



2008 RESPA REFORM AVERAGE CHARGE CONCEPT

The information contained in the following document is meant to be a helpful starting point in researching the law applicable to the subjects covered therein, but the information should not be relied upon as the final authority on the laws recited in the document. The current state and/or federal statutes on any subject should always be obtained and reviewed in reaching any determination as to the law of any particular jurisdiction.

One of the more significant changes made in the new RESPA rule is the concept of “average charge.” What follows is a short synopsis of that portion of the rule, the actual text of the relevant section of the rule, as well as HUD’s own analysis of the average charge provision.

According to HUD’s preamble to the rule, an average charge can be used for any settlement service, “provided that the total amounts received from borrowers for that service for a particular class of transactions do not exceed the total amounts paid to the providers of that service for that class of transactions.” While the average charge concept will be very useful for the settlement services industry, the preceding quote is important to remember. Care will have to be taken so that the total average charge billed does not exceed the total paid for a given service. HUD states that one of the benefits of the average charge is that it will save administrative fees for settlement service providers and HUD expects that those savings will be passed onto consumers due to the pressures of competition.

In calculating an average charge, a provider may define a class of transactions based on time, loan type or geographic area. The average charge must be recalculated at least every 6 months. If a settlement service provider uses an average charge for a class of transactions, the provider must use the same average charge for every transaction within that class. An average charge may NOT be used for services where the charge is based on the loan amount or property value, because it would cause smaller borrowers to subsidize larger borrowers. For instance, an average charge may NOT be used for title or mortgage insurance. A provider “must maintain all documents that were used to calculate the average charge for at least three years after any settlement in which the average charge was used.” This last provision concerning record-keeping will be very important to keep in mind, as well. See 24 CFR 3500.8 (b)(2).

It is important to note that the average charge concept is the exception to HUD’s rule. HUD states in its proposal that “(t)he amount stated on the HUD-1 for any itemized service cannot exceed the amount actually received by the settlement service provider for

that itemized service, unless the charge is an average charge in accordance with paragraph (b)(2) of this section.” 24 CFR Section 3500.08 (b)(1). In other words, RESPA does not allow mark-ups. Should distinct and necessary additional services be provided, however, it is appropriate to charge a fee equal to the value of the additional services rendered.

The ability to use an average charge begins when that part of the new rule takes effect on January 16, 2009.

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NEW § 3500.8 Use of HUD-1 or HUD-1A settlement statements.

(a) Use by settlement agent. The settlement agent shall use the HUD-1 settlement statement in every settlement involving a federally related mortgage loan in which there is a borrower and a seller. For transactions in which there is a borrower and no seller, such as refinancing loans or subordinate lien loans, the HUD-1 may be utilized by using the borrower's side of the HUD-1 statement. Alternatively, the form HUD-1A may be used for these transactions. The HUD-1 or HUD-1A may be modified as permitted under this part. Either the HUD-1 or the HUD-1A, as appropriate, shall be used for every RESPA-covered transaction, unless its use is specifically exempted. The use of the HUD-1 or HUD-1A is exempted for open-end lines of credit (home-equity plans) covered by the Truth in Lending Act and Regulation Z.

(b) Charges to be stated. The settlement agent shall complete the HUD-1 or HUD-1A, in accordance with the instructions set forth in Appendix A to this part. The loan originator must transmit to the settlement agent all information necessary to complete the HUD-1 or HUD-1A.

(1) In general. The settlement agent shall state the actual charges paid by the borrower and seller on the HUD-1, or by the borrower on the HUD-1A. The settlement agent must separately itemize each third party charge paid by the borrower and seller. All origination services performed by or on behalf of the loan originator must be included in the loan originator's own charge. Administrative and processing services related to title services must be included in the title underwriter's or title agent's own charge. The amount stated on the HUD-1 or HUD-1A for any itemized service cannot exceed the amount actually received by the settlement service provider for that itemized service, unless the charge is an average charge in accordance with paragraph (b)(2) of this section.

(2) Use of average charge. (i) The average charge for a settlement service shall be no more than the average amount paid for a settlement service by one settlement service provider to another settlement service provider on behalf of borrowers and sellers for a particular class of transactions involving federally related mortgage loans. The total amounts paid by borrowers and sellers for a settlement service based on the use of an average charge may not exceed the total amounts paid to the providers of that service for the particular class of transactions.

(ii) The settlement service provider shall define the particular class of transactions for purposes of calculating the average charge as all transactions involving federally related mortgage loans for:

(A) A period of time as determined by the settlement service provider, but not less than 30 calendar days and not more than 6 months;

(B) A geographic area as determined by the settlement service provider; and

(C) A type of loan as determined by the settlement service provider.

(iii) A settlement service provider may use an average charge in the same class of transactions for which the charge was calculated. If the settlement service provider uses the average charge for any transaction in the class, the settlement service provider must use the same average charge in every transaction within that class for which a GFE was provided.

(iv) The use of an average charge is not permitted for any settlement service if the charge for the service is based on the loan amount or property value. For example, an average charge may not be used for transfer taxes, interest charges, reserves or escrow, or any type of insurance, including mortgage insurance, title insurance, or hazard insurance.

(v) The settlement service provider must retain all documentation used to calculate the average charge for a particular class of transactions for at least 3 years after any settlement for which that average charge was used.

(c) Violations of section 4 of RESPA (12 U.S.C. 2604). A violation of any of the requirements of this section will be deemed to be a violation of section 4 of RESPA. An inadvertent or technical error in completing the HUD-1 or HUD-1A shall not be deemed a violation of section 4 of RESPA if a revised HUD-1 or HUD-1A is provided in accordance with the requirements of this section within 30 calendar days after settlement.

HUD Determination (HUD description of Average Charge rule)

Based on the comments received in response to the proposed rule, HUD has revised the average cost pricing provisions to provide more flexibility and greater clarity.

Commenters representing some consumer interests opposed implementation of the proposed average cost pricing provision, recommending that HUD limit charges for third party services to the actual cost of providing those services, plus an established rate of return. While HUD appreciates these comments, the proposed average cost pricing provision was not intended to limit the amounts charged for settlement services in this fashion, but instead simply provided for an alternative means of calculating and disclosing settlement charges on the HUD-1 or HUD-1A settlement statements. In order to avoid similar confusion about the intent of this provision in the future, the final rule uses the term “average charge” in place of “average cost pricing.” The term “average charge” appropriately focuses on the amount disclosed on the settlement statement, rather than the underlying costs of providing a particular settlement service.

The final rule also clarifies that an average charge may be used by any settlement service provider that obtains a service from a third party on behalf of a borrower or seller; the provision is not limited to loan originators. HUD has determined that benefits to consumers and the benefits of reduced recordkeeping requirements and pricing flexibility from this provision should not be limited to one group of settlement service providers. Any provider that is able to calculate an average charge for a service in accordance with this provision and that is able to meet the provision’s recordkeeping requirements is permitted to use an average charge for that service.

In addition to these clarifying changes, HUD has made several other significant changes to provide additional flexibility in calculating average charges. HUD has determined that its objective of providing a method that benefits consumers and results in charges that are easily calculated, verified, and enforced is best served by restricting the actual charges imposed on borrowers and sellers rather than by prescribing a particular method for calculating those charges.

The final rule provides that an average charge may be used for any settlement service, provided that the total amounts received from borrowers for that service for a particular class of transactions do not exceed the total amounts paid to the providers of that service for that class of transactions. This approach leaves the method of determining the average charge to the discretion of the settlement service provider. However, the provider must ensure that the average charge used does not result in borrowers, in the aggregate, paying more for a particular settlement service than the aggregate price paid for obtaining that service from third parties. HUD has determined that this approach balances the settlement service provider’s interest in flexibility in calculating an average charge with the

borrower's interest in preventing excessive settlement charges. This approach is intended to promote greater efficiencies that ultimately lead to lower prices for consumers.

The final rule provides that a settlement service provider may define a class of transactions based on the period of time, type of loan, and geographic area. For example, a settlement service provider might calculate an average charge for all purchase money mortgages in the States of Georgia and South Carolina in a specified period of time. Alternatively, a settlement service provider could establish the class of transactions in which it would use a single average charge broadly, e.g., all transactions it engages in for a period of time, regardless of loan type or location. The settlement service provider must recalculate the average charge at least every 6 months. In order to prevent selective use of an average charge, the final rule provides that if an average charge is used in any class of transactions defined by the settlement service provider, then that provider must use the same average charge for every transaction within that class.

The final rule also prohibits the use of average charges for settlement services where the charge is based on the loan amount or the value of the property. Permitting average charges for those types of services would require borrowers in transactions with lower loan amounts and property values to subsidize the costs for borrowers with higher loan amounts and property values. HUD has determined that such subsidization is not in the interest of consumers. This prohibition applies to charges such as transfer taxes, daily interest charges, reserves or escrow, and all types of insurance, including mortgage insurance, title insurance, and hazard insurance.

The final rule maintains the proposed recordkeeping requirements, to ensure that average charges are calculated appropriately and that regulators and borrowers are able to determine the basis on which the average charge was determined. Any settlement service provider that uses an average charge for a particular service must maintain all documents that were used to calculate the average charge for at least three years after any settlement in which the average charge was used.