

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.