AUTOMATIC EXTENSION OF THE CLOSING DATE? NOT SO FAST MY FRIEND!

As many of you have seen over the past year or so, buyers are increasingly using the "up to 10 day extension" provided for in Paragraph 5(a) of the FAR/BAR contract to extend the closing date. The issue is that the buyer mistakenly believes that the extension is automatic if their lender is not ready to close. This is simply not the case. Even more troubling, we have seen numerous examples of lenders trying to use the extension on behalf of buyers well in advance of the closing date and in turn well in advance of any CFPB delivery requirements coming due. How could the CFPB delivery requirement be an issue if the closing date is further than 3 days out?

In October of 2015 the Consumer Financial Protection Bureau ("CFPB") implemented the TILA RESPA Integrated Disclosure ("TRID") rule. In response, the FAR/BAR committee amended the FAR/BAR contract ("Contract") so that the Contract could adapt and conform to the new TRID rules. One of the many Contract modifications that resulted from TRID was the change to Paragraph 5(a), Extension of Closing Date, which was modified so that the closing date could be extended for a period up to 10 days if the closing funds from the buyer's lender were not available on the closing date due to the CFPB closing disclosure delivery requirements ("CFPB Requirements").

At this point you may be asking why the cause for concern? The answer is that the FAR/BAR committee was very specific in the language they used when revising the Contract. Specifically, the extension is only available if the lender's funds are not available on the closing date due to the CFPB delivery requirements. This does not mean that the extension is available because the buyer's lender is simply not ready to close by the closing date. Unfortunately, a buyer who mistakenly believes that they have an automatic extension may be running the risk of a material contract default by letting the closing date lapse without first securing an extension amendment.

Obviously, it is critical to understand the reason for the delay in funding by the lender before trying to claim that the extension provided for in Paragraph 5(a) should automatically kick in. The prudent thing will always be to secure an amendment extending the closing date and only using the extension language as a last resort. As always, we suggest that you contact your local real estate attorney should you have any questions regarding the extension language or the use of the extension.

Sincerely,
Berlin Patten Ebning, PLLC

Article Authored by Will McComb, Esq. wmccomb@berlinpatten.com

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www.berlinpatten.com

SARASOTA
3700 South Tamiami Trail, Suite 200, Sarasota, FL 34239  P (941) 954-9991  F (941) 954-9992
Sent by:
Jacqueline Mazur
Marketing & Business Development Director
jmazur@berlinpatten.com

Berlin Patten Ebling, PLLC, 3700 South Tamiami Trail,
Suite 200, Sarasota, FL 34239

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