BLACK | MANN & GRAHAM L.L.P.

9575 Katy Freeway, Suite 300

Houston, TX 77024

Phone: 713-871-0005

Fax: 713-871-1358

Thomas E. Black, Jr., P. C. *
Calvin C. Mann, Jr., P. C.
Gregory S. Graham, P. C.
David F. Dulock
Diane M. Gleason
Benjamin R. Idziak **
Shawn P. Black **
Margaret A. Noles
Robert J. Brewer
Regina Uhl
Ali Hedayatifar

Of Counsel
David M. Tritter

** Also Licensed in New York, Washington, West Virginia and Iowa*
*** Also Licensed in New York*

July 12, 2011

To: Clients and Friends

From: David F. Dulock

Subject: Corrections and Amendments to Regulation X – GFE and HUD-1

In the July 11, 2011 *Federal Register*, the Department of Housing and Urban Development (HUD) published a final rule ("July 2011 rule") that makes technical corrections and clarifying amendments to HUD's Regulation X final rule that became effective on January 1, 2010 ("January 2010 rule"). The effective date of the July 2011 rule is August 10, 2011.

This memorandum addresses the July 2011 rule only as it relates to the Good Faith Estimate (GFE) and HUD-1/1A Settlement Statements. As to the other corrections and amendments made by the July 2011 rule, they are more in the nature of technical corrections and are not addressed in this memorandum.

In regard to the GFE and HUD-1/1A, the July 2011 rule makes changes summarized as follows:

1. It amends Section 3500.7(a)(4) and (b)(4) of Regulation X by adding the requirement that additional fees may not be charged until after the applicant has indicated an intention to proceed with the loan.
2. It amends the Appendix A Instructions for Page 3 of the HUD-1 to provide that the estimated charge disclosed on the GFE for a settlement service that is not provided must not be included in the comparison chart on Page 3 of the HUD-1.

The July 2011 rule changes summarized above are discussed more fully below:

- **Section 3500.7 (GFE):**

Amendment. The July 2011 rule amends Section 3500.7(a)(4) and (b)(4) of Regulation X to provide that the applicant must also indicate an intention to proceed with the loan covered by the GFE received by the applicant before the lender (subsection (a)(4)) or mortgage broker (subsection (b)(4)) may charge additional fees other than the permitted credit report fee. Accordingly, the third sentence of subsections (a)(4) and (b)(4) now read, in pertinent part, that the lender or mortgage broker "may not charge additional fees until after the applicant has received the GFE *and indicated an intention to proceed with the loan covered by that GFE*." **(not italicized in original)**

Reason. The January 2010 rule's preamble discussion of subsections (a)(4) and (b)(4) states that: "After the GFE has been received, the loan originator may collect additional fees needed to proceed to final underwriting for borrowers *who decide to proceed with a loan from that originator*." **(not italicized in original)** This italicized requirement was inadvertently omitted from the text of subsections (a)(4) and (b)(4) in the January 2010 rule. In addition, and in spite of the omission of this requirement, HUD stated in FAQ 10) in its "New RESPA Rule FAQs" originally issued August 13, 2009 (updated April 2, 2010 without change) that: "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." **(not italicized in original)**

Our Comments:

1. Although the effective date of the July 2011 rule is August 10, 2011, due to the fact that as early as August 13, 2009, HUD's FAQs have stated that the applicant must also indicate an intention to proceed with the loan before additional fees may be charged, we advise immediate compliance with this requirement.

2. HUD did not provide any guidance in the July 2011 rule or the January 2010 rule or the April 2, 2010 "New RESPA Rule FAQs" on how to determine when an applicant has "indicated an intention to proceed with the loan covered by that GFE." Therefore, before additional fees are charged, we recommend that written documentation be obtained from the applicant (all applicants if more than one) stating that the applicant has received the GFE and intends to proceed with the loan. We believe an email from the applicant or facsimile transmission bearing the applicant's signature that is received prior to charging the additional fees is sufficient to document compliance with this requirement.

- **Appendix A – HUD-1 Instructions for Page 3:**

Amendment. The July 2011 rule revises the first paragraph of the Appendix A Instructions for Page 3 of the HUD-1 to clarify that the HUD-1/1A is a statement of actual charges and adjustments and the amounts to be inserted in the comparison chart are those for the services that were purchased or provided as part of the loan, and that no amount should be included on pages 1 or 2 of the HUD-1 for any service that was listed on the GFE but was not obtained in connection with the loan. Accordingly, the first paragraph of the Appendix A Instructions for Page 3 of the HUD-1 is revised to read as follows:

> The HUD–1/1–A [*sic*] is a statement of actual charges and adjustments. The comparison chart on page 3 of the HUD–1 must be prepared using the exact information and amounts for the services that were purchased or provided as part of the transaction, as that information and those amounts are shown on the GFE and in the HUD–1. If a service that was listed on the GFE was not obtained in connection with the transaction, pages 1 and 2 of the HUD–1 should not include any amount for that service, and the estimate on the GFE of the charge for the service should not be included in any amounts shown on the comparison chart on Page 3 of the HUD–1. The comparison chart is comprised of three sections: ''Charges That Cannot Increase'', ''Charges That Cannot Increase More Than 10%'', and ''Charges That Can Change''.

Reason. HUD believes the current HUD-1 Instructions are not sufficiently clear when a settlement service (and its estimated charge) disclosed on the GFE was not actually purchased or provided in connection with the loan. HUD also believes that allowing charges from the GFE for settlement services that were not purchased or provided to be included in the comparison chart on Page 3 of the HUD-1 may induce loan originators to discourage borrowers from purchasing settlement services (for example, owner's title insurance) in order to pad the 10 percent tolerance category on Page 3 of the HUD-1 or encourage loan originators to pad the 10 percent tolerance category charges on the GFE with estimates of services not needed in connection with the loan.

HUD previously addressed this issue informally in its July 2010 *RESPA Roundup*, wherein HUD states that: "If the consumer did not purchase a service that was listed on the GFE (usually owner's title) there should be nothing entered in that line on Page 2 of the HUD–1 and the estimate of the charge should not appear on the comparison chart on Page 3 of the HUD–1."

Our Comments: Although the effective date of the July 2011 rule is August 10, 2011, due to the fact that HUD informally advised as early as July 2010 that this is a requirement, we advise immediate compliance with the revised Instructions for Page 3 of the HUD-1.

As stated on page 1, this memorandum is not a complete discussion of the corrections and amendments made by the July 2011 rule. For a full understanding we advise you to read the entirety of the July 2011 rule and HUD's preamble explanation published in the above issue of the *Federal Register* at: http://www.gpo.gov/fdsys/pkg/FR-2011-07-11/pdf/2011-17230.pdf.