December 26, 2007

Maine Bureau of Financial Institutions
Maine Bureau of Consumer Credit Protection
Joint Advisory Ruling # 112
Computation of "Total Loan Amount"

Dear:

You have asked the Bureau of Financial Institutions and the Bureau of Consumer Credit Regulation for guidance regarding the computation of the "total loan amount" as that phrase is set forth in the Maine Consumer Credit Code (the "Code").

The phrase "total loan amount", which was enacted as part of PL 2007, Ch. 273, is defined as "the principal of the loan minus points and fees that are included in the principal amount of the loan…." 9-A MRSA (the Code), § 8-103(1-A)(GG).

This definition differs from the "total loan amount" under section 32 of federal Regulation Z, which is described in the Official Staff Commentary as follows:

Total loan amount. For purposes of the "points and fees" test, the total loan amount is calculated by taking the amount financed, as determined according to §226.18(b), and deducting any cost listed in §226.32(b)(1)(iii) and §226.32(b)(1)(iv) that is both included as points and fees under §226.32(b)(1) and financed by the creditor *(21 Comment 32(a)(1)(ii)—1).*

In contrast, under the Code's language one starts with the principal of the loan and subtracts fees that are "included in principal" (in other words, those fees that are financed).

Your question arises because, as you point out, at a loan closing one cannot tell what costs are financed and what are paid in cash. A lender cannot determine which dollar is deployed for which purpose out of a pool of dollars on a closing table.

You have provided the following example:

Assume a note for $83,500 used to refinance an $81,000 mortgage as well as pay part of $3500 in closing costs. The borrower pays $1000 at the closing.

One can argue that $81,000 of loan proceeds went to the former creditor, $2500 of the loan amount represented financed closing costs, and $1000 was paid by the borrower for the rest of the closing costs. In that case the "total loan amount" is $81,000.

One could just as easily argue that $3500 of loan proceeds went to closing costs, $80,000 went to the former creditor, and $1000 from the borrower went to the former creditor, in which case the "total loan amount" is $80,000.

You point out that the HUD-1 form does not indicate which dollars are used for which costs. It simply totals the charges to the borrower and subtracts the loan proceeds, calculating a net amount due from the borrower. Thus, the documentation does not resolve this issue. You also note that the Commentary to section 32 of Regulation Z does not help, both because it calculates a different number and because it avoids the issue by defining the amount of costs that are financed in its examples.

In our view, the consumer expectation and the common meaning of financing points and fees refers only to the situation in which the principal loan amount exceeds the amount of the transaction being financed: either the prior loan payoff(s) (in a refinance) or the purchase price (in a Residential Mortgage Transaction). The consumer understands he or she is borrowing money to pay for a transaction, and that is the first use of loan proceeds. The second use is any additional costs such as points and fees, and the last use is "cash out" to the borrower.
If the transaction documents dictate a different application of proceeds, the documents would, of course, govern this issue.

We adopt the following rules to allocate monies at a closing table: assuming the loan documents do not contradict this characterization, loan proceeds are applied first to the transaction being financed, second to any points and fees, third to any excludable costs and fourth to cash out to the borrower.

We hope this is responsive to your request for our opinion.

Sincerely,

/s/ Lloyd P. LaFountain III
Superintendent

Bureau of Financial Institutions

Sincerely,

/s/ William N. Lund
Superintendent

Bureau of Consumer Credit Protection