



RESPA and Secondary Market Concerns

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While it is no surprise that compliance with the new RESPA requirements has been very challenging to all Brokers and Lenders, there seem to still be new issues emerging on a weekly basis. The strict GFE disclosure requirements and the resulting re-disclosure requirements have made the phrase "changed circumstance" part of every originators vocabulary. Just as we begin to understand the nuances of what is in fact a "changed circumstance," concerns have surfaced as to how this RESPA requirement will be handled by the Secondary Market and Auditors. Specifically when a re-disclosure of the GFE occurs, a lender must ask themselves; what was the basis for the changed circumstance, to what extent do I need to verify the validity of the changed circumstance, and how must I prove that the resulting change on the GFE is directly related to the changed circumstance?

Tracking Re-disclosed GFEs

When the GFE has been re-disclosed, the chain of the GFE disclosure and the rationale "changed circumstance" must be documented. Closed loan files that make their way into the Secondary Market will need to have the requisite proof of what triggered the "changed circumstance" or supporting information proving the specific "borrower request" to support the re-disclosure and the resulting change. In addition, should there be a change in "fee type" or "fee amount" resulting from the changed circumstance or request, it must be clearly tied to the change or request.

Establishing that nexus between valid purpose for change and proper fee amendment is a challenge. However, memorializing that change in a form that can be clearly communicated to anyone reviewing that loan file in the future may prove to be exponentially more difficult. While there is no clear guidance on what form the documentation must take, or how much proof is necessary, lenders face much uncertainty when it comes to protecting themselves against possible repurchase risk or audit questioning.

"It really is a complete nightmare," was the response of Jeffrey DeMaso, Senior Regulatory Counsel at Clayton when discussing how Due Diligence firms are auditing loans for RESPA compliance. "My instructions [to the underwriters] are to look in the file for documentation of the changed circumstance if they see a re-disclosed GFE. Only those fees affected by the changed circumstance can change."

It appears that the lenders must not only establish that the GFE was in fact properly re-disclosed and tie the change in fees to the changed circumstance, but somehow memorialize this so when the loan is audited either by a lenders Quality Control representative, a Regulator, or a Due Diligence firm, there is a clear understanding that the Lender met all necessary obligations in re-disclosing the GFE. It is not clear if we will see guidance on this particular issue, but in the absence of clear obligations, it is always in a lenders best interest to clearly document and create a clear record of what the circumstances were that led to the re-disclosure.

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