REGULATORY ALERT

NATIONAL CREDIT UNION ADMINISTRATION
1775 DUKE STREET, ALEXANDRIA, VA 22314

DATE: **January 2003** **NO:** **03-RA-01**

TO: **All Federally-Insured Credit Unions**

SUBJECT: **Real Estate Settlement Procedures Act: Mark-Up of Settlement Service Fees**

Introduction

Two recent appellate court rulings, will affect the range of transactions prohibited by Section 8(b) of the Real Estate Settlement Procedures Act (RESPA) (12 U.S.C. § 2607(b)). Boulware v. Crossland Mortgage Corp., 291 F. 3d 261 (4th Cir. 2002) (Boulware); Echevarria v. Chicago Title & Trust Co., 256 F. 3d 623 (7th Cir. 2001) (Echevarria). The two cases establish law in the Fourth Circuit and the Seventh Circuit. Affected states are: Illinois, Indiana, Maryland, North Carolina, South Carolina, Virginia, West Virginia, and Wisconsin. Both cases address 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 to the third party. The United States Department of Housing and Urban Development (HUD) has stated this practice is prohibited under Section 8(b). These court decisions hold that this practice is not a violation in certain circumstances.

Specifically, for loans subject to RESPA where the underlying real estate is located in one of the above mentioned states, NCUA 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.

Background

Section 8(b) prohibits any person from giving or accepting "any portion, split or percentage of any charge made or received . . . other than for services actually performed." HUD interprets this section as barring the acceptance of any portion or part of a charge other than for services actually performed, including a split fee that requires the participation of more than one provider. Until the Boulware and Echevarria cases, the Federal Financial Institutions Examination Council (FFIEC) member agencies applied HUD's interpretation of Section 8(b) nationwide.

This nationwide application of HUD's interpretation must be modified in light of these decisions, which adopted a different interpretation of the scope of Section 8(b). In each of the mentioned cases, settlement service providers charged consumers fees for services in excess of what the settlement service providers paid to other third parties for a service or product. The settlement service providers retained the overcharges, and the consumers brought suit, alleging a violation of Section 8(b). In both Boulware and Echevarria, the courts held that Section 8(b) did not prohibit the actions of the settlement service companies. Because the third parties received no more than their regular fees, and did not give or arrange for the settlement service companies to receive the unearned portions, the courts found that they did not engage in the third-party involvement necessary to create a violation of Section 8(b).

Effect of Court Decisions in the Fourth and Seventh Circuits

Within the Fourth and Seventh Circuits, the Boulware and Echevarria decisions must now be applied. Therefore, for loans subject to RESPA, NCUA examiners should not cite violations of Section 8(b) in situations where the facts are similar to those in Boulware or Echevarria (e.g., where a credit union 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 credit union 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 FFIEC agencies will apply the rule in Boulware and Echevarria when the real estate in a RESPA-covered transaction is located in Illinois, Indiana, Maryland, North Carolina, South Carolina, Virginia, West Virginia, or Wisconsin.

Application of Law Outside the Fourth and Seventh Circuits

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 the Fourth and Seventh Circuits. [1]

[1] 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, 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.

Disclosures

These decisions do not affect RESPA disclosure requirements. For example, a proper disclosure in a HUD-1 or HUD-1A settlement disclosure statement would show the amount of fees received by the settlement service companies and the fees received by the other parties to the transaction.

Similarly, Truth in Lending Act disclosure requirements are not changed by these cases. Thus, mark-ups allowed under Boulware or Echevarria may constitute finance charges that must be disclosed as such.

Sincerely,

/S/

Dennis Dollar
Chairman