

## **CLTA ANALYSIS OF THE UNIFORM GENERAL CLOSING INSTRUCTIONS**

### **Potential Title and Escrow Issues to Consider**

The following is an analysis of the Uniform General Closing Instructions (hereafter “draft general closing instructions”) conducted by CLTA and outside counsel to raise a number of issues for consideration by title insurers and underwritten title companies reviewing the draft general closing instructions for impact upon their operations in California.

#### Potential Shift of Liability to Title and Escrow Companies?

The draft of the draft general closing instructions *require* a “settlement agent” to notify lender’s “designated fraud protection contact” in the lender contacts section of the specific instructions.

While the draft states that it is not the purpose of the requirement to broaden the liability of the signing agent, settlement agent or their employees beyond existing legal requirements, title and escrow companies would be wise to read these new draft general closing instruction provisions closely to ensure that any potential additional liability is acceptable to achieve uniformity.

The notes to potential adopters that are part of the draft state that it is intended that the instructions will provide greater clarity about responsibilities for each step in the closing process and that the instructions will change industry behaviors that are inherently subject to the risk of fraud.

#### Important issues of potential concern raised by our analysis of the Uniform General Closing Instructions

The settlement agent is held to a fairly high standard of understanding of the draft general closing instructions, cannot alter them in any way, and agrees to indemnify lender:

- The general conditions and definitions in the draft sets out that by conducting the closing the Settlement Agent affirms that the agent has (a) read, (b) understood and (c) agreed to strictly comply with and satisfy all conditions of the uniform instructions.
- The settlement agent is prohibited from changing, modifying or waiving any provision of the Instructions without the lender’s written consent.
- The settlement agent agrees to indemnify lender from any losses resulting from settlement agent’s or signing agent’s failure to follow the instructions. The indemnification includes, but is not limited to, reasonable attorney’s fees and court costs incurred by the lender.

The settlement agent is required to notify the lender of any suspicious activities:

Section J of the UGCI sets forth the responsibility of the settlement agent to notify the lender of at least 25 different types of “suspicious activities.”

This includes the discovery of what is suspected to be (a) unfair, (b) deceptive, (c) misleading or (d) unlawful behavior by an lender or mortgage broker employee in connection with the loan.

Under the uniform instructions, the lender agrees to indemnify the settlement agent against any legal claims brought by a lender employee or mortgage broker employee who is the subject of any suspicious activity report given in good faith.

The draft states that the settlement agent *must postpone a signing* and notify the lender’s designated “fraud prevention contact” if certain facts, suspicions or activities are identified.

Listed below are some of the items which must be disclosed or reported to the lender:

1. If a lender employee, mortgage broker employee or real estate brokerage employee or agent overtly pressures the borrower at signing or encourages the borrower to sign prior to reading the loan documents, acts as interpreter, or in any way obstructs the ability of the settlement agent or signing agent to perform its duties.
2. If there is any suggestion by any party that the borrower use the rescission period to read loan documents or to address questions or objections raised at signing.
3. If the transaction will occur in conjunction with, or simultaneously with, any other sale, transfer of financing of the property (with certain exceptions).
4. If a full or partial transfer of the property has occurred or will occur on or before the completion of closing.
5. If the loan is for purchase money and the Borrower has acquired record title to the property before the signing date.
6. Any material fact that may, in the reasonable opinion of the closing employee, have an impact on lender’s decision to make a loan. (Examples are significant information on changes in the value or title of the property or financial condition of borrower or changes in marital status or other indication of suspicious activity).
7. Any evidence that a potential or actual fraud or scheme related to the transaction has been or may be committed.

8. That any person involved in the transaction (including brokers, builders, appraisers, etc.) may have made a material misstatement or committed a falsehood that might affect the transaction.
9. That a loan document or invoice appears to have been tampered with, falsely generated, bears any falsified or materially incorrect data, bears different names or address for the same party, or bears a fictitious name.
10. That any person's handwriting or signature appears to be inconsistent with earlier documents.
11. Recent adverse changes to the condition of the property; including fire, flood, regional disaster, or other damage.
12. A closing employee who handles the transaction has a conflict of interest, is a party to the transaction or has an ownership interest in or is controlled by or is related to the seller, borrower, appraiser, lender, mortgage broker or any other interested party to the transaction.
13. The mortgage broker appears to be or is a party to the transaction, has an ownership interest or is related to an interested party.
14. The seller appears to have or has an ownership interest in or is controlled by or is related to mortgage broker, borrower, appraiser, settlement or signing agent or other interested party.
15. If the closing employee suspects that the borrower does not comprehend the transaction.
16. If the title policy to be issued is to contain exceptions not shown in the original title commitment provided to lender or if the title owner shown on the title commitment does not match the seller on the purchase contract.
17. If the loan documents are incomplete or inconsistent with other information in settlement agent's closing file.
18. The closing employee cannot verify the identity of any signatory or any signatory is unable to produce an unexpired form of government issued photo identification.
19. A lien undisclosed to Lender has been, or will be placed on the property or other financing undisclosed to Lender has been provided to Borrower.
20. The borrower's source of funds is to be paid by a third party without lender's approval.
21. The borrower appears to be coerced or under undue influence.

22. The sales price is inconsistent with the sales price shown in the property section of the specific instructions.
23. The borrower occupies another residence not subject to the transaction and does not appear to intend to occupy the property unless it's noted as investment property.
24. Any request for a disbursement is ambiguous, has incomplete information, lacks a clear description, appears unusual in any manner or has not been approve by lender.
25. The Mortgage Broker had advised Borrower against making scheduled payments on any existing obligation.