

# Proposed RESPA Rule

## Buckley Kolar Webinar

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# Principal Features

- New GFE trigger and New GFE Required Form
- Treatment of Yield Spread Premiums (YSPs)
- Closing Script
- Average Cost Pricing and Discounts
- New “Required Use” Definition to Address Builder Issue
- Servicing Transfer Update
- Timing: Comments due May 13<sup>th</sup> (55 days)

# Themes of Proposal

- Enable consumers to obtain multiple GFEs to shop
  - At minimal cost
- GFE includes detailed loan terms and costs
  - No APR, but interest rate and monthly payment required
  - Particular detail on ARM loan adjustments
  - Settlement costs are grouped in categories
- New accuracy requirements for GFE
- Closing script added to ensure consumer understanding of key terms and features
- Broker / Lender distinction blurred (YSP not shown)

# Initial Observations

- Rule impacts other laws (TILA, HMDA, ECOA)
- Greater disclosure means less simplicity
  - Will consumers read 4-page GFE?
  - Still have itemization
- Burden on lenders to pre-underwrite for nominal fee
- New notice requirements (counteroffer GFE or loan rejection notice in 1 day)
- Treatment of broker compensation at odds with Fed approach in Regulation Z proposal
- Unclear authority for new tolerances and mandated GFE form
- Average Cost Pricing – helpful
- Elimination of “Required Provider” disclosure - helpful

# New GFE Trigger

## ■ GFE Application - § 3500.2

- GFE required when broker or lender (“Originator”) receives “GFE Application” - only enough information for a borrower to arrive at a preliminary credit decision but not considered a “mortgage application.” Includes:
  - **Name and Social Security Number (to order credit)**
  - **Property address**
  - **Gross monthly income**
  - **Borrower’s information on the house price or best estimate of the property’s value**
  - **The amount of the loan sought**
- The GFE application may be taken orally but it must be reduced by the lender to a written or electronic record.

# New GFE Form

## ■ New GFE Provides Summary of Loan Terms and Total Settlement Charges

### □ The GFE discloses on the first page:

- Initial loan amount
- Loan term
- Initial interest rate and the specific date it remains available
- Initial monthly payment owed for principal, interest and mortgage insurance (but not taxes)
- Rate lock period
- Whether the interest rate can rise, and the maximum
- Whether the loan balance can rise, and the maximum
- Whether the monthly payment (P,I, MI) can rise, and the maximum
- Whether the loan has a prepayment penalty, and the maximum
- Whether the loan has a balloon payment, and description
- Whether the loan has a monthly escrow payment for taxes and other obligations
- The specific date the estimate for settlement charges remains available

# New GFE Form

- The first page also discloses a total amount for each of:
  - A. **Your Adjusted Origination Charges**
  - B. **Your Charges for All Other Settlement Services**
  - A+B. **Total Estimated Settlement Charges**  
(which is the sum of A and B)
- The components of these figures are described on the second page of the GFE

# New GFE Form

- **Your Adjusted Origination Charges** consists of:
  - Our Service Charge (Block 1) and
  - Your Credit or Charge for the specific interest rate chosen (points) (Block 2)

Three choices for the “Credit or Charge” for the rate:

1. Credit or Charge included in “Service Charge”
2. Credit of \$ XX received for this rate (credit reduces upfront charges)
3. Charge of \$XX paid for this rate (points increases your upfront charges)

# Treatment of YSPs

- YSPs are never mentioned on the form.
- All direct broker charges are included in “Our Service Charge”
- A YSP (the amount paid to the broker by the lender above the amount needed to fund the loan) is shown as a credit for the specific interest rate chosen – which reduces total origination charges
- Discount Points (a “charge”) collected by the broker to be paid to the lender would be netted against any YSP (“credit”) and shown as net “credit” or “charge” depending upon which is larger.
- A “Credit” and “Charge” cannot both be shown in the same transaction

# New GFE Form

## ■ Your Charges for All Other Settlement Services

- Includes:
  - (Block 3) **“Required services that we select”** (other than title) showing the estimated price for each service, plus a total for all such services (e.g. appraisal, credit report, etc.)
  - (Block 4) **Title services and lender’s title insurance**
  - (Block 5) **“Required services that you can shop for”** (other than title) showing estimated price for each service, plus a total for all such services (e.g. attorney, closing services, notary)
    - If the borrower is permitted to shop for required settlement services, the loan originator must provide a written list of settlement service providers at the time of the GFE on a separate sheet of paper.

# New GFE Form

## ■ Your Charges for All Other Settlement Services

- Also Includes:
- (Block 6) Government Recording and Transfer Charges (based upon proposed loan amount and property address)
- (Block 7) Reserves or escrow (for taxes and insurance) at settlement
- (Block 8) Daily interest charges (showing # of days until specific closing date)
- (Block 9) Homeowner's insurance (premium at settlement)
- (Block 10) Optional owner's title insurance

# New GFE Form - Tolerances

- Page 3 of GFE outlines what charges may change
- Charges with **zero tolerance** (can't increase):
  - “Our Service Charge”
  - “Your Charge or Credit for Rate Chosen” (if rate is locked)
  - Gov't Recording and Transfer Charges (unless loan amount changes)
- Charges with **10% tolerance** (in aggregate):
  - “Required Services We Select”
  - Title services (“if we select or you use providers identified by us”)
  - Option owner's title (“if you use providers identified by us”)
- Can also change if “**unforeseeable circumstances**”

# New GFE Form - Tolerances

- Charges with **no restriction** (can change)
  - “Required services you can shop for (“if you do not use providers identified by us”)
  - Title services and lender’s title insurance (“if you do not use providers identified by us”)
  - Reserves or escrow
  - Daily interest charges
  - Homeowner’s insurance
  - Optional owner’s title insurance (“if you do not use providers identified by us”)

# New GFE Form

- Page 3 also provides rate/cost “teeter-totter” comparison chart showing alternative loans with same loan amount and terms, except:
  - 1 with higher interest rate and lower settlement charges
  - 1 with lower interest rate and higher settlement charges
  - Must show changes in monthly payment
  - If ARM loan, just show initial rates

# New GFE Form

- On page 4, the originator must provide estimated annual amounts for:
  - Property taxes
  - Homeowner's insurance
  - Flood insurance
  - Other required property protection insurance

# Fee for New GFE; Availability

- No fee may be charged as condition for the GFE except “cost of providing GFE,” including initial credit report cost.
- GFE Terms must be available for at least 10 business days from GFE delivery, except:
  - Charge or credit for specific rate chosen
  - Adjusted origination charges
  - Per diem interest
- If consumer chooses to pursue GFE terms, then submits “mortgage application”

# Mortgage Application; New Notices

## ■ Mortgage Application – Definition

- Includes all other information needed to underwrite the loan and/or to verify the information provided in the GFE application
- A borrower may not be rejected unless the rejection is based on final underwriting by the originator
- Originator must complete final underwriting within “reasonable time” after mortgage application is complete

## ■ Notice Requirements – Rejection of loan

- After final underwriting, rejected borrower must be notified within 1 business day of decision to reject
- Where a borrower’s GFE application is rejected, and another loan product is available, the originator must provide the borrower with another GFE.
  - The basis for the rejection or changes to the GFE must be documented and retained for at least 3 years after settlement

# Revised HUD-1

- HUD-1/1A modified to allow comparison of charges on the GFE
  - HUD-1/1A lines reference corresponding “Block” on GFE.
  - Renumbering of many lines and new labels for lines, showing totals while permitting disclosure of details so long as not shown in either column or (P.O.C.)
  - Continues to separately itemize every service provided by a third party (other than loan originator) to show the name of the party ultimately receiving payment

# No Cost Loans

## ■ “No cost” loans

- Complicated manner of disclosure
- Where “no cost” encompasses third party fees as well as the up-front payment to the loan originator, the third party services to be paid for out of the **adjusted origination charge** must be itemized and listed on the HUD-1/1A with the charge for the third party service. These itemized charges **must be recorded in the HUD-1 columns.**
- The **adjusted origination charge** would reflect a negative number to offset the numbers in the columns
- The rule’s instructions are not consistent on this issue

# Title Services

## ■ Title Services

- Title insurance commissions paid to individual agents would be separately disclosed under the rule
- If a party other than the title company listed on line 1101 of the HUD-1 provides services that are separate from providing title insurance, such as attorney and settlement or escrow agent services the title company should separately itemize those services with the total amount paid to that provider, to the left of the columns.
- But charges for “primary title services” such as abstract, binder, copying, document handling, or notary fees, should not be separately itemized.

# Closing Script

- Loan originator transmits to the settlement agent all information necessary to complete the “closing script,” which is an addendum to the HUD-1/1A settlement statement
- Settlement agent must read the addendum aloud to the borrower at settlement.
- The proposal does not address “escrow closings” or “mail away” closings where borrowers may not be physically present at an escrow office.

# Closing Script

## ■ Contents

- Compares the loan terms and settlement charges estimated on the GFE with those on the HUD-1
- Explains whether or not charges are within the tolerances
- Describes in detail the loan terms for the specific mortgage loan as stated in the mortgage note and related settlement information
- Length varies based on terms of the loan
- The rule has several examples for different product types (hybrid ARMs, Payment Option ARMs, etc.)

# Average Cost Pricing

- Charges for third party services may be calculated using average cost pricing mechanisms based on appropriate methods established by HUD, without violating Section 8
  - May be based on the actual average price for that service in all loans closed by the loan originator, on a national or more limited basis, during the averaging period
  - May be based on a tiered pricing contract, provided the projected number of loans used in calculating the average is equal to the number of loans actually closed by the loan originator during the averaging period
    - To calculate the average price, the averaging period must be a specific recent 6-month period preceding the receipt of the GFE application, as designated by the loan originator
  - Loan originator must retain all documentation that average cost pricing is accurate for 3 years

# Discounts

- The amended definition of “thing of value” provides that a “discount negotiated by settlement service providers in the price of a third party settlement service is not a thing of value, provided that no more than the discounted price is charged to the borrower and disclosed on the HUD-1/1A.”
- Clarification of existing law
  - If all the benefit of a negotiated discount is passed through to the borrower, no thing of value remains with the party referring the settlement service business

# Disingenuous Builder Discounts

## ■ HUD's Concern:

- Builders have conditioned “incentive packages” of home features or economic benefits on buyer’s use of affiliated lender where the “incentives” were made up by a higher house price. No real benefit.
  - Now this would be a “required use”
  - “Required use” means a situation in which a borrower’s access to some distinct service, property, discount, rebate, or **other economic incentive, or the borrower’s ability to avoid an economic disincentive or penalty**, is contingent upon the borrower using or failing to use a referred provider of settlement services.
- Offering by a settlement service provider of an optional package or a combination of bona fide settlement services to a borrower at a total price lower than the sum of the prices of the individual settlement services does not constitute a “required use.”

# Effect on Other Laws

- GFE application trigger HMDA reporting?
- Rejection of GFE treated as ECOA/FCRA adverse action notices
  - GFE rejection notice inconsistent with timing of ECOA/FCRA notices
- GFE application trigger TILA disclosures
- Need borrower consent to pull credit
  - Question if mere shopping is sufficient intent to apply for lender permissible purpose under FCRA
- Inconsistent disclosures of mortgage broker compensation with Fed proposal

# Miscellaneous

- Eliminates the 1% (2.5% for new construction) cap on FHA origination fees
- Updates the Servicing Transfer Disclosure to match previous statutory changes
- All RESPA disclosures may be provided to consumers in electronic form so long as the consumer consents and other applicable ESIGN conditions are met

# Statutory Changes

- HUD also to seek changes in RESPA
  - Authority to impose civil money penalties, injunctive and equitable relief for Sections 4 (HUD -1),5 (GFE),6 (Servicing Transfer),8 (Referral Fees/Fee Splits),9 (Required use of Title) and 10 (Escrows)
  - Require delivery of HUD-1 three days before closing
  - Expanded statute of limitations

## Question & Answer

Any further questions may be submitted electronically to:

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### *Practice*

Joe Kolar is founding partner of Buckley Kolar LLP. Mr. Kolar regularly counsels financial institutions, financial services companies, mortgage companies, mortgage insurers, national trade associations and others in complying with mortgage and consumer lending regulations, including those relating to real estate settlement procedures, privacy, electronic signatures and records, escrows, truth in lending, fair credit reporting, equal credit opportunity, fair housing/fair lending, community reinvestment, state regulations and licensing. Mr. Kolar also has a significant practice in evaluating, drafting and advocating new legislative and regulatory proposals affecting the mortgage and consumer credit industry.

Mr. Kolar advises on FHA-insured and VA-guaranteed single-family and project mortgage loan programs, GNMA guaranteed securities programs and the programs and policies of FNMA and FHLMC, as they relate to loan origination, servicing and secondary market transactions. In addition, Mr. Kolar frequently represents mortgage lenders and others in negotiating joint ventures, marketing and Internet origination agreements and vendor agreements, as well as other contracts used or needed by a wide variety of financial services companies.

### *Professional Activities*

Mr. Kolar is a member of the Consumer Financial Services Committee of the American Bar Association where he serves as Co-Chair of the Housing Finance and RESPA Subcommittee, and of the bars of Maryland, Virginia and the District of Columbia.

### ***Publications/Presentations***

Mr. Kolar is a frequent speaker at conferences on consumer and mortgage regulatory issues and has written widely in these areas.

He was an Associate Editor of *The Tax Lawyer* at Georgetown University Law Center.

### ***Professional Experience***

Before joining Buckley Kolar, Mr. Kolar was a partner with Goodwin Procter LLP. Prior to law practice, Mr. Kolar worked as a staff member for U.S. Representative Jim Leach (R-IA).

### ***Education***

J.D., Georgetown University Law Center, 1985 (cum laude)

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### *Practice*

Grant Mitchell is Senior Counsel at Buckley Kolar LLP and specializes in RESPA issues.

### *Professional Experience*

Mr. Mitchell was formerly with the Department of Housing and Urban Development (HUD) in Washington, DC, where he was the most experienced lawyer and regulator working with the federal Real Estate Settlement Procedures Act (RESPA).

As the Senior Attorney for RESPA, Mr. Mitchell has interpreted this statute for a variety of Presidential administrations, HUD Secretaries and HUD General Counsel. He has written numerous RESPA regulations, statements of policy, and interpretive letters. His analysis has impacted every segment of the residential mortgage industry.

In addition, Mr. Mitchell has testified before Congress with the General Counsel of HUD and has spoken frequently at conferences sponsored by major industry trade organizations and by federal bank regulators including FDIC, OTS, OCC, and the Federal Reserve Board. He has also addressed state regulators and private mortgage finance conferences.

At HUD, Mr. Mitchell was also the longtime Assistant General Counsel for the federal New Communities program, which assisted large-scale residential and commercial land developments throughout the United States with Wall Street placements guaranteed by the Government, and with other aid. He is consulted on a broad variety of real estate issues, as well as HUD programs, including those of the Federal Housing Administration (FHA). Mr. Mitchell left HUD in April 1999.

Since leaving HUD, Mr. Mitchell was employed by the Washington offices of Reed Smith, LLP and, in 2003, Lotstein Buckman, LLP. He joined Buckley Kolar LLP on October 22, 2007. Since entering private practice, Mr. Mitchell has spoken at more than 100 functions, including trade association meetings, state bar functions, private lending conferences and client seminars. In addition, he has been engaged as an expert witness in eighteen cases.

Publications include articles on RESPA history and development in the May 5, 1999 Standard & Poors *Review of Banking and Financial Services* and in the November 1999 edition of *Mortgage Banking* magazine. A March 2000 article regarding online lending was published in *Mortgage Banking* magazine. Other publications are in *Practical Real Estate Lawyer* and the *Consumer Finance Law's Quarterly Report*. In May 2002 *Mortgage Banking* magazine published an article on "Bundling" and RESPA. A Viewpoint article was published in the August 18, 2003 edition of American Banker. The October 2003 Origination News contains Mr. Mitchell's commentary on RESPA reform. He was co-editor of A.S. Pratt's Mortgage Compliance Letter for a two year period. He was also featured on C-SPAN's Washington Journal in a live half-hour interview on mortgage lending on July 23, 2003.

### **Bar Admissions**

Mr. Mitchell is a member of the District of Columbia and Maryland State Bars. He is also admitted to practice in front of the United States Supreme Court.

### **Education**

B.S., State University of New York

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