

THE BUMPY ROAD TO RESPA REFORM

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January 15, 2004 Luncheon, Real Estate Section, Utah State Bar

RESPA – REAL ESTATE SETTLEMENT PROCEDURES ACT

12 U.S.C. 2601

24 C.F.R. 3500 (Regulation X)

I. What is it?

Federal law governing almost all residential mortgage transactions.

Exceptions: business purpose loans, more than 25 acres, vacant land (unless within 2 years from closing, loan proceeds will be used to build), assumption without lender approval, certain loan conversions, secondary market transactions (except servicing), temporary financing (except when construction loan is made to finance construction of 1-4 family residential property and that loan that may be converted to permanent financing by the same lender or the loan is used to finance transfer of title to the first user).

II. Purposes

Provide advance disclosures regarding costs so consumers are not surprised just before closing.

Eliminate kickbacks or referral fees tending to increase the costs of certain settlement services.

Reduce amounts consumers are required to deposit in escrow accounts for taxes and insurance.

III. Meat of RESPA

A. *Good Faith Estimate (GFE)*

No bright line test for determining whether there is a reasonable relationship between GFE and the charge the borrower is likely to be required to pay at settlement.

B. *HUD-1 Settlement Statement*

Itemization of all charges imposed on borrower and seller (if any) in connection with the settlement.

C. *Servicing*

Escrow accounts – Servicer requirements
Servicing transfers – Notices and late fees

D. *Section 8 Prohibition against Kickbacks and Unearned Fees*

1. Section 8(a) Kickback Provision

Prohibits transfer of a thing of value pursuant to any agreement or otherwise for referral of real estate settlement service (broad definition).

3 elements for violation:

1-payment or receipt of a thing of value (examples: opportunity to win a prize, reduced rental payment when market practice is not to charge rent, waived or reduced fee, ticket to sporting event, vacation trip, etc.)

2-agreement or understanding (can be established by practice, pattern or course of conduct)

3-referral of settlement service business (action with the effect of “**influencing**” the selection of a settlement service, or when person is required to use service)

2. Section 8(b) Unearned/Split Fees

No person can split any charge made for performance of settlement service except for services actually performed. Language: “No person shall give AND no person shall accept any portion, split, or percentage of a real estate service in connection with a transaction involving a federally related mortgage loan other than for services actually performed.”

3. Exemptions:

Affiliated business arrangement. Conditions for exemption -

a. a written disclosure must be furnished to the consumer being referred stating: 1) the existence of an affiliated business arrangement; 2) an explanation of the parties’ ownership and financial interest; 3) an estimate of the charge or ranges of charges generally made by the provider to which the consumer is being referred; and, 4) a statement that the consumer is not required to use the affiliated entity to which he or she is being referred and may elect to use any provider of her or her choice;

b. the person being referred is not required to use any particular settlement service provider (except that a lender may require the borrower to pay for an attorney, title insurance company, credit reporting agency, or appraisal chosen by the lender to represent the lender’s interest); and

c. the only thing of value received from the arrangement is a return on the parties’ ownership interests.

Employer/employee payments. Employer may compensate its own employees for referring business to the employer or for referring business elsewhere.

4. Safe Harbor (Current HUD Ruling, 2/14/95):

Avoid possible RESPA violation for referral by making sure person receiving compensation fills out the application and completes at least five items on HUD's list.

E. *Hot (or not so hot) areas of litigation*

1. Yield spread premiums (YSP) and HUD's 2001 test for whether YSP violates RESPA:

Determine whether the broker has provided goods or services of the kind typically associated with a mortgage transaction. If yes, determine whether the total compensation paid to the broker is "reasonably related" to the total value of the goods or services actually provided.

2. Up-charges
Circuit Courts (4th, 7th and 8th) vs. HUD (Hud's 2001-1 RESPA Statement of Policy)

IV. Proposed Changes to RESPA

A. *Summary of Proposed Rule*

1. New Good Faith Estimate
2. HUD-1 Settlement Statement
3. Guaranteed Mortgage Package Agreement (GMPA)

B. *A few problems with Proposed Rule*

- Lack of Congressional authority for changes
- GMPA proposal is based on erroneous assumptions
- Proposal structured to make it probable that the market will move toward lender-provided packages.
- Would become unlikely that anyone other than lenders would be in a position to offer GMPAs.
- Proposal would provide an artificial competitive advantage to the country's biggest lenders over their smaller competitors
- Many states' laws are inconsistent
- Characterization of yield spread premium as "lender payment to borrower" for higher interest rate is misleading.

- C. *Status:* the Final Rule is expected soon and will likely have a substantial effect on mortgage lenders and brokers, appraisers, and title companies.

HUD'S SAFE HARBOR LIST
(to avoid a RESPA Section 8 violation for unearned fees)
From Current HUD Ruling, February 14, 1995

Take information from the borrower and fill out the application; and at least five additional items from the list below (HUD has repeatedly stated that mere delivery of an application is not considered sufficient work to justify a fee):

1. Analyze the prospective borrower's income and debt and pre-qualify the prospective borrower to determine the maximum mortgage that the prospective borrower can afford;
2. Educate the prospective borrower in the home buying and financing process, advising the borrower about the different types of loan products available, and demonstrate how closing costs and monthly payments would vary under each product;
3. Collect financial information and other related documents that are part of the application process;
4. Order verifications of employment and verifications of deposits;
5. Order requests for mortgage and other loan verifications;
6. Order appraisals;
7. Order inspections or engineering reports;
8. Provide disclosures (Truth-in-Lending, Good Faith Estimate, etc.) To the borrower;
9. Assist the borrower in understanding and clearing credit problems;
10. Maintain regular contact with the borrower, realtors, and lender between application and closing to apprise them of the status of the application and to gather any additional information as needed;
11. Order legal documents;
12. Determine whether the property was located in a flood zone or ordering such service; and
13. Participate in the loan closing.

In addition, the fee paid must be reasonably related to the market value of the services rendered and must be disclosed on the HUD-1 Settlement Statement and the Good Faith Estimate. HUD's caveat to this list is that if the service provided is essentially counseling services, (items 2, 3, 4, 10 and 11 only) it may consider the counseling services a disguise for a referrals if the counseling is not meaningful.