

HAPPY NEW YEAR!!!



We at Grace Title, Inc. sincerely wish all of our friends and clients a happy and prosperous 2005. We also want to say thank you for making 2004 a great year for us. Our pledge to you continues to be that you will receive the highest quality, most timely service in the land title and closing services industry. You deserve no less.

For those of you that already partner with us for your real estate closing services, we thank you. And for those of you that have not had the opportunity to try us, we would welcome the opportunity to earn your business. We promise you magnificent service. Give us a call at **321-207-0465** or e-mail us at info@thegracecompanies.com.

This month, for your information, we have decided to offer the following article on FHA rules changes for buyer/broker fees. This article was in the RESPRO report last summer but many of you may have missed it. We hope you find it interesting.

FHA Changes Rules on Buyer/Broker Fees

The following article is reprinted with permission from The Real Estate Services Providers Council Inc.'s (RESPRO) June/July issue of the RESPRO Report.

By Jay Varon, Esq., Foley & Lardner

As part of its mortgage program, the Federal Housing Administration (FHA) regulates the closing costs and fees that its borrowers can pay when utilizing FHA financing. FHA regulations have long been hostile toward real estate broker/mortgage lender affiliations that were born in an era long pre-dating HUD's 1992 pro-affiliated business regulations. Recently, however, FHA incorporated in its new handbook a RESPRO recommendation that drops its discriminatory treatment of realty-based mortgage companies.

FHA's former prohibition

In particular, in its Handbook 4000.2 (Rev. 2), section 5-3L, HUD provided that an FHA borrower could not pay fees or charges to real estate brokers or agents unless the real estate broker was "independently engaged" – that is to say, it had a direct "buyer/broker" arrangement with the borrower. However, even with an independently engaged buyer/broker, FHA still prohibited the fee "if there was any 'financial relationship' between the broker and the mortgagee [e.g., the lender]."

RESPRO action

RESPRO argued to HUD for many years that its rules on real estate broker fees needlessly discriminated against affiliated business arrangements.

While it appeared that HUD officials were sympathetic to RESPRO's arguments, this topic became one of many issues to be resolved as HUD drafted its new FHA handbook. For the last couple of years, the FHA handbook has been caught up for unrelated reasons in what's known as "departmental clearance," which requires the sign-off of all HUD divisions that have jurisdiction over FHA issues.

FHA's new rule

This past summer, FHA finally issued Handbook 4000.2 (Rev. 3) and a new rule on real estate broker fees.

In section 5-2L of the new handbook, the rule states: "Listed below are customary and reasonable fees and charges that may be collected from the borrower by the lender and used to meet the minimum investment requirements for purchase and added to the existing indebtedness for refinances. The cost of any item charged to the borrower must not exceed the cost paid by the lender or charged to the lender by the service provider. ..."

Real estate broker's fees

"The borrower may be charged real estate broker fees only if the borrower engages the broker independently and the fees are reasonable and customary. However, if the broker is not independently engaged, no fees may be charged to the borrower."

Thus, gone is the restriction on real estate brokers and mortgage brokers/lenders with financial relationships, and, in its place is a more sensible requirement (borrowed from FHA Handbook 4150, which the old provision also had cross-referenced) that the charge be "reasonable and customary."

Implications of the new FHA rule

Buyer/broker fees

The most obvious change is that buyer/broker fees can now be charged in FHA transactions, even with an affiliated lender. However, it may be necessary for a written buyer/broker agreement to be executed by the parties in order to be in the best position to prove that the real estate broker was "independently engaged." While some state laws and the internal policies of many real estate brokers call for written buyer/broker agreements to be executed, busy sales agents do not always do so. This is but one more compliance reason for brokers to insist that this policy be followed.

Transaction fees and administrative or fixed-fee commissions

Another significant opportunity relates to the ability of real estate brokers to successfully charge and collect certain administrative fees or commissions in transactions with affiliated lenders.

Since the new rule says buyer/broker fees are permissible if "reasonable and customary," it would appear that if a buyer/broker fee agreement cited that the real estate broker would provide various services listed in the agreement (e.g., showing houses to buyers, advising them about such houses and/or potential purchase terms, etc.) in

consideration for a fee of 3 percent of the house price plus \$199, the fee would comply with the new FHA rule.

The fee likely would also comply with Section 8(b) of RESPA. Certainly, this would be the situation with respect to those courts following the majority rule set forth in *Boukware v. Crossland Mortgage Corp.*, 291 F.3d 261 (4th Cir. 2003); *Krzalic v. Republic Title Co.*, 314 F.3d 875 (7th Cir. 2002); and *Haug v. Bank of America*, 317 F.3d 832 (8th Cir. 2003). However, even under the Eleventh Circuit view in *Sosa v. Chase Manhattan*, 348 F.3d 979, 983 (11th Cir. 2003), if the fee was listed as part of the consideration for performing general real estate brokerage services, it would not violate Section 8(b) because real services were in fact performed.

Two additional considerations may also prove relevant. First, the FHA rule requires that the fee be “reasonable.” Therefore, real estate brokers may want to reconsider imposing buyer/broker fees that are significantly higher than those in the market without adequate justification.

Second, in order to support and/or be consistent with the argument that the fixed \$199 fee together with the 3 percent commission are collectively charged for the real estate services provided by the buyer/broker, it might be helpful for the \$199 fee to appear on the same line of the HUD-1 as the 3 percent commission, or at least in the real estate broker section’s list of fees on the HUD-1. Some brokers have asked closing agents to show the fee on a separate line so real estate agents do not think that they share the \$199 fee the same way they share the commission. However, it would probably be just as effective to make explicit arrangements with the sales agents on this point and not affect the description of the fee on the HUD-1.

Conclusion

FHA has finally adopted RESPRO’s sensible recommendation to allow closing costs to be paid to real estate brokers with affiliated mortgage companies. Realty-based affiliated business arrangements should study the change and take full advantage of it.



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