Inter-Agency Examiner Guidance
On Settlement Service Mark-Ups
Under Real Estate Settlement Procedures Act ("RESPA")

Scope of 12 U.S.C. § 2607(b) and 24 C.F.R. § 3500.14(c)

Introduction

A recent federal appellate court ruling, Echevarria v. Chicago Title & Trust Co. ("Echevarria"),[1] will affect the range of transactions prohibited by Section 8(b) of RESPA (12 U.S.C. § 2607(b)). The court's ruling establishes the law in the territory covered by the Seventh Circuit (the States of Illinois, Indiana, and Wisconsin). The Echevarria case dealt with the permissibility under Section 8(b) of "mark-ups" -- the practice of charging a consumer more for a third party's settlement services than is actually paid over to the third party. Although the Department of Housing and Urban Development ("HUD") has stated that this practice is prohibited by Section 8(b), the Echevarria decision holds that this practice is not a violation, at least in certain circumstances.

Specifically, for loans subject to RESPA where the underlying real estate is in Illinois, Indiana, or Wisconsin, examiners should not cite a violation of Section 8(b) where: (1) a consumer is charged more for a settlement service provided by a third party than is actually paid to the third party, and (2) the third party is not involved in the mark-up. This guidance addresses issues arising from the Echevarria decision and should be used in addition to, but not in place of, other applicable examination procedures and guidelines.

Background

Section 8(b) prohibits any person from giving or accepting "any portion, split, or percentage of any charge made or received for the rendering of a real estate settlement service in connection with a transaction involving a federally related mortgage loan other than for services actually performed." Section 8(b) is implemented by Regulation X, promulgated by HUD.[2]

HUD has interpreted this section as prohibiting the acceptance of any portion or part of a charge other than for services actually performed. HUD does not interpret Section 8(b)'s prohibition as limited to a split fee that requires the participation of more than one

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[1] 256 F.3d 623 (7th Cir. 2001).

[2] Regulation X states in part, "[a] charge by a person for which no or nominal services are performed or for which duplicative fees are charged is an unearned fee and violates this section. The source of the payment does not determine whether or not a service is compensable. Nor may the prohibitions of this Part be avoided by creating an arrangement wherein the purchaser of services splits the fee." See 24 C.F.R. § 3500.14(c).

provider. Until Echevarria, the financial institution regulatory agencies applied HUD's interpretation of Section 8(b) nationwide.

This nationwide application of HUD's interpretation must be modified in light of the Echevarria decision, which adopted a different interpretation of the scope of Section 8(b). In Echevarria, a title insurance company had charged the Echevarrias a mortgage recordation fee of $45. The fee actually charged by the county recorder for this purpose was $31. The title insurance company had retained the difference, and the Echevarrias brought suit, alleging that the title insurance company violated Section 8(b). The court in Echevarria held that Section 8(b) did not prohibit the title insurance company's actions. Because the county recorder received no more than its regular fee, and did not give or arrange for the title company to receive the unearned portion, the court found that the county recorder did not engage in the third-party involvement necessary to create a violation of Section 8(b).

Effect of Appellate Court Decision in the Seventh Circuit

Within the Seventh Circuit, the Echevarria decision must now be applied. Therefore, for loans subject to RESPA, examiners should not cite violations of Section 8(b) or 24 C.F.R. § 3500.14(c) in situations where the facts are similar to those in Echevarria (e.g., where a financial institution marks up an appraisal, credit report, flood hazard determination, or other third party settlement service fee for which no additional or distinct service is provided by the financial institution to the consumer for the extra charge, and the third party is not involved in the mark-up). A violation would occur, however, if a second settlement service provider (the third party) performs the work, collects the entire fee, and gives a portion, split, or percentage of the charge back to the first settlement service provider, who accepts the fee without performing additional services.

For examination purposes, the rule in Echevarria will apply when the real estate in a RESPA-covered transaction is located in Illinois, Indiana, or Wisconsin. Financial institutions and examiners should be aware, however, that this position represents only the supervisory policy of the FFIEC agencies, and that this supervisory policy would not insulate an institution from litigation risk if it engaged in mark-ups, even where the property is located within the Seventh Circuit.

Application of Law Outside the Seventh Circuit

For examination purposes, HUD's interpretation of Section 8(b) will continue to be applied in transactions where the real property is not located in Illinois, Indiana, or Wisconsin. [3]

[3] HUD has recently reiterated its position that Section 8(b) prohibits the following arrangements: (a) a single settlement service provider charges a consumer a fee where no, nominal, or duplicative work is done, or the fee exceeds the reasonable value of goods or facilities provided or the services actually performed; (b) a single settlement service provider marks up the cost of the services performed or goods provided by a second settlement service provider without providing additional, actual, necessary, and distinct services,

Disclosures

The Echevarria decision does not affect RESPA disclosure requirements. For example, under the facts in Echevarria, a proper disclosure in a HUD-1 or HUD-1A settlement disclosure statement would show that the title company received $14 of the recordation fee, and the county recorder received $31. See 24 C.F.R. § 3500, Appendix A, Sections L and M.

Similarly, Truth in Lending Act ("TILA") disclosure requirements are not changed by the court's decision. Thus, mark-ups allowed under Echevarria may constitute finance charges that must be disclosed as such. See 12 C.F.R. §§ 226.4(a)(1)-(3), (c)(7) and 12 C.F.R. Part 226, Supp. I (commentary to paragraphs 4(a)(1)-(3) and comment 4(c)(7)-1).

Further Information

Examiners having questions about this guidance, or about the effect of Echevarria in a particular circumstance, should contact the appropriate supervisory office.

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goods, or facilities to justify the additional charge; or (c) two or more persons split a fee for settlement services, any part of which is unearned. See HUD Policy Statement 2001-1, 66 Fed. Reg. 53052, 53058 (October 18, 2001).