



DEPARTMENT OF VETERANS AFFAIRS

8320-01

38 CFR Part 36

RIN 2900-AP32

Loan Guaranty: Vendee Loan Fees

AGENCY: Department of Veterans Affairs.

ACTION: Final rule.

SUMMARY: This document adopts as final a proposed rule of the Department of Veterans Affairs (VA) Loan Guaranty Service to amend its regulations to establish reasonable fees that VA may charge in connection with the origination and servicing of vendee loans made by VA. Fees mentioned in this rulemaking are consistent with those charged in the private mortgage industry, and such fees will help VA to ensure the sustainability of this vendee loan program. The loans that will be subject to the fees are not veterans' benefits. This rule will also ensure that all direct and vendee loans made by the Secretary are safe harbor qualified mortgages.

DATES: Effective Date: This rule is effective [insert date 30 days after date of publication in the FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Andrew Trevayne, Assistant Director for Loan and Property Management (261), Veterans Benefits Administration, Department of Veterans Affairs, 810 Vermont Ave., NW., Washington, DC 20420, (202) 632-8795 (this is not a toll-free number).

SUPPLEMENTARY INFORMATION: On October 26, 2016, VA published a proposed rule in the Federal Register, at 81 FR 74382, to amend VA regulations to establish reasonable fees in connection with loans made by VA, commonly referred to as vendee loans. The fees associated with vendee loans are standard in the mortgage industry. The vendee loans that are subject to the fees are not veterans' benefits and are available to any purchasers, including investors, who qualify for the loan. Specifically, this rulemaking will permit VA to establish a fee to help cover costs associated with loan origination. The rule will also permit certain reasonable fees to be charged following loan origination, during loan servicing. Pursuant to this rulemaking, VA will begin charging fees for ad-hoc services performed at the borrower's request or for the borrower's benefit, as well as standard fees specified in loan instruments. Lastly, third-party fees, those not charged by VA, are included in this rule solely to clarify for borrowers the various costs that a borrower may incur when obtaining a vendee loan.

The public comment period for the proposed rule closed on December 27, 2016. VA received one comment. For the reasons explained below, VA adopts, with a change, the proposed rule that revises VA's authority to charge reasonable fees associated with vendee loans at 38 CFR 36.4500, 36.4501, 36.4528, 36.4529, and 36.4530.

VA received one comment on the proposed rule from an individual. The commenter was unclear regarding whether or not VA will use discretion in determining fees. The commenter questioned whether fees will be waived under the following circumstances: when a veteran is purchasing a home from another veteran, including circumstances where the purchaser is a disabled veteran in receipt of compensation;

when a non-profit or non-veteran purchaser seeks a vendee loan to house homeless veterans; or when an individual in receipt of VA Family Caregiver Program benefits seeks to purchase a repossessed home to provide care for a veteran with a serious injury. The commenter also expressed concern that this was not a veterans' benefit program intended to keep a veteran in his or her home and that the Secretary's focus should essentially be on retention options. Lastly, the commenter requested veterans' benefits not be used to fund this program.

In its proposed rule, VA discussed that the Secretary has the discretion to negotiate fees on a case-by-case basis (81 FR 74382, 74383). The very nature of the Secretary's discretion might permit the waiver of fees in unique situations. Additionally, as stated in the preamble to the proposed rule, VA states that the Secretary may make vendee loans to certain entities pursuant to 38 U.S.C. 2041 for the purpose of assisting homeless veterans and their families in acquiring shelter (81 FR 74382). Specifically, 38 U.S.C. 2041(b)(2)(C) states that the Secretary may use discretion when determining whether or not to waive fees if appropriate in situations regarding homeless veterans.

In regard to the commenter's concern regarding purchasers who are disabled veterans in receipt of compensation, VA notes that 38 U.S.C. 3729(c) prohibits VA from charging a loan fee to "a veteran who is receiving compensation (or who, but for the receipt of retirement pay or active service pay, would be entitled to receive compensation) or [to] a surviving spouse of any veteran (including a person who died in the active military, naval, or air service) who died from a service-connected disability." In proposed § 36.4528, VA stated that the Secretary may charge a loan origination fee "[i]n addition to the loan fee required pursuant to 38 U.S.C. 3729." VA understands that

this language may be interpreted as VA attempting to charge a loan fee to those veterans or surviving spouses who Congress exempted from loan fees in 38 U.S.C. 3729(c). In order to clarify that VA is not charging a fee prohibited by statute, VA is adding “if any” following “[i]n addition to the loan fee required pursuant to 38 U.S.C. 3729” to clarify that not all loans will carry the loan fee described in section 3729.

In regard to the commenter’s concern that the vendee loan program is not a home retention option, VA notes that, prior to a holder foreclosing a VA-guaranteed loan, there are specific required actions the holder must take that emphasize loss mitigation and retention options for borrowers. All participating VA servicers adhere to these regulations prior to initiating foreclosure sales. VA also notes that the principal and interest resulting from the repayment of vendee loans are deposited into the Veterans Housing Benefit Program Fund (VHBPF) to help offset the housing operation costs of the Home Loan Guaranty Program. Lastly, in response to the commenter’s statement asking VA not to use veterans’ benefits to fund this program, VA notes that vendee loans are not classified as veterans’ benefits and are available to any purchaser VA determines creditworthy and whose offer is awarded a sales contract. Vendee loans enable VA to sell more of its properties and to sell them at a faster rate, and as previously stated, the proceeds are deposited into the VHBPF. The fees are consistent with the private mortgage industry and will ensure the sustainability of the vendee loan program.

Therefore, this rule finalizes the proposed rule with the change noted above.

## Executive Orders 12866 and 13563

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, and other advantages; distributive impacts; and equity). Executive Order 13563 (Improving Regulation and Regulatory Review) emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. Executive Order 12866 (Regulatory Planning and Review) defines a “significant regulatory action” requiring review by the Office of Management and Budget (OMB), unless OMB waives such review, as “any regulatory action that is likely to result in a rule that may: (1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) Raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in this Executive Order.”

The economic, interagency, budgetary, legal, and policy implications of this regulatory action have been examined, and it has been determined not to be a significant regulatory action under Executive Order 12866. VA’s impact analysis can be found as a supporting document at <http://www.regulations.gov>, usually within 48 hours

after the rulemaking document is published. Additionally, a copy of the rulemaking and its impact analysis are available on VA's Web site at <http://www.va.gov/orpm/>, by following the link for "VA Regulations Published from FY 2004 Through Fiscal Year to Date."

### Unfunded Mandates

The Unfunded Mandates Reform Act of 1995 requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before issuing any rule that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more (adjusted annually for inflation) in any one year. This final rule will have no such effect on State, local, and tribal governments, or on the private sector.

### Paperwork Reduction Act

This final rule contains no provisions constituting a collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3521).

### Regulatory Flexibility Act

This final rule will affect individuals and small businesses who choose to obtain a vendee loan from VA to finance the purchase of a VA-owned property rather than alternate financing. A party who wants to purchase a VA-owned property may choose whatever source of financing he wishes. Presumably the purchaser would select the least expensive financing option available, which may or may not be a VA vendee loan.

VA does not believe that this final rule will impose any significant economic impact for the following reasons. Should the purchaser decide that the VA vendee program was not the most economically advantageous to the purchaser then the purchaser would obtain alternate financing. Parties would have to choose to be subject to the impact, if any, imposed by this rule.

Accordingly, the Secretary certifies that the adoption of this final rule will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601-612. Therefore, under 5 U.S.C. 605(b), this rulemaking is exempt from the final regulatory flexibility analysis requirements of section 604.

#### Catalog of Federal Domestic Assistance

The Catalog of Federal Domestic Assistance number and title for the program affected by this document is 64.114, Veterans Housing—Guaranteed and Insured Loans.

### List of Subjects in 38 CFR Part 36

Condominiums, Flood insurance, Housing, Indians, Individuals with disabilities, Loan programs-housing and community development, Loan programs-Indians, Loan programs-veterans, Manufactured homes, Mortgage insurance, Reporting and recordkeeping requirements, Veterans.

### Signing Authority

The Secretary of Veterans Affairs, or designee, approved this document and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs. Gina S. Farrisee, Deputy Chief of Staff, Department of Veterans Affairs, approved this document on July 25, 2017, for publication.

Dated: July 26, 2017.

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Michael Shores,  
Director, Regulation Policy & Management,  
Office of the Secretary,  
Department of Veterans Affairs.

For the reasons set out in the preamble, VA amends 38 CFR part 36, subpart D, as set forth below:

PART 36—LOAN GUARANTY

1. The authority citation for part 36 continues to read as follows:

Authority: 38 U.S.C. 501 and 3720.

Subpart D--Direct Loans

2. Amend § 36.4500 by:

- a. Revising paragraph (c)(2).
- b. Removing the authority citation following paragraph (c)(2).
- c. Adding paragraph (e).
- d. Adding an authority citation at the end of the section.

The revision and additions read as follows:

§ 36.4500 Applicability and qualified mortgage status.

\* \* \* \* \*

(c) \* \* \*

(2) Applicability of safe harbor qualified mortgage. Any VA direct loan made by the Secretary pursuant to chapter 20 or 37 of title 38, U.S.C., is a safe harbor qualified mortgage.

\* \* \* \* \*

(e) Sections 36.4528, 36.4529, and 36.4530, which concern vendee loans, shall be applicable to all vendee loans.

(Authority: 15 U.S.C. 1639C(b)(3)(B)(ii), 38 U.S.C. 2041, 3710, 3711, 3720, 3733, and 3761)

3. Amend § 36.4501 by:

- a. Adding in alphabetical order a definition for "Safe harbor qualified mortgage."
- b. Revising the definition "Vendee loan."
- c. Removing the authority citation following the definition "Vendee loan."

The addition and revision read as follows:

§ 36.4501 Definitions.

\* \* \* \* \*

Safe harbor qualified mortgage means a mortgage that meets the Ability-to-Repay requirements of sections 129B and 129C of the Truth-in-Lending Act (TILA) regardless of whether the loan might be considered a high cost mortgage transaction as defined by section 103bb of TILA (15 U.S.C. 1602bb).

\* \* \* \* \*

Vendee loan means a loan made by the Secretary for the purpose of financing the purchase of a property acquired pursuant to chapter 37 of title 38, United States Code. The terms of a vendee loan (e.g., amount of down payment; amortization term; whether to escrow taxes, insurance premiums, or homeowners' association dues; fees, etc.) are negotiated between the Secretary and the borrower on a case-by-case basis, subject

to the requirements of 38 U.S.C. 2041 or 3733. Terms related to allowable fees are also subject to §§ 36.4528 through 36.4530.

\* \* \* \* \*

4. Add §§ 36.4528, 36.4529, and 36.4530 to read as follows:

§ 36.4528 Vendee loan origination fee.

(a) In addition to the loan fee required pursuant to 38 U.S.C. 3729, if any, the Secretary may, in connection with the origination of a vendee loan, charge a borrower a loan origination fee not to exceed one-and-a-half percent of the loan amount.

(b) All or part of such fee may be paid in cash at loan closing or all or part may be included in the loan. The Secretary will not increase the loan origination fee because the borrower chooses to include such fee in the loan amount financed.

(c) In no event may the total fee agreed upon between the Secretary and the borrower result in an amount that will cause the loan to be designated as a high-cost mortgage as defined in 15 U.S.C. 1602(bb) and 12 CFR part 1026.

(Authority: 38 U.S.C. 2041, 3720, 3733)

§ 36.4529 Vendee loan post-origination fees.

(a) The Secretary may charge a borrower the following reasonable fees, per use, following origination, in connection with the servicing of any vendee loan:

(1) Processing assumption fee for the transfer of legal liability of repaying the mortgage when the individual assuming the loan is approved. Such fee will not exceed

\$300, plus the actual cost of the credit report. If the assumption is denied, the fee will not exceed the actual cost of the credit report;

(2) Processing subordination fee, not to exceed \$350, to ensure that a modified vendee loan retains its first lien position;

(3) Processing partial release fee, not to exceed \$350, to exclude collateral from the mortgage contract once a certain amount of the mortgage loan has been paid;

(4) Processing release of lien fee, not to exceed \$15, for the release of an obligor from a mortgage loan in connection with a division of real property;

(5) Processing payoff statement fee, not to exceed \$30, for a payoff statement showing the itemized amount due to satisfy a mortgage loan as of a specific date;

(6) Processing payment by phone fee, not to exceed \$12, when a payment is made by phone and handled by a servicing representative; and

(7) Processing payment by phone fee, not to exceed \$10, when a payment is made by phone and handled through an interactive voice response system, without contacting a servicing representative.

(b) The specific fees to be charged on each account may be negotiated between the Secretary and the borrower. The Secretary will review the maximum fees under paragraph (a) of this section bi-annually to determine that they remain reasonable.

(c) The Secretary may charge a borrower reasonable fees established in the loan instrument, including but not limited to the following:

(1) Property inspection fees;

(2) Property preservation fees;

(3) Appraisal fees;

(4) Attorneys' fees;

(5) Returned-check fees;

(6) Late fees; and

(7) Any other fee the Secretary determines reasonably necessary for the protection of the Secretary's investment.

(d) Any fee included in the loan instrument and permitted under paragraph (c) of this section would be based on the amount customarily charged in the industry for the performance of the service in the particular area, the status of the loan, and the characteristics of the affected property.

(Authority: 38 U.S.C. 2041, 3720, 3733)

§ 36.4530 Vendee loan other fees.

(a) In addition to the fees that may be charged pursuant to §§ 36.4528 and 36.4529 and the statutory loan fee charged pursuant to 38 U.S.C. 3729, the borrower may be required to pay third-party fees for services performed in connection with a vendee loan.

(b) Examples of the third party fees that may be charged in connection with a vendee loan include, but are not limited to:

(1) Termite inspections;

(2) Hazard insurance premiums;

(3) Force-placed insurance premiums;

(4) Courier fees;

(5) Tax certificates; and

(6) Recorder's fees.

(Authority: 38 U.S.C. 2041, 3720, 3733)

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