is likely to incur in connection with the settlement. These disclosures are mandatory.

Section 4(a) of RESPA mandates that HUD develop and prescribe this standard form to be used at the time of loan settlement to provide full disclosure of all charges imposed upon the borrower and seller. These are third party disclosures that are designed to provide the borrower with the pertinent information during the settlement process in order to be a better shopper.

The Public Reporting Burden for this collection of information is estimated to average one hour per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

This agency may not collect this information, and you are not required to complete this form, unless it displays a currently valid OMB control number.

The information requested does not lend itself to confidentiality.

L. Settlement Charges		
700. Total Sales / Brokers Commission based on price @ % = $0.00	Paid From Borrowers Funds at Settlement	Paid From Seller's Funds at Settlement
Division of Commission (line 700) as follows:		
701. to		
702. to		
703. Commission paid to at settlement		
704.		
800. Items Payable in Connection With Loan		
801. Loan Origination Fee %		
802. Loan Discount %		
803. Appraisal Fee to		
804. Credit Report to		
805. Lender's Inspection Fee		
806. Mortgage Insurance Application Fee to		
807. Assumption Fee		
808.		
809.		
810.		
811.		
900. Items Required By Lender To Be Paid In Advance		
901. Interest from to @ /day (days)	$0.00	
902. Mortgage Insurance Premium for months to		
903. Hazard Insurance Premium for years to		
904.		
905.		
1000. Reserves Deposited With Lender		
1001. Hazard insurance months @ per month	$0.00	
1002. Mortgage insurance months @ per month	$0.00	
1003. City property taxes months @ per month	$0.00	
1004. County property taxes months @ per month	$0.00	
1005. Annual assessments months @ per month	$0.00	
1006.		
1007.		
1008.		
1100. Title Charges		
1101. Settlement or closing fee		
1102. Abstract or title search		
1103. Title examination		
1104. Title insurance binder		
1105. Document preparation		
1106. Notary fees		
1107. Attorney's fees		
(includes above item numbers)		
1108. Title insurance		
(includes above item numbers)		
1109. Lender's coverage		
1110. Owner's coverage		
1111.		
1112.		
1113.		
1200. Government Recording and Transfer Charges		
1201. Recording fees: Deed ; Mortgage ; Releases	$0.00	
1202. City/ County tax/ stamps: Deed ; Mortgage		
1203. State tax/stamps: Deed ; Mortgage		
1204.		
1205.		
1300. Additional Settlement Charges		
1301. Survey		
1302. Pest Inspection		
1303.		
1304.		
1305.		
1400. Total Settlement Charges (enter on lines 103, Section J and 502, Section K)	$0.00	$0.00

The Undersigned Acknowledges Receipt of this Disclosure Statement and Agrees to the Correctness Thereof.

608 F.Supp.2d 330
(Cite as: 608 F.Supp.2d 330)

H

United States District Court,
E.D. New York.
Sylvia C. COHEN, Plaintiff,
v.
J.P. MORGAN CHASE & CO. & J.P. Morgan Chase Bank., Defendants.
No. CV-04-4098 (CPS).

Jan. 28, 2009.

Background: Borrowers, who were charged a fee for post-closing review, brought action against lender, seeking damages for violations of Real Estate Settlement Procedures Act (RESPA), and New York General Business Law (GBL). After remand, 498 F.3d 111, lender filed motion for summary judgment.

Holdings: The District Court, Sifton, Senior District Judge, held that:
(1) genuine issues of material fact existed as to whether fee for post-closing review charged only to lender's New York and Connecticut borrowers was "in exchange for" any compensable services;
(2) post-closing review provided by lender to ensure the salability of the loan on the secondary mortgage market was not a valid "settlement service" within meaning of RESPA; and
(3) if lender's collection of post-closing fee was illegal under RESPA, then collecting the fee would be "misleading" for purposes of New York statute prohibiting deceptive acts or practices.

Motion denied.

West Headnotes

[1] Federal Civil Procedure 170A 2491.8

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(C) Summary Judgment
170AXVII(C)2 Particular Cases
170Ak2491.8 k. Consumer Credit, Cases Involving. Most Cited Cases

Genuine issues of material fact existed as to whether fee for post-closing review charged only to lender's New York and Connecticut borrowers was "in exchange for" any compensable services, precluding summary judgment in favor of lender on borrowers' claim under section of Real Estate Settlement Procedures Act (RESPA) prohibiting unearned fees. Real Estate Settlement Procedures Act of 1974, § 8(b), 12 U.S.C.A. § 2607(b); 24 C.F.R. § 3500.14(c).

[2] Statutes 361 219(2)

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k213 Extrinsic Aids to Construction
361k219 Executive Construction
361k219(2) k. Existence of Ambiguity. Most Cited Cases
When a statute administered by a federal agency is unclear and the agency is authorized to interpret it, the agency's reasonable interpretation is binding.

[3] Statutes 361 217.4

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k213 Extrinsic Aids to Construction
361k217.4 k. Legislative History in General. Most Cited Cases

Statutes 361 219(2)

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k213 Extrinsic Aids to Construction
361k219 Executive Construction
361k219(2) k. Existence of Ambiguity. Most Cited Cases
Determining whether a statute is ambiguous for *Chevron* purposes requires considering the statute as a whole; if the text of the statute is ambiguous, court must next apply canons of statutory construction and to investigate the legislative history, and if it is not

clear that Congress has directly addressed the question at issue, court accords deference to the agency's interpretation of the statute if it finds it to be reasonable.

[4] Consumer Credit 92B 52

92B Consumer Credit
92BII Federal Regulation
92BII(B) Disclosure Requirements
92Bk52 k. Price, Balance, Rate, and Charges in General. Most Cited Cases
Fees for duplicative work are not impermissible under Real Estate Settlement Procedures Act (RESPA); if settlement services are actually performed, then RESPA permits charging a fee, even if those services are performed twice and billed twice. Real Estate Settlement Procedures Act of 1974, § 8(b), 12 U.S.C.A. § 2607(b).

[5] Consumer Credit 92B 52

92B Consumer Credit
92BII Federal Regulation
92BII(B) Disclosure Requirements
92Bk52 k. Price, Balance, Rate, and Charges in General. Most Cited Cases
For purposes of Real Estate Settlement Procedures Act (RESPA), a settlement service provider "marks up" a fee for a settlement service when the provider outsources the task of providing the service to a third-party vendor, pays the vendor a fee for the service, and then, without providing an additional service, charges homeowners seeking mortgages a higher fee for the settlement service than that which the provider paid to the third-party vendor; central to the definition of a markup is the requirement that the charger of the fee not provide any additional service. Real Estate Settlement Procedures Act of 1974, § 8(b), 12 U.S.C.A. § 2607(b).

[6] Consumer Credit 92B 30

92B Consumer Credit
92BII Federal Regulation
92BII(A) In General
92Bk30 k. Regulations in General. Most Cited Cases
A finding that the services that were allegedly provided in exchange for settlement-service fee were not in fact "settlement services" does not render Real Estate Settlement Procedures Act's (RESPA) prohibition against unearned fees inapplicable; fact that a settlement fee was charged is enough to invoke RESPA. Real Estate Settlement Procedures Act of 1974, § 8(b), 12 U.S.C.A. § 2607(b).

[7] Statutes 361 205

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k204 Statute as a Whole, and Intrinsic Aids to Construction
361k205 k. In General. Most Cited Cases
A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme; such clarification occurs when only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.

[8] Consumer Credit 92B 30

92B Consumer Credit
92BII Federal Regulation
92BII(A) In General
92Bk30 k. Regulations in General. Most Cited Cases
Real Estate Settlement Procedures Act's (RESPA) prohibition against charging of a settlement service fee "other than for services actually performed" requires that no fee be charged for the rendering of a real estate settlement service other than for settlement services actually performed. Real Estate Settlement Procedures Act of 1974, § 8(b), 12 U.S.C.A. § 2607(b).

[9] Consumer Credit 92B 30

92B Consumer Credit
92BII Federal Regulation
92BII(A) In General
92Bk30 k. Regulations in General. Most Cited Cases
A "settlement service" within meaning of Real Estate Settlement Procedures Act (RESPA) is that which either directly benefits the consumer, or is performed at or before the closing. Real Estate Settlement Procedures Act of 1974, § 3(3), 12 U.S.C.A. § 1202(3); 24 C.F.R. § 3500.2.

[10] Consumer Credit 92B 30

92B Consumer Credit
92BII Federal Regulation
92BII(A) In General
92Bk30 k. Regulations in General. Most Cited Cases
Post-closing review provided by lender to ensure the salability of the loan on the secondary mortgage market was not a valid "settlement service" within meaning of Real Estate Settlement Procedures Act (RESPA). Real Estate Settlement Procedures Act of 1974, § 8(b), 12 U.S.C.A. § 2607(b).

[11] Antitrust and Trade Regulation 29T 134

29T Antitrust and Trade Regulation
29TIII Statutory Unfair Trade Practices and Consumer Protection
29TIII(A) In General
29Tk133 Nature and Elements
29Tk134 k. In General. Most Cited Cases
To establish a claim under New York statute prohibiting deceptive acts or practices, a plaintiff must demonstrate: (1) the defendant's act was misleading in a material way; (2) the act was directed at consumers; and (3) the plaintiff has been injured as a result. N.Y.McKinney's General Business Law § 349(a).

[12] Antitrust and Trade Regulation 29T 136

29T Antitrust and Trade Regulation
29TIII Statutory Unfair Trade Practices and Consumer Protection
29TIII(A) In General
29Tk133 Nature and Elements
29Tk136 k. Fraud; Deceit; Knowledge and Intent. Most Cited Cases
Act need not constitute common-law fraud to be actionable under New York statute prohibiting deceptive acts or practices. N.Y.McKinney's General Business Law § 349(a).

[13] Antitrust and Trade Regulation 29T 136

29T Antitrust and Trade Regulation
29TIII Statutory Unfair Trade Practices and Consumer Protection
29TIII(A) In General
29Tk133 Nature and Elements
29Tk136 k. Fraud; Deceit; Knowledge and Intent. Most Cited Cases
New York's general rule that consumer fraud claims cannot be predicated on fully disclosed facts does not apply when one party has exploited a disparity of bargaining power. N.Y.McKinney's General Business Law § 349(a).

[14] Antitrust and Trade Regulation 29T 209

29T Antitrust and Trade Regulation
29TIII Statutory Unfair Trade Practices and Consumer Protection
29TIII(C) Particular Subjects and Regulations
29Tk209 k. Finance and Banking in General; Lending. Most Cited Cases
If lender's collection of post-closing fee was illegal under Real Estate Settlement Procedures Act (RESPA), then collecting the fee would be "misleading" for purposes of New York statute prohibiting deceptive acts or practices. Real Estate Settlement Procedures Act of 1974, § 8(b), 12 U.S.C.A. § 2607(b); N.Y.McKinney's General Business Law § 349(a).

[15] Antitrust and Trade Regulation 29T 209

29T Antitrust and Trade Regulation
29TIII Statutory Unfair Trade Practices and Consumer Protection
29TIII(C) Particular Subjects and Regulations
29Tk209 k. Finance and Banking in General; Lending. Most Cited Cases
If lender's collection of post-closing fee was illegal under Real Estate Settlement Procedures Act (RESPA), then collecting the fee would not violate New York statute prohibiting deceptive acts or practices. Real Estate Settlement Procedures Act of 1974, § 8(b), 12 U.S.C.A. § 2607(b); N.Y.McKinney's General Business Law § 349(d).

***333** Catherine Elizabeth Anderson, Oren Giskan, Giskan, Solotaroff & Anderson, LLP, New York, NY, for Plaintiff.

David Sapir Lesser, Noah Adam Levine, Wilmer Cutler Pickering Hale & Dorr, LLP, New York, NY, for Defendants.

MEMORANDUM AND ORDER

SIFTON, Senior District Judge.

Sylvia Cohen ("plaintiff") brings this proposed class action against J.P. Morgan Chase & Co. and J.P. Morgan Chase Bank ("Chase") (collectively, "defendant"), seeking damages for violations of Section 8(b) of the Real Estate Settlement Procedures Act of 1974 ("RESPA"), 12 U.S.C. § 2607(b), and section 349 of the New York General Business Law (GBL). Presently before the Court is defendant's motion for summary judgment pursuant to Federal Rule of Civil Procedure 56. For the reasons stated below, the motion is denied.

I. Factual Background

The following facts are taken from the parties' Local Rule 56.1 statements of material facts and submissions of the parties in connection with this motion. Disputes are noted.

In February 2003, plaintiff and her husband, Richard L. Cohen (collectively, "the Cohens") applied for a Chase loan in order to refinance their cooperative apartment in Brooklyn, New York. First Am. Compl. at ¶ 6 and ¶ 20 ("Compl."). On February 28, 2003, Mr. Cohen wrote a $425 check to Chase in payment of a non-refundable application fee. *Id.* Chase thereafter sent the Cohens several documents in connection with the loan, including a Good Faith Estimate of Settlement Charges. Deposition of Richard Cohen at 69 ("R. Cohen Dep."). In the section entitled "Items Payable in Connection with Loan," the words "delivery fees" were crossed out, and the words "Post Closing Fee to JP/Morganchase Bank" written in, together with the amount of $225. Anderson Decl. Ex. G., Plaintiff's Ex. 2. Another document, entitled "Good Faith Estimate of Settlement Charges" ("GFE"), listed "Post Closing Fees" of $225 under the line "Additional Settlement Charges." Siopis Dec. ex. A., Defendant's Ex. 10. The mortgage transaction closed on September 23, 2003. Defendant's Ex. 5. Later that day, the Cohens reviewed the HUD-1 statement and for the first time noticed the post-closing fee. R. Cohen Dep. at 73-74; Sylvia Cohen Deposition at 107-110 ("S. Cohen Dep."). In response to questioning at their depositions, Mr. and Mrs. Cohen both testified that they did not feel coerced or pressured to pay the fees associated with the closing documents. S. Cohen Dep. at 88-89; R. Cohen Dep. at 87-89.

Chase maintains that it charged the post-closing fee to cover "post-closing services." Ward Decl. ¶ 17; Siopis Decl. ¶ 4. Plaintiff disputes this. [FN1] As described by ***334** Chase, post-closing services include: reviewing the documents received from the settlement agent to ensure that the agent followed the Chase closing instructions and that the file is complete, correcting mistakes in the documents, retrieving missing documents, combining the closing documents with the existing underwriting file in an organized fashion, sending that file to the National Post Closing center ("NPC"), and thereafter forwarding any late-arriving documents to NPC. Siopis Decl. ¶ 5, Ward Decl. ¶ 7-9. NPC employees thereafter review the files for any errors in collateral documents that might affect investors' willingness to purchase the loans. *Id.* at ¶ 11. The primary purpose of post-closing review of loans is to ensure their salability on the secondary mortgage market. Ward Decl. ¶ 15.

FN1. Pursuant to Local Rule 56.1, defendant produced a Statement of Material Facts. Paragraphs 13-22 describe "post-closing services" that Chase claims to perform on all mortgage loans after closing. In its correspondingly numbered responses to defendant's Rule 56.1 Statement, plaintiff objected to each of these numbered paragraphs on the grounds that they set forth testimony about facts that defendant knew to be contradicted by unspecified testimony and evidence submitted by plaintiff, and admitted only that the declarations of Kathie Ward and Sophia Siopis submitted in support of defendant's motion made representations regarding the services. Defendant claims that this objection is not effective as a denial of its description and conclude that plaintiff does not dispute that it performs post-closing services. D. Mem. in Supp. at 6, 11; D. Reply at 9, 10, 23. Whether or not plaintiff's "objection" should be considered a denial, *Holtz v. Rockefeller & Co., Inc.*, 258 F.3d 62, 73 (2d Cir.2001), plaintiff's statement that she received no benefit from any post-closing actions taken by Chase suffices to raise a genuine dispute of fact as to the nature of the "services" for which the fee was sought.

Plaintiff's loan file contains checklists and other documentation that indicate that post-closing review was performed on her loan at Chase's regional operations center and at NPC. Ward Decl. ¶ 9.

The post-closing fee was instituted sometime between the mid-1980s and the mid-1990's. Steinfeld Dep. at 29, Siopis Decl. ¶ 2, 4, Ward Decl. ¶ 3. It was charged from that point until April, 2007, when Chase shifted to a fee structure that did not include a post-closing fee. Ward Decl. ¶ 4. Chase states that the decision to charge the fee grew out of the desire to break up a large up-front fee and instead charge borrowers smaller fees throughout the loan process. Steinfeld Dep. 38-39., D. Reply at 16.

Chase states that post-closing services were and still are performed on all loans handled by Chase, even though the fee is no longer charged, and in the past was only charged on some loans. Ward Dep. at 26. The fee was only charged in the Northeast division of Chase, and only in two of the four states in that division. Steinfeld Dep. at 21, 22, Anderson Decl., Ex. D. Chase states that it did not charge the fee in all areas of the country in which post-closing services were performed because decisions about fee structures were decentralized at the time the fee was instituted. Ward Decl. ¶ 3, Ward Dep. at 28-29.

II. Procedural History

Plaintiff filed her complaint in this action on September 22, 2004. By Memorandum and Order dated March 16, 2005, I granted defendant's motion to dismiss plaintiff's complaint pursuant to Fed. R. Civ. Pro. 12(b)(6) on the ground that it failed to state a claim under RESPA § 8(b) because (1) the fee at issue was analogous to an "overcharge," which *Kruse v. Wells Fargo Home Mortgage, Inc.*, 383 F.3d 49, 55-57 (2d Cir.2004), held was not prohibited by § 8(b); (2) plaintiff failed to plead that the challenged fee represented part of a charge split between defendant and one or more third parties as required by § 8(b); and (3) the complaint failed to state a deceptive practices claim under § 349 of the New York General Business law because the pleaded facts demonstrated that the challenged fee was disclosed. *Cohen v. J.P. Morgan Chase & Co.*, 2005 U.S. Dist. LEXIS 45466, 2005 WL 5870856 (E.D.N.Y. March 16, 2005). I subsequently denied plaintiff's motion for reconsideration. *Cohen v. J.P. Morgan Chase & Co.*, 2006 WL 20596, 2006 U.S. Dist. LEXIS 597 (E.D.N.Y. January 4, 2006).

***335** On August 6, 2007, the Court of Appeals vacated the judgment of dismissal and remanded the case for reinstatement of the complaint, on the grounds that *Kruse* does not control this case. *Cohen v. J.P. Morgan Chase & Co.*, 498 F.3d 111, 113 (2007) (hereinafter "*Cohen I*"). The Circuit concluded that because RESPA § 8(b) is ambiguous as to whether the section applies to undivided, as well as divided, unearned fees, the interpretation of the Department of Housing and Urban Development ("HUD") [FN2] that RESPA does apply to such fees should be accorded deference under *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 103 S.Ct. 2778, 81 L.Ed.2d 694 (1984). *Id.* Regarding the GBL § 349 claim, the Court stated that New York law offers "some support" for the conclusion that a post-closing fee could not be objectively misleading (and therefore would not qualify as a deceptive act under the statute), if it was disclosed prior to closing. *Id.* at 126. Regardless, stated the court, collecting fees in violation of state and federal laws may satisfy the misleading element of the statute. *Id.* Therefore, this Court should not have concluded as a matter of law that the charge was not a deceptive practice under § 349.

> FN2. The federal agency charged with administering RESPA.

On October 12, 2007, plaintiff filed her First Amended Complaint, setting forth the claims listed above. The defendant moved for summary judgment.

III. Discussion

A. Summary Judgment Standard

A court must grant a motion for summary judgment if the movant shows that "there is no genuine issue as to any material fact" and that "the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. Pro. 56(c). Summary judgment is appropriate "[w]hen the record taken as a whole could not lead a rational trier of fact to find for the non-moving party." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).

The party seeking summary judgment has the burden of demonstrating that no genuine issue of material fact exists. *Apex Oil Co. v. DiMauro*, 822 F.2d 246, 252 (2d Cir.1987). In order to defeat such a motion, the non-moving party must raise a genuine issue of material fact. "An issue of fact is genuine if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Elec. Inspectors, Inc. v. Village of East Hills*, 320 F.3d 110, 117 (2d Cir.2003). A fact is material when it "might affect the outcome of the suit under the governing law." *Id.* Although all facts and inferences therefrom are to be construed in the light most favorable to the non-moving party, the non-moving party must raise more than a "metaphysical doubt" as to the material facts. *See Matsushita*, 475 U.S. at 586, 106 S.Ct. 1348; *Harlen Assocs. v. Vill. of Mineola*, 273 F.3d 494, 498 (2d Cir.2001). The non-moving party may not rely on conclusory allegations or unsubstantiated speculation. *Twin Labs., Inc. v. Weider Health & Fitness*, 900 F.2d 566, 568 (2d Cir.1990). In deciding such a motion the trial court must determine whether "after resolving all ambiguities and drawing all inferences in favor of the non-moving party, a rational juror could find in favor of that party." *Pinto v. Allstate Ins. Co.*, 221 F.3d 394, 398 (2d Cir.2000).

B. Plaintiff's RESPA Claim

1. RESPA

Congress enacted RESPA in 1974 to protect home buyers from "unnecessarily high settlement charges caused by certain abusive practices that have developed in ***336** some areas of the country." 12 U.S.C. § 2601. RESPA's legislative history identifies major problem areas that had to "be dealt with if settlement costs are to be kept within reasonable bounds." HUD RESPA Statement of Policy 1999-1, 64 Fed.Reg. 10080, 10082 (1999) (quoting Senate Report No. 93-866 *6547 (1974) reprinted in 1974 U.S.C.C.A.N. 6548 (the "Senate Report")). One such problem area was the "[a]busive and unreasonable practices within the real estate settlement process that increase settlement costs to home buyers without providing any real benefit to them." *Id.* However, "reasonable payments in return for services actually performed or goods actually furnished" were not intended to be prohibited. *Id.*, quoting the Senate Report at *6551.

Plaintiff's claim against Chase is premised on RESPA § 8(b), which states:

> No person shall give and no person shall accept any portion, split, or percentage of any charge made or received for the rendering of a real estate settlement service in connection with a transaction involving a federally related mortgage loan other than for services actually performed.

12 U.S.C. § 2607(b).

In a formal policy statement, HUD has interpreted this section to prohibit "unearned fees" in several situations, including those in which:

> (1) one service provider charges the consumer a fee where no, nominal, or duplicative work is done, or (2) the fee is in excess of the reasonable value of goods or facilities provided or the services actually performed.

Statement of Policy 2001-1, 66 Fed.Reg. 53052, 53059 (Oct 18, 2001) (codified at 24 C.F.R. § 3500.14(c)) (numbers added) ("2001 HUD Policy Statement"). In *Kruse v. Wells Fargo Home Mortgage, Inc.*, 383 F.3d 49, 57 (2d Cir.2004), the Second Circuit invalidated the second part of this interpretation, holding that it was contrary to the plain meaning of the statute. *Id.* at 56. In *Cohen I*, the Second Circuit interpreted RESPA § 8(b) in light of Congress's statement that RESPA's "overall goal [is] to protect consumers from 'abusive practices' that result in 'unnecessarily high settlement charges.' " 498 F.3d at 122, quoting 12 U.S.C. § 2601(a). The Court accorded *Chevron* deference to the first part of HUD's interpretation (quoted above), finding that HUD reasonably construes RESPA § 8(b) to prohibit a *sole* settlement service provider from charging the consumer a fee when "no ... work is done," rejecting the argument that § 8(b) only prohibits divided fees. *Id.* at 126.

2. Overview of the Arguments

In her complaint, plaintiff alleges that because Chase provided no settlement services to the consumer that would entitle Chase to collect the post-closing fee, the post-closing fee was an unearned fee that was prohi-

bited by RESPA. First Am. Compl. ¶ 27, 29. She presents three arguments to support this claim, which I discuss in order below. First, plaintiff argues that there were no services provided "in exchange for" the post-closing fee, i.e., in a *quid pro quo* transaction. Defendant contends that the proper inquiry is whether there were any services performed that would "justify" the fee. Second, plaintiff argues that if there were any services performed for the fee, they were duplicative of services already performed by other agents in the transaction. Third, plaintiff contends that even if there were services performed post closing, the services provided were not settlement services.

3. Whether the fee was "for" services under RESPA

[1] Plaintiff argues that there are issues of fact as to whether defendant ***337** performed any compensable services "in exchange for" the post-closing fee. Plaintiff's Memorandum in Opposition to Defendant's Motion at 8 and 27 ("P.Opp."). Plaintiff argues that in order to show that the fee was provided "in exchange for" services, defendant must show some "nexus" between the fee charged and services provided. *Id.* at 18. Defendant challenges plaintiff's reading of the law, describing it as plaintiff's "direct tie test," and stating that it does not reflect the correct legal standard. Argument on Summary Judgment Motion at p. 5:18-24 ("SJ Argument"). Rejecting the "exchange for" analysis, defendant contends that the only pertinent question is whether Chase earned the post-closing fee by performing any post-closing services "in support of" or "justifying" the fee, regardless of the purpose of the charge. Defendant's Reply in Support at 2 ("D.Reply").

Defendant seeks support for its contention from a series of cases dealing with payments by lenders to mortgage brokers. *See* *Culpepper v. Irwin Mortgage Corp.*, 491 F.3d 1260 (11th Cir.2007); *Heimmermann v. First Union Mortgage Corp.*, 305 F.3d 1257 (11th Cir.2002); *Bjustrom v. Trust One Mortg. Corp.*, 322 F.3d 1201 (9th Cir.2003); *Glover v. Std. Fed. Bank*, 283 F.3d 953 (8th Cir.2002). These cases hold that defendant lender need not show a direct tie between a Yield Spread Premium ("YSP") fee payment by the borrower to the lender (then passed on to the broker) and the services provided by the broker in order to justify the fee. The YSP amount reflects the difference between the interest rate at which the lender is willing to lend the money (the par rate) and the higher rate at which a broker brings the borrower to the lender (above par). *See* *Culpepper*, 491 F.3d at 1263-64. In *Culpepper*, the Eleventh Circuit rejected a challenge by a borrower to the YSP method of paying brokers. The plaintiffs in that case argued that defendants had to show a direct relationship between the fee paid and specific services provided; otherwise, the fee would be an illegal referral fee. *Id.* at 1271. The Court declined to accept that argument, following the 2001 HUD policy statement cited above, which formulated a two step test for evaluating the compensation paid to mortgage brokers: first, the court must assess whether compensable services were performed, and second, the court must assess whether the total compensation (including YSP and other payments) was reasonable in light of the total services provided. *Id.* at 1273. Whether or not the parties intended that the YSP cover the services provided was not material to that inquiry. *Id.* at 1268.

The YSP line of cases is inapposite here. The YSP is a payment to the broker in compensation for all work performed by the broker. It is not limited to particular services rendered.[FN3] This case concerns a fee paid directly to the lender that refers to a particular set of tasks (so called "post-closing services"), rather than referring to loan-related services generally. The post-closing fee purports to compensate Chase for settlement activities. Given that it is so described, it is appropriate to require some showing that the fee is connected to the particular part of the loan process described as "settlement."

> FN3. Moreover, HUD's YSP analysis was explicitly limited to the YSP context. 66 Fed.Reg. at 53053 ("the coverage of this statement is restricted to payments to mortgage brokers.").

In support of her argument that defendant must show some connection between the fee and the service, plaintiff cites a district court opinion in *Busby v. JRHBW Realty, Inc.*, Civil Action No. 2:04CV2799-VEH (N.D.Ala. Oct.7, 2005), which denied a motion to dismiss in a case where a bank charged a fee for which customers received***338** no services in exchange. Defendant argues that *Busby* does not support the proposition that a link must be shown between a service and a fee, since the bank

agents in that case admitted that no services were provided in exchange for the fee. D. Reply at 6. However, bank agents in *Busby* stated that they provided many services, but then acknowledged that the fee was not linked any of them. If defendant's argument were applied in *Busby*, then the fact that any services had been provided would be enough to justify the fee, whether or not customers received the services in exchange for the fee. The Eleventh Circuit later indicated that the "in exchange for" standard is proper in its opinion overturning the District Court's denial of plaintiff's motion to certify a class. *Busby v. JRHBW Realty, Inc.*, 513 F.3d 1314, 1323 (11th Cir.2008).

Second Circuit opinions and the text of RESPA support plaintiff's interpretation. In *Cohen I*, the Second Circuit stated that RESPA prohibits " 'one service provider' from charging the consumer a fee *for which* 'no ... work is done.' " 498 F.3d at 126 (emphasis added). In *Kruse*, the Second Circuit stated that RESPA does not authorize courts to determine whether a charge is "reasonable" as interpreted by HUD, because "[w]hatever its size, such a fee is *"for"* the services rendered by the institution and received by the borrower." 383 F.3d at 56 (emphasis added).

Defendant's reading is closer to HUD's construction of § 8(b), since it relies on HUD's finding that in the mortgage broker compensation context, a fee will be permitted if the total compensation received by the broker is supported by the total amount of services performed. *Id.* at 53-54. This interpretation enables a lender to make an after-the-fact justification of the fee. However, while *Cohen I* and *Kruse* adopted some of HUD's reasoning, they did not adopt all of it; the Court in each case conducted a *Chevron* analysis to determine whether the agency's interpretation should be accorded deference. From this analysis, the Court determined that the statute required that the relationship between the fee and services be more than coincidental. The fee must be "for" the services.

Defendant next argues that even if it must show that the fee is "for" the services, there is no genuine issue of fact as to whether a service was provided in exchange for the fee. D. Reply at 11. Defendant asserts that plaintiff has the burden to show that Chase charged the post-closing fee for something other than post-closing services. In support, defendant cites *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986), which held that "the plain language of Rule 56(c) mandates the entry of summary judgment ... against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Id.* at 322, 106 S.Ct. 2548. Defendant contends that demonstrating that Chase charged the post-closing fee for something other than post-closing services is an essential element of plaintiff's case. However, this misstates the burden, since plaintiff need not determine the true purpose of the fee. Instead, under the statute, plaintiff need only show that no valid settlement services were provided in exchange for the fee. Plaintiff has claimed in her brief that the fee was a "rogue fee devised by executives in New York branch offices to generate profit." P. Opp at 23. If this were the extent of her proof, then her position would fail due to its conclusory nature, or, in the language of hoary Rule 56 law, its raising at most "a metaphysical doubt." "Although all inferences must be drawn in favor of the nonmoving party, mere speculation and conjecture is insufficient to preclude***339** the granting of the motion." *Harlen Assocs. v. Village of Mineola*, 273 F.3d 494, 499 (2d Cir.2001).

However, contrary to defendant's contention, plaintiff has provided a number of pieces of evidence in support of her conclusion that the fee was not for post-closing services to plaintiff. Plaintiff's contention that the fee did not cover post-closing services is based, *inter alia*, on the inability of witnesses to remember why the fee was instituted, the lack of internal documentation linking the fee to any services, the fact that national post-closing documents do not authorize the fee, the fact that the fee was charged only to New York and Connecticut customers, the fact that post-closing review is performed on all files regardless of whether the post-closing fee is charged, the fact that few Chase witnesses knew anything about the fee, and the fact that post-closing charges were assessed for services that have no purpose under the laws of New York and Connecticut, the only states where the fee was routinely charged. P. Opp. at 13-23. Based on these facts, a jury could reasonably infer that the fee was not paid in exchange for settlement services actually received.

Plaintiff argues that the fact that some customers and not others were charged, while all received the same post-closing review, meant that borrowers in New

York were being charged for something that had already been paid for. P. Opp. at 22. The fact that borrowers who pay the post-closing fee apparently receive no additional services in comparison to borrowers who do not pay the fee suggests that the fee is not in fact "for" the service. To explain this oddity, defendant points to the regional fee determination structure that was in place during the time when the post closing-fee was instituted, explaining that the various offices had discretion to institute or not institute fees in their areas. D. Reply at 15, Ward Decl. ¶ 3. However, the fact remains that the fee was only charged in New York and Connecticut, whereas the Northeast division also included Pennsylvania and New Jersey. Steinfeld Dep. at 21, 22, Anderson Decl., Ex. D. An inference could be drawn from the uneven application of the fee that it was being charged not for settlement services, but instead due to the larger pockets of New York borrowers, or the exceptional effort of New York bankers to maximize profits.[FN4]

FN4. Several times throughout her brief, including in reference to the uneven application of fee charges around the country, plaintiff cites the opinion of plaintiff's expert, Laura Borrelli, who has reviewed the materials in this case and has written a report summarizing her findings with regards to the post-closing fee. P. Opp. at 3, 9, 21, 23, 25, 32, 33. At times, plaintiff relies on Ms. Borrelli for facts, and at other times plaintiff cites Ms. Borelli's opinions, such as her conclusion that the post-closing fee was implemented solely to enhance profits in certain branch offices and was in fact a "junk fee." Report of Laura Borelli, Anderson Decl. Ex. C. The opinions of an expert witness may not be considered on summary judgment if they are inadmissible. *Raskin v. Wyatt Co.*, 125 F.3d 55, 66-67 & n. 5 (2d. Cir.1997). In addition, an expert's conclusory assertions based on undisputed facts and not based on any technical expertise that is necessary to resolve a highly complex factual issue are insufficient to create a dispute of material fact sufficient to withstand summary judgment. *Kelsey v. City of New York*, 2007 WL 1352550, *6, 2007 U.S. Dist. LEXIS 33465 at *17-*20 (E.D.N.Y. May 7, 2007). Because I find that plaintiff has stated facts sufficient to create a dispute of material fact independent of Ms. Borelli's report, it is not necessary to determine the admissibility of Ms. Borelli's opinions at this juncture.

The deposition testimony quoted by defendant to support its argument fails to establish that the post-closing fee was charged "for" the post-closing review. Defendant quotes five employees who testified in depositions that the post-closing fee was "to cover Chase's post-closing services." D. Reply at 4, note 1. However, ***340** two of these witnesses stated that they had drawn the connection between the post-closing fee and post-closing services based on the name alone. Dep. of James McCoullough at 31 ("Q. And how do you know [the post-closing fee is for post-closing services]? ... A. It's been my experience at Chase that the fee name was depictive of its description."); Dep. of Kathie Ward at 19-20 ("Well, it's named post closing review fee, and it's a post closing activity. I would draw some conclusion."). Another witness gave a conclusory answer. Dep. of Sophia Siopis at 36 ("Q. How do you know what the post-closing fee is for ... A. I know that ... I know what we do, what we conduct. So, 'post-closing fee' is for post-closing the loan.") The quotation from another witness was taken out of context; rather than stating that the fee was for post-closing services, the witness simply acknowledged that the claimed services must have taken place after the loan had closed. Dep. of Anita Lerch 35-37. Only one witness, a former regional director of Chase, stated straightforwardly that "[t]he fee was charged for services-the fee was charged for work done after a loan closed." Dep. of Ellen Steinfeld at 11. This witness was the one who explained that Chase used to charge one up-front fee, but in the early 1980's a decision was taken to split that fee up into smaller fees that would be assessed throughout the loan application process; one of these smaller fees was the post-closing fee. *Id.* at 38-39. However, this witness could not say whether the amount of the up front fee was reduced in any way after the post-closing fee was instituted. *Id.* A finding that Chase did not reduce the up front fee would undercut the explanation that the purpose of the fee was to cover post-closing review, and might lead a reasonable jury to disbelieve Chase's account of the fee. In addition, the lack of supporting documents to corroborate the statements of Chase employees would establish a basis for a reasonable jury to determine that the fee was not in fact "for" compensable settlement services.

Defendant protested at oral argument that there will be a "flood of litigation" regarding the numerous varieties of bank fees if banks are required to show some link between the fee and the services. SJ Argument at 6:18. However, it would appear to be a rare case in which a person receives the same services whether she pays a fee or not. That would not be the case with an application fee or the underwriting fee, both cited by the defendant as fees that might be excessively questioned under what it calls the direct tie test.

A rational jury could find that the fee was not in fact charged "for" services, but that instead it was an overhead charge, or another form of fee unconnected to compensable settlement services. Defendant fails to meet the standard for summary judgment on this claim.

4. Duplicative Services

As an alternative to her theory that defendant provided no settlement services "in exchange for" the post-closing fee, plaintiff argues that any services that were provided for the fee were duplicative, because the services provided by the post-closer (including checking the accuracy of documents and organizing the file) were already performed by the Chase closing attorney, who was paid a separate fee, or were covered by the loan origination fee. P. Opp. at 28, 32. Defendant responds that post-closers conduct a number of services in addition to their review of closing documents, any one of which could justify the post-closing fee. D. Reply at 19. In addition, post-closers identify mistakes made by closing attorneys, so that even if they are looking at the same documents, the work is not duplicative. D. Reply at 21. Defendant points to a handbook created by federal banking regulators, who recommend***341** [FN5] that banks conduct post-closing review of documents to ensure that settlement agents properly close loans in accordance with closing instructions. *See* Comptroller of the Currency, *Mortgage Banking: Comptroller's Handbook* 11 (March 1998). According to defendant, this recommendation indicates that the services are necessary and therefore not duplicative.

> FN5. At numerous points throughout its papers and at oral argument, defendant has asserted that "banking regulators *require* that lenders such as Chase have post-closing processes in place." D. Mem. at 5, 6, 16, D. Reply at 2, 21, 22, Ward Decl. at 5. In support of this assertion, defendant cites a handbook prepared by the Office of the Comptroller of the Currency ("OCC"), which states that "[t]he closing unit should perform a post-closing review of each loan file after closing." OCC, *Mortgage Banking: Comptroller's Handbook* 11 (Mar.1998) ("Comptroller's Handbook"), available at http:// occ. gov/ handbook/ mortgage. pdf., quoted in D. Mem. in Supp. at 5. Defendant has mischaracterized the handbook's statements. As is clear from the quoted text, the handbook indicates that lenders "should" perform various tasks. This is not a requirement. The handbook does use the word "must" numerous times throughout its text. *See, e.g.*, Comptroller's Handbook at 4 ("As the escrow account administrator, the service must protect borrowers' funds and make timely payments on their behalf.") When the handbook seeks to use an imperative, it knows how to do so. In the case of post-closing services, the handbook makes a suggestion rather than a requirement. Defendant's repeated insistence that post-closing services are "required," when the evidence indicates otherwise, does nothing to further its claim that it is permitted to charge a fee for such services.

Regulation X states that "[a] charge by a person for which no or nominal services are performed or for which duplicative fees are charged is an unearned fee and violates this section." 24 C.F.R. 3500.14(c). In its 2001 policy statement, HUD states that § 8(b) prohibits unearned fees where "one service provider charges the consumer a fee where no, nominal, or duplicative work is done." 66 Fed.Reg. at 53057. Whereas the regulation focuses on a duplicative *fee*, the policy statement indicates that charges may not be made for duplicative *work*. HUD does not make clear whether it intends for both forms of duplication to be impermissible. HUD states that where work is duplicative, "no work is done" and therefore the fee violates § 8(b). *Id.*

No caselaw analyzes the question of whether HUD's prohibition on charging a fee for duplicative work is

due *Chevron* deference. In *Cohen I*, the Second Circuit adopted only part of the HUD statement interpreting § 8(b), holding that HUD reasonably construes the section "to prohibit charging the consumer a fee for which 'no ... work is done.' " 498 F.3d at 126 (ellipsis in original, quoting HUD policy statement). The Court made no statement regarding the proper outcome when nominal or duplicative work has been performed.

However, HUD's interpretation that duplicative fees (where someone is charged twice for the same work) are prohibited appears to be foreclosed by *Kruse*. In *Kruse*, the Second Circuit declined to follow HUD's interpretation of 8(b) to the extent that it required the Court to determine whether the fee charged to the borrower was "reasonable" in light of the services provided, stating that "section 8(b) clearly and unambiguously does not extend to overcharges." 383 F.3d at 56. A second fee charged for the same piece of work is an overcharge. *See Edwards v. Accredited Home Lenders, Inc.*, 2008 WL 2952075, *10, 2008 U.S. Dist. LEXIS 57757 *33 (S.D.Ala.2008). However, plaintiff does not claim that two fees were charged for the same piece of work, but rather that two fees were charged for two pieces of work that were duplicative. This does not fall into the "overcharge" category.

***342** In one case addressing the issue of duplicative work, a district court determined that there were issues of material fact where a lender hired an appraisal management company that in turn hired an appraiser and charged fees for both the appraisal and the management of the appraisal, and the plaintiff claimed that these two pieces of work were duplicative (the appraisal management company claimed that it performed many additional services for the plaintiff, including making sure the appraisal was complete and managing the paperwork.) *Szczubelek v. Cendant Mortg. Corp.*, 215 F.R.D. 107, 124 (D.N.J.2003). If HUD's interpretation is correct, then there would similarly be an issue of material fact on the duplicative claim in this case. However, the *Szczubelek* Court did not perform a *Chevron* analysis to determine that this interpretation of § 8(b) is reasonable and therefore should be accorded deference. Such an analysis is required here.

[2][3] When a statute administered by a federal agency is unclear and the agency is authorized to interpret it, the agency's reasonable interpretation is binding. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-44, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). The first step in this analysis is to determine whether the language enacted by Congress is clear. If so, the inquiry is at an end. *Id.* at 842-43, 104 S.Ct. 2778. Ambiguity is, however, a product of context, and a court should therefore "not confine itself to examining a particular statutory provision in isolation." *Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-33, 120 S.Ct. 1291, 146 L.Ed.2d 121 (2000). Rather, determining whether a statute is ambiguous for *Chevron* purposes requires considering the statute as a whole. *Id.* If the text of the statute is ambiguous, the court must next apply canons of statutory construction and to investigate the legislative history. *Cohen I*, 498 F.3d at 116. If it is not clear that Congress has directly addressed the question at issue, then comes step two, at which a court accords deference to the agency's interpretation of the statute if it finds it to be reasonable. *Chevron*, 467 U.S. at 843-44, 104 S.Ct. 2778; accord *Kruse*, 383 F.3d at 55.

[4] The statutory language is clear in this case. Section 8(c) of RESPA states that "[n]othing in this section shall be construed as prohibiting ... payment for goods or facilities actually furnished or for services actually performed." The statute clearly states that if a service is actually performed, then RESPA does not prohibit the fee. The text of § 8(b) cannot bear an interpretation that fees for duplicative work are impermissible. If settlement services are actually performed, then RESPA permits charging a fee, even if those services are performed twice and billed twice. Plaintiff's argument that the fee is duplicative fails.

5. The post-closing fee as an illegal markup

[5] Plaintiff claims that Chase has illegally marked up a fee to a company used by Chase to ship the loan file to NPC. P. Opp. at 34-36. Plaintiff cites defendant's response to an interrogatory, in which defendant stated, among other things, that the post-closing fee was for shipping the loan to NPC. [FN6] P. Opp. at 34, Anderson ***343** Decl. Ex H Interrogatory number 14. Plaintiff argues that the $225 fee constitutes an illegal mark up of the real cost to ship the file. "A settlement service provider 'marks up' the fee for a settlement service when the provider outsources the task of pro-

viding the service to a third-party vendor, pays the vendor a fee for the service, and then, without providing an additional service, charges homeowners seeking mortgages a higher fee for the settlement service than that which the provider paid to the third-party vendor." *Kruse*, 383 F.3d at 53. In *Kruse*, the Second Circuit accorded deference to HUD's determination that § 8(b) prohibits markups. *Id.* at 61-62. Central to the definition of a markup is the requirement that the charger of the fee not provide any additional service. *Id.* Chase claims that it arranges and manages the shipment of loan files, in addition to non-shipping related post-closing services.[FN7] If Chase in fact did perform such services, and if they are deemed to be "settlement services," then the fee would not be a markup, but rather an overcharge. *Id.* at 62. *See also Sosa v. Chase Manhattan Mortgage Corp.*, 348 F.3d 979 (11th Cir.2003) (holding that because defendant arranged to have items delivered to complete the closing and thereby benefitted the borrowers by arranging for third party contractors to perform the deliveries, the added charge on top of the third party vendor's fee was not a markup). Thus, the question of whether there was a markup is contingent on the question of whether post-closing review as a whole includes compensable settlement services. If it does, then the fee is not an illegal markup.

> FN6. The full text of the interrogatory is as follows:
>
> > Q: Please set forth the services performed by Defendant in exchange for its receipt of a post closing fee.
> >
> > A: Following closing, Chase performs a variety of services, including a review of documents, including the Deed of Trust, the Deed if applicable, the title insurance binder and other documents to audit them; making sure the documents are present, properly executed and dated and that the notary has properly signed and sealed documents where necessary; and correcting documents where required. Chase also incurs shipping costs to send the loan file to its records center.

> FN7. *See* previous note.

6. Invalid settlement service

Plaintiff asserts in her complaint that the post-closing fee did not compensate Chase for a "valid settlement service." First Am. Compl. ¶ 2. Defendant seizes on this statement and argues that because § 8(b) applies only to settlement-service fees, if the fee in this case is not for a settlement service, then plaintiff has no claim under RESPA. Plaintiff does not take up this issue in her Memorandum of Law in Opposition to defendant's motion. Nevertheless, defendant's argument is without merit.

[6] Defendant argues that because § 8(b) only applies to settlement-service fees, plaintiff's claim that post-closing services are not valid settlement services undermines her § 8(b) claim. Defendant's Memorandum of Law in Support of Defendant's Motion at 12 ("D.Mem."). This is not a correct reading of the statute. Section 8(b)'s prohibition on unearned fees applies to those "charge[s] made or received for the rendering of a real estate service." 12 U.S.C. § 2607(b). The relevant question is whether a settlement service fee was charged, not whether the activity for which the fee was allegedly charged was in fact a settlement service. "In order to state a claim under RESPA, plaintiffs must establish that the ... [fees] at issue constitute charges rendered at *or* in relation to settlement." *Bloom v. Martin*, 865 F.Supp. 1377, 1381-82 (N.D.Ca.1994) (emphasis added). A finding that the services that were allegedly provided in exchange for the settlement-service fee were not in fact "settlement services" does not render § 8(b) inapplicable. The fact that a settlement fee was charged is enough to invoke RESPA. Additionally, if ***344** defendant's reading were correct, then a lender could charge settlement fees for non-settlement services with impunity, claiming that because the thing for which the fee was charged was not a settlement service, RESPA did not apply. This contravenes the purpose of the statute, which is to protect borrowers from paying settlement fees when no settlement services are provided. *See* Senate Report at *6547.

In support of its position, defendant cites *In re Merscorp, Inc., RESPA Litigation* (*"In re Merscorp"*), MDL No. 1810, 2008 U.S. Dist. LEXIS 40473 (S.D.Tex. May 16, 2008), in which the Court said that in order to state a claim under RESPA, plaintiffs "must establish that the service provided ... constitutes

a 'settlement service.' " *Id.* at *31. This reading of the statute runs contrary to the text, which applies RESPA when a settlement service fee is charged.[FN8] The plaintiff's § 8(b) claim in that case depended on the ability to make a showing that there was no service provided. *Id.* at 41 ("Section 8(b) ... prohibits payments for [settlement] services that were not actually performed.") If the plaintiff were required under RESPA to establish that a settlement service was in fact provided, then it would be impossible to make out a claim that no settlement service were provided.

> FN8. To support this construction, the Court cited three District Court opinions. *See Wooten v. Quicken Loans, Inc.*, C.A. No. 07-00478-CG-C, 2008 U.S. Dist. LEXIS 20252, 2008 WL 687379 (S.D.Ala. Mar.10, 2008); *Thomas v. Ocwen Fed. Bank FSB*, 01-C-4249, 2002 WL 99737, 2002 U.S. Dist. LEXIS 1231 (N.D. Ill. Jan 23, 2002); *Bloom v. Martin*, 865 F.Supp. 1377(N.D.Cal.1994). However, none of the cases cited support the conclusion of the *In re Merscorp* court. In *Wooten*, the court stated that § 8(b) "only applies to *charges* for the rendering of a real estate settlement service" 2008 U.S. Dist. LEXIS 20252 at *12 (emphasis added). In *Thomas*, the court stated that "[section 8] of RESPA ... does not apply to charges incurred after closing and unrelated to settlement service." 2002 WL 99737, *4, 2002 U.S. Dist. LEXIS 1231 at *13. In *Bloom*, the court found that two fees incurred and charged after settlement were not settlement charges and did not need to be disclosed in the HUD-1 settlement statement under RESPA. 865 F.Supp. at 1381-83. None of these cases supports the contention that RESPA does not apply to charges incurred at settlement for which no settlement service was provided.

The question remains whether Chase's post-closing review constitutes a settlement service under RESPA. This inquiry must first determine whether the statute does require that settlement services be performed in exchange for settlement service fees. Then it must be determined whether the services that were provided fit the definition of settlement services. If defendant's post-closing review is not a compensable settlement service under RESPA, then Chase has charged an unearned fee even though work may have actually been performed.

(a) Section 8(b) requires that settlement services be performed

[7][8] Section 8(b) prohibits the charging of a settlement service fee "other than for services actually performed." At issue is the meaning of the term "services." The term on its face applies to any and all services. However, the term must be interpreted in context. "Statutory construction ... is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme." *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371, 108 S.Ct. 626, 98 L.Ed.2d 740 (1988) (quoted in *ACLU v. DOD*, 543 F.3d 59, 71 (2d Cir.2008)). Such clarification occurs when "only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law." *Id.* The use of the word "services" in the context of the text makes clear that the only services referred to ***345** here are *settlement* services. If the word "services" were read to include all services, a settlement service provider would need only to provide a service-of any kind-in order to justify its charging of a fee for settlement service. Congress could not have intended this result.

HUD has, moreover, interpreted the statute to require that the services performed be settlement services. In its 2001 Policy Statement, HUD interpreted Section 8(b) to prohibit payments that are unearned fees for settlement services, which can occur in cases where "one settlement service provider charges the consumer a fee where no, nominal, or duplicative work is done, or the fee is in excess of the reasonable value of ... the services actually performed." 66 Fed.Reg. at 53057. Following this interpretation, HUD makes clear that the "services actually performed" must be *settlement* services. In its Settlement Costs Booklet for consumers, quoted in the Policy Statement, HUD states that "[i]t is also illegal for anyone to accept a fee or part of a fee for services if that person has not actually performed settlement services for the fee." 62 Fed.Reg. 31982, 31998 (June 11, 1997), quoted in 66 Fed.Reg. at 53058.

Section 8(b) thus requires that no fee may be charged for the rendering of a real estate settlement service other than for settlement services actually performed.

(b) Whether Chase's post-closing services are settlement services

[9] RESPA Section 3 defines the term "settlement services" to include:

> any service provided in connection with a real estate settlement including, but not limited to, the following: title searches, title examinations, the provision of title certificates, title insurance, services rendered by an attorney, the preparation of documents, property surveys, the rendering of credit reports or appraisals, pest and fungus inspections, services rendered by a real estate agent or broker, the origination of a federally related mortgage loan (including, but not limited to, the taking of loan applications, loan processing, and the underwriting and funding of loans), and the handling of the processing, and closing of settlement.

12 U.S.C. § 2602(3). In Regulation X, HUD's implementing regulation for RESPA, HUD has defined the term "settlement" in the following manner:

> Settlement means the process of executing legally binding documents regarding a lien on property that is subject to a federally related mortgage loan. This process may also be called "closing" or "escrow" in different jurisdictions.

24 CFR 3500.2. Similarly, Black's law dictionary defines a "closing," also known as "settlement," as

> the final meeting between the parties to a transaction, at which the transaction is consummated; esp., in real estate, the final transaction between the buyer and seller, whereby the conveyancing documents are concluded and the money and property transferred.

Black's Law Dictionary (8th ed.2004).

1. Temporal Analysis

Post-closing services do not fit within the definition of settlement services under the preceding definitions of settlement.[FN9] ***346** They are not akin to any of the particular services listed in the statute, nor do they fall within the catch-all phrase including "handling of the processing and closing of settlement." As the definitions of "settlement" make clear, the closing of settlement is complete at the time when the property is transferred. Post-closing review takes place after this time. Under a temporal analysis, in which the status of a service as a settlement service is determined by its timing relative to settlement, post-closing review is not a settlement service. *See McAnaney v. Astoria Fin. Corp.*, 357 F.Supp.2d 578, 589-90 (E.D.N.Y.2005) (applying "temporal analysis" to determine what constitutes a settlement service under RESPA).[FN10]

FN9. Regulation X expands on the definition of "settlement service" provided in the statute, and defines the term "settlement service" as follows:

> Settlement service means any service provided in connection with a prospective or actual settlement, including, but not limited to, any one or more of the following ...

Id. The regulation goes on to list fifteen services in connection with a settlement, fourteen of which refer to specific services performed in the creation of a loan. Number fifteen is a catch-all phrase: "[p]rovision of any other services for which a settlement service provider requires a borrower or seller to pay." *Id.* Taken on its face, this definition is circular; a settlement service is said to be that for which a settlement service provider requires a borrower to pay. This does not aid in the determination of whether the post-closing review provided by Chase constitutes a 'settlement service' that is compensable under RESPA. Such a broad definition of what constitutes a settlement service is not consistent with the text of the statute, the goal of which is to address "unnecessarily high settlement charges." 12 U.S.C. § 2601.

FN10. Courts have found that suits challenging fees for services that were provided post-settlement fail to state a claim under RESPA. *See Bloom v. Martin*, 865 F.Supp. 1377 (N.D.Ca.1994) (plaintiff failed to state a claim under RESPA when challenging

demand and reconveyance fees, since the fees were paid and the services provided after closing); *McAnaney v. Astoria Fin. Corp.*, 357 F.Supp.2d 578 (E.D.N.Y.2005) (services provided when a loan is discharged, satisfied, or recorded do not fall within the ambit of RESPA, since they are charged and take place after settlement); *Molosky v. Wash. Mut. Bank*, 2008 WL 183634, *5, 2008 U.S. Dist. LEXIS 3896 at *15, 2008 WL 183634 (E.D.Mich. Jan. 18, 2008) (plaintiff failed to state a claim under RESPA because the fees at issue were not assessed at or prior to the settlement); *but see MorEquity, Inc. v. Naeem*, 118 F.Supp.2d 885, 900 (N.D.Ill.2000) ("RESPA applies not only to the actual settlement process, however, but also to the servicing of federally regulated mortgage loans"), *accord Cortez v. Keystone Bank*, 2000 U.S. Dist. LEXIS 5705, 2000 WL 536666, at *10 (E.D.Pa.2000). However, in each of these cases, neither the challenged fee nor the service was provided at or before settlement. In contrast, here plaintiff paid the post-closing fee at settlement.

To support its claim that "post-closing services" are compensable under RESPA, defendant argues that the fact that these activities take place after the closing is not a bar to charging a settlement fee for them. Defendant points to Regulation X and HUD's sample forms, which state that lenders may charge borrowers at closing for premiums covering various forms of insurance to be provided after closing. D. Mem. at 14. In particular, defendant cites HUD's explanation of settlement costs listed in Section 900 of the HUD-1 disclosure form. The explanation states: "[y]ou may be required to prepay certain items at the time of settlement, such as accrued interest, mortgage insurance premiums, and hazard insurance premiums." HUD, *Your Settlement Costs, available at* http:// www. hud. gov/ offices/ adm/ hudclips/ forms/ files/ 1. pdf, Levine Decl. Ex. 5. However, defendant did not include the post-closing fee in Section 900 of the HUD-1 settlement form provided for insurance premiums and other "Items Required By Lender to be Paid in Advance." Plaintiff's Ex. 2. Instead, the post-closing fee is hand written in Section 800, "Items Payable in Connection with Loan." *Id.* HUD explains this section as follows: "[t]hese are the fees that lenders charge to process, approve, and make the mortgage loan." HUD, *Your Settlement Costs.* The post-closing fee was not charged as a "prepayment" of an item that would be provided to the borrower after settlement, but instead as an item payable in connection with processing, approving, and making of the loan. However, the ***347** post-closing review was not done in connection with the making of a loan, but was instead a post-settlement activity. Defendant's comparison of post-closing review to prepaid insurance premiums does not withstand scrutiny.

2. Benefit Analysis

In addition to arguing that the post-closing review is not a valid settlement service due to its timing, plaintiff suggests that the review is not a settlement service because it does not "benefit the consumer." P. Opp. at 24. Defendant argues that the fact that the post-closing review does not benefit the borrower "lacks any foundation in RESPA." D. Mem. at 15. Defendant states that nothing in the text of § 8(b) prohibits a lender from charging a borrower for services that benefit only the lender, and furthermore points to clauses in RESPA and in Regulation X that authorize lenders to charge borrowers for services, such as title examination and title insurance, that protect only the lender's interest in the real-estate collateral. *Id.* At 16.

The suggestion that RESPA is devoid of the idea that settlement services must benefit borrowers is in conflict with the legislative history of the statute, which indicates that Congress was indeed concerned about services benefitting consumers. The Senate Report states that in the case of unearned fees, "the payment or thing of value furnished by the person to whom the settlement business is referred tends to increase the cost of settlement services *without providing any benefits* to the home buyer." Senate Report at *6551 (quoted in *Cohen I*, 498 F.3d at 123) (emphasis added). Although the statute does not state that a service must be directly beneficial to the borrower in order to be compensable, the issue of benefits was clearly of concern to the Senate. In addition, leading cases addressing RESPA have evaluated the fees at least in part based on the benefits conferred to borrowers. *See Sosa*, 348 F.3d at 981 and 984 (explaining that the statute prohibits fees that increase settlement costs without providing benefits and finding that defendant's fee did benefit consumers and therefore was permissible); *Culpepper*, 491 F.3d at 1273 (compen-

sation was not unreasonable where a mortgage broker benefitted borrowers in their mortgage transactions); *but see In re Merscorp*, 2008 U.S. Dist. LEXIS 40473 at *40-*41 (finding that because the text of § 8(b) does not require that there be a benefit to the borrower, it is clear that no benefit is required).

In support of its claim that settlement services need not benefit borrowers, defendant relies on a definition of "benefit" developed by HUD to support its "total compensation for total services" approach to Yield Spread Premiums. In its explanation of its YSP framework in its 1999 Policy Statement, HUD states that "[a]ll services, goods and facilities insure to the benefit of both the borrower and the lender in the sense that they make the loan transaction possible ... The consumer is ultimately purchasing the total loan and is ultimately paying for all the services needed to create the loan." 64 Fed.Reg. at 10086. However, defendant glosses over the word "create." During the time when the loan transaction is being put together and approved, the question of who benefits from a particular service cannot be determined since all services work together to realize the loan transaction. However, once the loan is created, that difficulty disappears. Chase's post-closing review of documents is not part of the loan creation process. It is a separate process performed to ensure that Chase can enforce the loan or sell it to investors. Ward Decl. ¶ 11, 14, 15. The benefits clearly accrue to Chase and not to the individual borrower who is charged the fee.

***348** In further support of its claim, defendant cites *Kruse*, in which the Second Circuit held that RESPA did not prohibit as an overcharge compensation for the underwriting service analysis of the borrower's ability to repay the loan in order to determine if it would be purchased by Fannie Mae or Freddie Mac on the secondary mortgage market. 383 F.3d at 53. Defendant argues that if RESPA had required that services be for the benefit of the borrower in order to be valid settlement services, the Court would have found the fee to be illegal rather than permitting it. However, the facts of *Kruse* are distinguishable. The underwriting service performed in that case took place prior to closing, and thus was part of the process of making the loan. Applying HUD's benefits analysis, the borrower benefitted from that service. In contrast, because post-closing review does not benefit the borrower in the creation of her particular loan, it is not a settlement service.[FN11]

FN11. Defendant argues that the salability of loans on the secondary mortgage market is a crucial method of freeing up capital for banks to make additional mortgage offerings to borrowers. Therefore, defendant reasons, post-closing review "benefits" borrowers. D. Mem. at 17. However, this analysis could just as well encompass any actions taken on behalf of the bank to keep its loan process functioning, such as the purchasing of computers, or the conducting of staff training. These overhead expenditures also "benefit" borrowers by ensuring that the infrastructure is in place for extending loans. However, this broadly understood benefit does not bear a direct relationship to the loan in the manner required of settlement services.

3. Achieving a Working Definition of "Settlement Service"

Based on the foregoing, a working definition of what constitutes a "settlement service" is that which either directly benefits the consumer, or is performed at or before the closing. This accounts for actions taken by the lender before closing that for the most part benefit the lender, such as underwriting, credit reports, and appraisals, for which RESPA clearly permits fees to be charged. It also accounts for actions performed after closing that are deemed compensable by HUD, such as in the case of prepaid insurance premiums, which are clearly beneficial to the borrowers who pay for them. This formulation ensures that the services performed and paid for by individual borrowers are all tied to the creation of an individual loan.

An example of this approach appears in *Friedman v. Market Street Corp.*, 520 F.3d 1289 (11th Cir.2008) ("*Friedman II*"), which defendant cites for the proposition that fees for services performed after closing are permissible. In *Friedman*, plaintiffs paid a one time fee of $556.25 in order to have the right to make tax, insurance, and other payments associated with their property directly, rather than having to put money into an escrow account held by the bank. The Court explained that "[t]he benefit to borrowers who choose a non-escrowed loan is that the borrowers retain control over the monies that would otherwise be paid into escrow until such time as they make the payments

directly." *Id.* at 1291. While it is not clear that the services provided were in fact compensable settlement services,[FN12] the Court's specific ***349** statement of consumer benefit offers a model of analyzing instances where settlement fees are charged for services performed after settlement.

> FN12. In *Friedman II,* plaintiffs argued that they were provided no settlement services in exchange for the fee. In an unpublished opinion, the Eleventh Circuit had upheld the dismissal of the action, stating that "it is clear from the pleadings that some services were contemplated in exchange for the fee, such as monitoring the payment of taxes and insurance." *Friedman v. Market Street Mortgage Corp.*, 107 Fed.Appx. 888 (11th Cir.2004) ("*Friedman I*"), cited in *Friedman II*, 520 F.3d at 1292. *Friedman II* followed the law of the case in dismissing plaintiff's amended complaint that again alleged that no services were provided in exchange for the fee. Defendant has pointed to this case as an example of services provided after closing that were upheld as compensable, but the case cited offers no discussion of this question and simply refers to an earlier, unpublished opinion. There is no basis to determine whether the finding that compensable services were performed should serve as precedent.

[10] There is no serious dispute that post-closing review was performed on plaintiff's loan, and that Chase believed that this review was necessary work ("not sham services" as defense counsel put it at oral argument). The question of whether the post-closing fee was actually compensation for this review is an open one, as discussed previously. However, the more pertinent question is whether, under the statute, Chase can allocate its overhead costs to a particular mortgage. That Chase refers to its post-closing work as "post-closing services" does not transform this work into a settlement service. Chase admits that it charges this fee for work that Chase performs after the closing to ensure the salability of the loan on the secondary mortgage market. Chase argues that services need not be for the benefit of the borrower nor need they occur before the loan closing in order to qualify as settlement services. Chase further maintains that ensuring the salability of these loans makes it possible for banks to issue greater numbers of mortgages, which is a benefit to borrowers. This is too tenuous a connection. If this argument were enough to qualify an action as a settlement service, Chase could begin charging its borrowers for overhead costs related to the provision of mortgages, such as the cost of audits, training, and updating management information systems (all of which are recommended for banks by the *Comptroller's Handbook*, which also recommends performing post-closing review of loans).

For the foregoing reasons, the post-closing review provided by Chase was not a valid settlement service. Plaintiff paid a settlement service fee for which no compensable settlement services were performed. Chase's motion for summary judgment is denied on this claim.

C. Plaintiff's GBL § 349 Claim

1. GBL § 349

[11][12][13] Section 349 prohibits "[d]eceptive acts or practices in the conduct of any business, trade or commerce." N.Y. Gen. Bus. Law § 349(a). To establish a claim under § 349, Cohen must demonstrate: 1) the defendant's act was misleading in a material way; 2) the act was directed at consumers; and 3) the plaintiff has been injured as a result. *Maurizio v. Goldsmith*, 230 F.3d 518, 521 (2d Cir.2000). An act is deceptive if it is "likely to mislead a reasonable consumer acting reasonably under the circumstances." *Boule v. Hutton*, 328 F.3d 84, 94 (2d Cir.2003) (quoting *Maurizio*, 230 F.3d at 521). The act need not constitute common-law fraud to be actionable. *Id.* Under New York law, a defendant's disclosure of a fee in advance of its payment generally is sufficient to show that the fee was not misleading. *See Zuckerman v. BMG Direct Mktg., Inc.*, 290 A.D.2d 330, 737 N.Y.S.2d 14 (1st Dept.2002) (holding that shipping and handling fees were not deceptive where amounts disclosed); *Sands v. Ticketmaster-New York, Inc.*, 207 A.D.2d 687, 616 N.Y.S.2d 362 (1st Dept.1994) (same holding for disclosed ticket service fees); *Lewis v. Hertz Corp.*, 181 A.D.2d 493, 581 N.Y.S.2d 305 (1st Dept.1992) (same holding for disclosed rental car refueling fees). However, the general rule that consumer fraud claims cannot be predicated on fully disclosed facts does not apply when one party has exploited a disparity of bargaining power. ***350** *Negrin v. Norwest Mortgage, Inc.*, 263 A.D.2d 39, 700

N.Y.S.2d 184 (N.Y.App.Div.1999).

2. Relationship of § 349 claim to RESPA claim

In *Cohen I*, the Second Circuit stated that the post-closing fee charged in this case could constitute a deceptive practice even if disclosed. 498 F.3d at 126-27. The Court reasoned that given a consumer's reasonable assumption that all fees charged by a respectable bank are legal, collecting fees in violation of state and federal laws may satisfy the "misleading" element of § 349. *Id.* The Court stated that it could not dismiss the § 349 claim while plaintiff's RESPA claim was pending.

[14] Because the RESPA claim survives summary judgment, it is now appropriate to determine whether the illegality of a fee does in fact satisfy the "misleading" element of § 349 even if the fee is properly disclosed. There is authority under New York law for finding that collecting an illegal fee constitutes a deceptive conduct under § 349. *See Kidd v. Delta Funding Corp.*, 2000 N.Y. Misc. LEXIS 29, at *26-27 (Sup.Ct., N.Y.County, Feb. 22, 2000) (holding that although defendant disclosed the challenged fee, defendant's imposition of illegal fees constituted deceptive conduct under § 349); *Negrin v. Norwest Mortg., Inc.*, 263 A.D.2d 39, 50, 700 N.Y.S.2d 184 (2d Dept.1999) (notwithstanding disclosure, allegations of a bank's imposition of illegal and/or unwarranted fees stated a valid claim under § 349); *Dowd v. Alliance Mtge. Co.*, 32 A.D.3d 894, 895, 822 N.Y.S.2d 558 (2d Dept.2006) (reaffirming *Negrin*); *Bartolomeo v. Runco*, 162 Misc.2d 485, 490, 616 N.Y.S.2d 695 (Yonkers City Ct.1994) (representation that a cellar apartment was a legal apartment was deceptive under § 349) (overruled on other grounds by *Corbin v. Briley*, 192 Misc.2d 503, 747 N.Y.S.2d 134 (2d Dept.2002)). If it is found that collection of the post-closing fee was in fact illegal under RESPA, then first element of § 349 is established.

3. Coercion as an independent ground for the § 349 claim

In *Cohen I*, the Second Circuit directed this Court to allow plaintiff to amend her state law claim to include a belated allegation that payment of the post-closing fee was coerced by the threat of forfeiting the $425 non-refundable application fee.

[15] Plaintiff now argues that because the non-refundable application fee of $425 is greater than the post-closing fee of $225, any reasonable person would choose to pay the post-closing fee rather than walking away from the loan and losing the $425 application fee, and as such there are grounds for finding coercion. P. Opp. at 38. Defendant points out that because plaintiff and Mr. Cohen did not notice the post-closing fee until after the closing, they cannot now claim that they were coerced into closing the loan and thereby paying the post-closing fee. Plaintiff responds, citing no authority, that the existence of coercion in a class action is determined by the reasonable person standard. However, this dispute need not be resolved at this time, because under § 349(d), "it shall be a complete defense that the act or practice ... subject to and complies with the rules and regulations of, and the statutes administered by, ... any official department, division, commission or agency of the United States as such rules, regulations or statutes are interpreted by ... such department, division, commission or agency or the federal courts." N.Y. GBL § 349(d). This statute makes clear that if the post-closing fee is legal under RESPA, which is administered by HUD, a federal agency, then the § 349 claim is foreclosed. ***351** However, if RESPA was violated in this case, then plaintiff can base her § 349 claim on the illegal fee.

Conclusion

For the reasons set forth above, defendant's motion for summary judgment is denied. The Clerk is directed to transmit a copy of the within to all parties and the assigned magistrate judge.

SO ORDERED.

E.D.N.Y.,2009.
Cohen v. J.P. Morgan Chase & Co.
608 F.Supp.2d 330

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--- F.Supp.2d ----, 2009 WL 2259085 (D.D.C.)
(Cite as: 2009 WL 2259085 (D.D.C.))

United States District Court,
District of Columbia.
NATIONAL ASSOCIATION OF MORTGAGE BROKERS, INC., Plaintiff,
v.
Shaun DONOVAN, Secretary, U.S. Department of Housing and Urban Development, Defendant.
Civil Action No. 08-2208 (JR).

July 29, 2009.

Background: Non-profit mortgage brokers association brought action against Secretary of Department of Housing and Urban Development (HUD) asserting that Secretary acted arbitrarily and capriciously in promulgating "Rule to Simplify and Improve the Process of Obtaining Mortgages and Reduce Customer Settlement Costs." Both parties moved for summary judgment.

Holdings: The District Court, James Robertson, J., held that:
(1) Secretary of HUD, in promulgating rule, offered reasoned explanations for asymmetrical disclosure requirements for mortgage brokers and direct lenders on revised "good-faith estimate" (GFE) form;
(2) Secretary of HUD considered reasonable alternatives before promulgating rule which imposed asymmetrical disclosure requirements for mortgage brokers and direct lenders on revised "good-faith estimate" (GFE) form; and
(3) Secretary of HUD did not violate Administrative Procedure Act (APA) by not publishing results of seventh round of consumer testing of GFE form before issuing rule.

HUD's motion granted.

West Headnotes

[1] Consumer Credit 92B 30

92B Consumer Credit
92BII Federal Regulation
92BII(A) In General
92Bk30 k. Regulations in General. Most Cited Cases

Consumer Credit 92B 51

92B Consumer Credit
92BII Federal Regulation
92BII(B) Disclosure Requirements
92Bk51 k. Form and Sufficiency of Disclosure in General. Most Cited Cases
Secretary of the Department of Housing and Urban Development (HUD), in promulgating "Rule to Simplify and Improve the Process of Obtaining Mortgages and Reduce Customer Settlement Costs," offered reasoned explanations, as required by Administrative Procedure Act (APA), for asymmetrical disclosure requirements for mortgage brokers and direct lenders on revised "good-faith estimate" (GFE) form; disclosure of "yield spread premiums" in calculation of mortgage broker's total charge for transaction was necessary to achieve its goal of creating more competitive mortgage market, direct lenders would not be compelled to disclose secondary market premiums they receive in mortgage transactions since Real Estate Settlement Procedures Act (RESPA) only required disclosure of all charges imposed in connection with settlement, and lenders could not disclose premiums they would receive on secondary market because the premiums were unknown at settlement. 5 U.S.C.A. § 706(2)(A); Real Estate Settlement Procedures Act of 1974, § 4(a), 12 U.S.C.A. § 2603(a).

[2] Consumer Credit 92B 30

92B Consumer Credit
92BII Federal Regulation
92BII(A) In General
92Bk30 k. Regulations in General. Most Cited Cases
Secretary of the Department of Housing and Urban Development (HUD) considered reasonable alternatives, as required by Administrative Procedure Act (APA), before promulgating "Rule to Simplify and Improve the Process of Obtaining Mortgages and Reduce Customer Settlement Costs," which estab-

lished asymmetrical disclosure requirements for mortgage brokers and direct lenders on revised "good-faith estimate" (GFE) form; disclosure of "yield spread premiums" in calculation of mortgage broker's total charge for transaction was necessary to achieve its goal of creating more competitive mortgage market, direct lenders would not be compelled to disclose secondary market premiums they receive in mortgage transactions since Real Estate Settlement Procedures Act (RESPA) only required disclosure of all charges imposed in connection with settlement, lenders could not disclose premiums they would receive on secondary market because the premiums were unknown at settlement, and HUD had compiled six years of academic study and seven rounds of consumer testing before enacting Rule. 5 U.S.C.A. § 706(2)(A); Real Estate Settlement Procedures Act of 1974, § 4(a), 12 U.S.C.A. § 2603(a).

[3] Consumer Credit 92B 30

92B Consumer Credit
92BII Federal Regulation
92BII(A) In General
92Bk30 k. Regulations in General. Most Cited Cases

In promulgating "Rule to Simplify and Improve the Process of Obtaining Mortgages and Reduce Customer Settlement Costs," which established asymmetrical disclosure requirements for mortgage brokers and direct lenders on revised "good-faith estimate" (GFE) form, Secretary of the Department of Housing and Urban Development (HUD) did not violate Administrative Procedure Act (APA) by not publishing results of seventh round of consumer testing of GFE form before issuing Rule; HUD conducted six rounds of consumer testing before publishing its Notice of Proposed Rulemaking, in response to comments it received it revised GFE and subjected it to seventh round of testing and found that proposed GFE was more effective than the revised one, and accordingly, HUD eliminated many of the revisions so that the final GFE closely resembled the version that had tested well in rounds five and six. 5 U.S.C.A. § 706(2)(A).

Frederick Wilson Chockley, Baker & Hostetler, LLP, Washington, DC, for Plaintiff.

Lesley R. Farby, U.S. Department of Justice, Washington, DC, for Defendant.

MEMORANDUM

JAMES ROBERTSON, District Judge.

***1** The National Association of Mortgage Brokers, Inc. (NAMB) sues Shaun Donovan, the Secretary of the United States Department of Housing and Urban Development (HUD), asserting arbitrary and capricious action in his promulgation of a "Rule to Simplify and Improve the Process of Obtaining Mortgages and Reduce Customer Settlement Costs," 73 Fed. Reg. 68,204 (Nov. 17, 2008) ("Final Rule"). The parties have cross-moved for summary judgment. The defendant's motion will be granted.

Background

Among its many provisions, the Final Rule creates a new standardized form that originators of federally related mortgages [FN1] must provide to prospective borrowers. HUD asserts that the new form provides borrowers with a clearer picture of loan terms and conditions, allowing them to compare loan offers more easily, and promoting competition between loan providers. NAMB argues that the Final Rule is procedurally and substantively deficient: procedurally, because HUD developed the new form with the help of data that it did not disclose during the notice-and-comment period; and substantively, because HUD did not adequately explain why it imposed disclosure requirements on mortgage brokers different from those required of direct lenders.

A few words about terminology: Mortgage loan originators are either direct lenders or brokers-direct lenders originate loans and provide funds, while brokers originate loans and arrange for third parties to fund them.[FN2] *See* 24 C.F.R. § 3500.2. The various tasks that go into processing an application and originating a loan-title searches, title examinations, credit examinations, real estate appraisals, and so on-are known as "settlement services," for which the loan originator charges and the borrower pays a settlement fee. *See* 12 U.S.C. § 2602(3). Under long-standing federal law, loan originators must inform prospective borrowers of loan terms and settlement fees on a "good-faith estimate" form, or "GFE." *See* 24 C.F.R. Pt. 3500 App. A & B. The Final Rule at issue in this case creates a new GFE.

Broadly speaking, NAMB opposes the new GFE because of the way it discloses "yield spread premiums" (YSPs). A YSP is a payment by a lender to a broker that compensates the broker for originating a loan with an "above-par" interest rate. The "par rate" is the interest rate at which the lender will fund 100% of the loan with no premiums or discounts. Administrative Record [hereinafter, "A.R."] 241, 1636. If the par rate for a certain $100,000 mortgage is, say, 5%, and the broker originates that mortgage at a 5.5% interest rate, then the lender might deliver $100,500 at closing-$100,000 that will be disbursed to the borrower, plus a $500 YSP for the broker.

YSPs can benefit certain borrowers. Consider a borrower who wants a mortgage but is unable to pay the entire settlement fee at closing.[FN3] If she is working with a direct lender, she might agree to pay a higher rate of interest on her loan in order to reduce her settlement fee. In such a case, the lender trades off the smaller up front fee for larger monthly interest payments, or, as we have seen in recent years, for the ability to package and sell a more valuable loan on the secondary market. The broker, unlike the direct lender, gets no benefit from the higher-interest loan. It is the YSP that gives him the incentive to accept a lower settlement fee from the borrower.

***2** Borrowers only benefit from YSPs, however, if they can understand and make intelligent choices about the tradeoffs between short-term settlement costs and long-term interest payments. That was the idea behind the Real Estate Settlement Procedures Act(RESPA), 12 U.S.C. §§ 2601-2617, which provides mortgage borrowers "with greater and more timely information on the nature and costs of the settlement process." *Id.* § 2601(a). Section 4 of RESPA requires the HUD Secretary to "develop and prescribe a standard form for the statement of settlement costs which shall be used ... as the standard real estate settlement form in all transactions in the United States which involve federally related mortgage loans." *Id.* § 2603(a). "Such form shall conspicuously and clearly itemize all charges imposed upon the borrower and all charges imposed upon the seller in connection with the settlement." *Id.*

The Final Rule is the result of a very long administrative process motivated in part by HUD's dissatisfaction with the way the existing GFE disclosed the impact of YSPs on loan terms. In HUD's view, "YSP payments [were] not required to be included in the calculation of the broker's total charge for the transaction, nor [were] they clearly listed as an expense to the borrower, even though the borrower promise[d] to pay the YSP through interest payments." Dkt. 15, at 10.

Thus, in 1995, HUD began the process of designing a new GFE that, among other things, would more clearly demonstrate the inverse relationship between settlement fees and interest rates, and would allow borrowers to compare competing loan offers quickly and accurately. HUD issued a proposed rule and sought public comment on alternative approaches to disclosing various indirect fees, including YSPs. A.R. 1783-90. The HUD Secretary convened a negotiated rulemaking advisory committee consisting of industry groups (like NAMB), consumer groups, state organizations, and government-sponsored enterprises. *Id.* 1777. Though this initial process reached a dead end, it laid the foundation for a proposed rule issued in 2002. That rule would have revised the existing GFE, simplified and standardized the disclosure of settlement costs, and modified other disclosure requirements. *Id.* 91. After receiving over 40,000 comments-mostly supportive of HUD's goals-HUD decided to withdraw the rule in 2004 and gather additional information about settlement costs and the options for improving disclosure. *Id.*

HUD's first step was to assess the strengths and weaknesses of the existing GFE. It hired the Urban Institute to conduct a study of 7,560 home loans. *Id.* 3119. The study found that borrowers could not describe the basic aspects of their mortgages, particularly in more complex transactions involving YSPs. *Id.* 223-24. Unwittingly, borrowers tended to accept small reductions in their settlement fee in exchange for larger increases in their interest payments, resulting in significantly higher costs over the life of the loan. *Id.* 275, 316. In HUD's view, the Urban Institute study, combined with much of the research in the field, demonstrated that the existing GFE was too opaque for most borrowers to understand. *Id.* 246-67.

***3** HUD then tried to design a more effective GFE. Between 2002 and 2008, HUD had the Kleimann Communications Group (KCG) conduct seven rounds of consumer testing. In the first three rounds, KCG

tested HUD's draft GFE by asking current and potential homeowners for their thoughts on the GFE's clarity. *Id.* 360, 2092. HUD discovered that customers better understood the tradeoff between settlement costs and interest rates if YSPs were disclosed more prominently. *Id.* 23, 364.

But highlighting YSPs had the potential to give direct lenders a competitive advantage over brokers. HUD was concerned that borrowers might mistakenly believe that loans originated by brokers were more expensive than comparable loans originated by direct lenders, because only brokers would have to disclose the YSP payment.

Accordingly, in rounds four and five of the consumer testing, HUD focused on creating a form that would disclose YSP payments while avoiding anti-broker bias. Round four found that the proposed GFE failed to meet that standard: borrowers saw the YSP as a cost unique to broker-originated loans, and tended to choose more costly lender-originated loans. *Id.* 2065-66. In response, HUD made several revisions to the GFE, including requiring lenders to check a box stating, "The credit or charge for the interest rate you have chosen is included in 'Our service charge' (See Item 1 above)." *Id.*

Those revisions appeared to work. In round five, KCG found no evidence of bias against brokers when borrowers were asked to choose between a selection of loans with different terms. *Id.* 2094. Prospective borrowers identified the lowest cost loan at least 90% of the time, and chose that loan 88% of the time, regardless of whether the loan was offered by a lender or a broker. *Id.* 2067, 2218-23.

In round six, KCG did more qualitative testing, prompting HUD to make some minor modifications to the GFE. *Id.* 370, 2070-71, 2094. HUD concluded that round six affirmed that the proposed GFE produced no anti-broker bias: participants were still able to correctly identify the lowest-cost loan 90% of the time. *Id.* 2034.

Satisfied, the HUD Secretary published a Notice of Proposed Rulemaking on March 14, 2008, which solicited public comments on all aspects of the Rule, including the proposed GFE. *Id.* 113. HUD received approximately 12,000 comments from interested parties. *Id.* 9096-104,866. HUD revised the proposed GFE in response to some of these comments, and subjected the new form to an additional round of testing-round seven. In round seven, KCG found that prospective borrowers could identify the least expensive loan only 80% of the time-less reliably than in rounds five and six. *Id.* 2039. Although KCG concluded that the decline between rounds five and six and round seven was not statistically significant, HUD chose to eliminate many of the changes it had made to the GFE in response to public comments, and return the form to the format that had tested well before. *Id.* 2039. HUD did not publish the methodology and results of round seven for public comment.

***4** The Secretary issued the Final Rule on November 17, 2008. The final GFE is three pages long. The first page provides a summary of the loan terms and settlement costs, and makes no mention of YSPs or other specific settlement charges. *Id.* 54. The second page contains a chart titled "Understanding your estimated settlement charges," which is divided into two parts: one breaking down "adjusted origination charges," and the other enumerating the charges for "all other settlement services." *Id.* 55. A broker is required to include the YSP payment it will receive from a lender as part of its origination charge for the loan. For two identical loans, this requirement means that the broker-originated loan will show a higher adjusted origination charge on page two than will a loan made by a direct lender. But because the YSP should offset the charges for the other settlement services the broker offers, a broker in a competitive market should disclose a commensurately smaller charge in the "all other settlement services" section of the GFE. The result should be that the broker and the direct lender disclose the same amount of overall settlement charges on the first page of the form.

The third and final page of the GFE features a "tradeoff table" and a "shopping chart." *Id.* 56. The tradeoff table is optional for both brokers and lenders. It presents the prospective borrower with information about the settlement costs and monthly interest payments for three potential loans from the same originator: (1) the loan spelled out in detail in the GFE, (2) that same loan with lower settlement charges and a higher interest rate, and (3) that same loan with higher settlement charges and a lower interest rate. The shopping chart is to be filled out by the prospective borrower. It provides a template for the borrower to

compare loan offers across different originators.

The Final Rule requires loan originators to begin using the new GFE by January 1, 2010. *Id.* 2.

Analysis

Under the APA, a reviewing court will declare agency action unlawful if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). NAMB argues that the Final Rule is arbitrary and capricious for three reasons: first, because HUD failed to supply a reasoned explanation for the Rule; second, because HUD failed to consider reasonable alternatives to the Rule and explain why it rejected them; and third, because HUD relied substantially on data that it never produced for public comment.

"The scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983). The party challenging the agency action must show that there was no "rational connection between the facts found and the choice made." *Id.* (citation omitted). NAMB has not done so.

A. Failure to provide a reasoned explanation

***5** NAMB contends that HUD does not offer a reasoned explanation for its asymmetrical disclosure requirements. NAMB argues that if brokers are required to disclose YSP payments, then direct lenders should have to disclose any premiums they earn from selling a higher-interest loan on the secondary market. In NAMB's view, "[i]n both cases, the compensation is derived in the *same way* using the *same information*, and can be calculated at the time that a mortgage is originated." Dkt. 16, at 6 (emphasis in original).

[1] But HUD has offered a reasoned explanation for its decision-and a compelling one. As an initial matter, HUD submits that disclosing YSPs is necessary to achieve its ultimate goal of creating a more competitive mortgage market:

> The third round of testing did not include the YSP disclosure, and the important finding was that, without the YSP disclosure, consumers did not understand the existence of the tradeoff between interest rates and origination charges as well as when the YSP was disclosed. Helping consumers understand this tradeoff is a fundamental goal of HUD's RESPA reform effort and of the design of the GFE form. The third round of testing confirmed that inclusion of the YSP disclosure helped consumers understand the tradeoff, and that if they take a loan with a relatively high interest rate, they should pay lower settlement charges.

A.R. 23.

HUD then offers two explanations for its decision not to compel direct lenders to disclose the secondary market premiums they receive. The first is that RESPA only requires the disclosure of all charges imposed "in connection with the settlement." 12 U.S.C. § 2603(a). It similarly requires that the GFE include an estimate of charges "for specific settlement services the borrower is likely to incur in connection with the settlement." *Id.* § 2604(c). HUD argues that the premiums a direct lender may receive on the secondary market are separate from any settlement-related costs, and that it cannot lawfully mandate their disclosure under RESPA. A.R. 106.

The second explanation is that direct lenders cannot disclose the premiums they may receive on the secondary market because those premiums are unknown at settlement. Unlike YSPs, which are known and definite at settlement, the value of any premium a direct lender may earn depends on when the lender sells the loan, what the market conditions are like, and other factors that are not established with certainty at settlement. *Id.* 106, 271, 385-86. Direct lenders cannot be expected to disclose what they do not know.

While HUD makes a persuasive case for clear YSP disclosure by brokers, and for exempting direct lenders from disclosing premiums they have not yet realized, its most difficult task is to show that the new GFE can do both of those things without producing anti-broker bias. As HUD itself admits, the ultimate goal of the new GFE is to promote competition in the mortgage industry. *Id.* 23. If the new GFE distorts the marketplace by providing an artificial advantage to direct lenders, it would scuttle HUD's reform effort,

and run afoul of the APA's requirements.

***6** There is certainly evidence in the administrative record that raises doubts about the desirability of asymmetric disclosures. A 2004 study conducted by the Federal Trade Commission (FTC) found that an "asymmetric disclosure policy will cause a large proportion of consumers to view identically priced loans from brokers and lenders very differently." James M. Lacko & Jamis K. Pappalardo, Fed. Trade Comm'n, The Effect of Mortgage Broker Compensation Disclosures on Consumers and Competition: A Controlled Experiment ES-7 (2004) (A.R. 5268). The study warned that the resulting market distortion could cause "mortgage consumers to incur additional costs of hundreds of millions of dollars per year." *Id.* 5286. Both NAMB and the FTC cited the 2004 FTC study, and echoed its concerns, in their comments opposing HUD's proposed revisions to the existing GFE. *See* FTC Comment, at 24 (A.R. 24207); NAMB Comment, at 32-33 (A.R. 15923-24).

HUD adequately addresses these concerns, however. It notes first that the FTC study tested only excerpted portions of a draft GFE found in the 2002 proposed rule. A.R. 365. By contrast, in round five of consumer testing-which found no statistically significant anti-broker bias-HUD evaluated a different version of the GFE, and gave the study participants the entire GFE, not just excerpts. *Id.* 366. Thus, the FTC study does not directly undermine the study on which HUD bases the new GFE.

The FTC does take issue with HUD's claim that round five uncovered no anti-broker bias. In its Comment, the FTC notes that while anti-broker bias "does not appear in the results ... in which the broker loan ... is cheaper than the lender loan, it does still appear in the tests in which the broker and lender loans cost the same." *Id.* 24203. The FTC observes that round five showed a "17-18 percentage point bias in the proportion of customers preferring the lender loan even though the two loans had the same interest rates, closing costs, and payments." *Id.* 24204.

Once more, HUD offers a credible rebuttal. It points out that the 17-18 percentage point bias was only found in the first iteration of round five testing, when the study participants were given a draft GFE that did not have a shopping chart. When the shopping chart was included in subsequent iterations of round five testing, the results actually suggested a slight pro-broker bias. *Id.* 2068-69, 2466, 2502.

And HUD adequately addresses the finding that borrowers tended to select the lender loan over the broker loan when the loam terms were the same. The Urban Institute study found that, in the market, origination charges vary considerably even among similar loans with identical interest rates, *id.* 3150-51, so borrowers are rarely offered a choice among identical loans. *Id.* 2067, 2466. HUD notes that, under more realistic conditions, when prospective borrowers are asked to distinguish between disparate loan offers, consumers were able to identify the least expensive loan 92% of the time, and to select that loan at nearly identical rates whether it was offered by a lender or a broker. *Id.* 2464, 2466, 2494-95.

***7** HUD passes APA review "[s]o long as [it] has examined the relevant data and provided a reasoned explanation supported by a stated connection between the facts found and the choices made." *North Carolina v. FERC*, 112 F.3d 1175, 1189 (D.C.Cir.1997). Though the FTC, NAMB, and other interested parties expressed their doubts about asymmetric disclosure requirements, HUD provided ample evidence to support the efficacy of its chosen GFE. It is not my role to second-guess that well-supported finding.[FN4]

B. Failure to consider reasonable alternatives

"It is well settled that an agency has a 'duty to consider responsible alternatives to its chosen policy and to give a reasoned explanation for its rejection of such alternatives.' " *City of Brookings Mun. Tel. Co. v. FCC*, 822 F.2d 1153, 1169 (D.C.Cir.1987) (citations omitted). NAMB contends that HUD refused to consider two reasonable alternatives: requiring symmetrical disclosures for brokers and lenders or postponing promulgation of the Rule "to conduct further research into the operation of mortgage markets and the efficacy of the proposed disclosures." Dkt. 16, at 33.

[2] I have already catalogued HUD's stated reasons for rejecting symmetrical disclosures. As for the virtues of conducting further research, the mass of academic studies and consumer testing that HUD has already compiled-six years of study and seven rounds of testing-is enough.

C. Failure to produce data on which it relied

NAMB argues that HUD violated the APA by not publishing the results of round seven of consumer testing before issuing the Final Rule. "An agency commits serious procedural error when it fails to reveal portions of the technical basis for a proposed rule in time to allow meaningful commentary." *Owner-Operator Indep. Drivers Ass'n, Inc. v. Fed. Motor Carrier Safety Admin.*, 494 F.3d 188, 199 (D.C.Cir.2007). But the APA permits an agency to "use 'supplementary' data" during and after the notice and comment period as long as that data "expands on and confirms information contained in the proposed rulemaking and addresses 'alleged deficiencies' in the preexisting data, [and] so long as no prejudice is shown." *Chamber of Commerce v. SEC*, 443 F.3d 890, 900 (D.C.Cir.2006) (citations omitted).

[3] HUD conducted six rounds of consumer testing before publishing its Notice of Proposed Rulemaking. In response to some of the comments it received, it revised the GFE and subjected it to a seventh round of testing. Round seven found that the proposed GFE was more effective than the revised one: prospective borrowers were able to identify the lower-cost loan 90% of the time using the proposed GFE, and only 80% of the time using the revised version. A.R. 2039. Accordingly, HUD eliminated many of the revisions so that the final GFE closely resembled the version that had tested well in rounds five and six. *Id.*

The very purpose of the notice-and-comment process is to encourage the agency to consider revisions to its proposed rule before issuing the final version. HUD did just that, and took the extra precaution of testing those revisions before promulgating the Final Rule. When those revisions proved ineffective, HUD scrapped them. The process worked as intended.

***8** Indeed, to accept NAMB's argument would place agencies in an untenable position. They could either: (1) refuse to make changes to the proposed rule in response to public comments, forcing them to explain why they rejected suggestions they may have actually found helpful; (2) make changes in response to public comments, but not subject those changes to any testing, forcing them to justify the changes without any empirical data; or (3) open a new comment period after any additional testing they conduct, leading to an endless cycle of revisions and comments, *see Cmty. Nutrition Inst. v. Block*, 749 F.2d 50, 58 (D.C.Cir.1984) ("Rulemaking proceedings would never end if an agency's response to comments must always be made the subject of additional comments."). That is why the Court of Appeals has approved the use of "supplementary data"-such as round seven here-during the comment period.

Conclusion

NAMB has failed to meet its burden of showing that HUD acted arbitrarily or capriciously in promulgating the Final Rule. Accordingly, the defendant's motion for summary judgment [# 15] will be **granted** by the accompanying order.

FN1. A "federally related mortgage" is essentially any loan for residential property that is insured by the federal government, or that it is originated by an entity that is regulated by the federal government. *See* 12 U.S.C. § 2602(b).

FN2. This distinction is a transactional one: an entity may call itself a mortgage broker but provide funding for a loan that it originates. Such an entity is considered a direct lender, while an entity that holds itself out as a direct lender is considered a broker when it does not fund the loan it originates.

FN3. This is a common occurrence. As HUD had observed, "[o]ne of the primary barriers to home ownership and homeowners' ability to refinance and lower their housing costs is the up front cash needed to obtain a mortgage," which goes to pay for "closing costs and origination fees association with a mortgage loan." 2001 Statement of Policy, 66 Fed. Reg. at 53,053-054 (A.R. 1505-06).

FN4. NAMB's claim that HUD failed to explain why it made the tradeoff table optional is also unavailing. HUD cannot legally compel lenders to provide information on other loan options that might be available to the borrower. A.R. 2041. And, in any event, consumer testing revealed that there would

> be market pressure on lenders to fill out the tradeoff table, and that even a blank tradeoff table helped borrowers understand the relationship between settlement costs and interest rates. *Id.* 2041-42.

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