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Regulations Division
Office of General Counsel
Department of Housing and Urban Development
451 7th Street S.W., Room 10276
Washington, DC 20410-0001

Submitted electronically at:
www.regulations.gov

Re: Docket No. FR-5180-P-01 / 73 Fed. Reg.14030 (Mar. 14, 2008)

Dear Acting Secretary Bernardi:

I am writing to express my concerns about the proposed revisions to the RESPA Regulations that were recently published in the *Federal Register* on March 14, 2008 at 73 FR 14030 et seq. While I applaud HUD's attempts to refine the regulations governing RESPA and its goals and objectives to provide consumers with information that they can understand and rely on, I urge you to delay issuing final regulations until a number of concerns and issues with the proposed revisions can be debated and reviewed. I believe that the proposed revisions, in their current format, will actually hurt consumers and will not achieve the stated goals and objectives of HUD because 1) they are confusing and unclear; 2) they would likely discourage consumer shopping; 3) they disrupt the traditional role of the closer as a neutral, disinterested third party and might even subject the closer in some states to violations of the unauthorized practice of law; 4) they discriminate among settlement service providers unfairly by treating differently similarly situated service providers; 5) they are likely to increase the closing costs to consumers; 6) they encourage packaging and authorized volume discounting, both of which are not in the consumer's best interest; 7) they ignore the practical timing pressures at the closing table; and 8) they violate the privacy of the parties.

The proposed rule is confusing and vague

The proposed rule is likely to confuse consumers into believing that the fees charged by the lender providing the Good Faith Estimate (GFE) – or those service providers selected by the lender – will be less than those charged by service providers independently selected by the consumer. This is because the GFE form states that the charges and fees of the lender “cannot increase”, the charges and fees for service providers the lender selects “can increase up to 10%, and that the charges and fees of any service provider selected by the consumer “can change” without limit. This language is likely to confuse consumers into falsely believing that since there is no cap on the fees charged by consumer-selected service providers and a 0% - 10% cap on the fees charged the lender or lender-selected service providers, the consumer is best served to choose the lender and lender-selected service providers. This ignores the possibility, however, that the lender charges and those of its selected service providers could be significantly higher than other service providers in the area.

A possible solution to this issue would be to create a GFE where the lender only quotes the settlement service charges for its own services and those provided by service providers *required* by the lender. Additional GFEs could be created by HUD to be provided by the individual service providers that the consumer can shop for and select on it own. HUD could make all GFEs subject to some level of tolerance. This scenario would leave control of the costs with the provider of the service, and give the

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consumer estimates of all costs that could be relied upon, not just those of the lender and its required service providers.

The proposed rule is likely to also confuse consumers because fees and charges are bundled, or aggregated, on the GFE rather than being listed separately. One of Congress' reasons for enacting RESPA in the first place was the concern that there was not transparency to the consumer of the services they were being provided and the separate costs associated with each of the services. This new GFE form goes back to the day when a singular charge is represented but the consumer cannot tell from the charge what services may be included. Consumers might be tempted to select a lender because of its lower total settlement services estimate when the consumer does not realize that the particular lender does not provide the full or broad range of services provided by another lender whose estimate is slightly higher. The aggregation of fees on the GFE into general categories aids the hiding of junk fees and other costs as well as hiding the lack of specific services within the estimate.

A possible solution to this issue is to have the GFE mirror the HUD1 in its current, or slightly modified, form such that individual services are listed separately. A summary page could be used in the GFE that aggregates the charges for easy reference but it is important for the consumer to realize what services they will be receiving for the fees they will be paying.

The proposed rule is vague because it provides no direction or instructions to the closer should the lender or lender-required service provider's costs exceed the tolerance. Is the closer simply to cancel the closing? What if the consumer is willing to accept the difference in costs - which will likely be the case when the tolerance is exceeded by some small dollar amount? For example, it is unlikely the borrower will want to forego the transaction if the tolerance is exceeded by \$1. However, the closer, who is likely subject to fines and liability for closing a transaction that exceeds the tolerance by even \$1, will not be willing to allow the closing to proceed outside of tolerance.

A possible solution to this issue would be to provide for the ability of the borrower to accept the additional charges if he or she so chooses.

The proposed rule is vague in that it fails to contemplate the diversity of, and variables, in a real estate transaction. For instance, who is to read and explain the closing script if the closing is performed by mail rather than in person? What if the borrowers don't speak English? What about seller pay states (where the seller pays for the title insurance) and FHA and VA transactions where certain closing fees cannot be paid by the borrower or are capped? More specifically, the rule does not contemplate the seller getting an estimate of its settlement costs.

Additionally, the proposed rule is confused in that it inaccurately assumes how certain settlement fees are charged. For example, the proposed rules erroneously states, "Government recording and transfer charges are well known to loan originators or can be calculated based on the purchase price or value of the property." However, in Colorado, and many other states, recording fees are based upon the number of pages of the mortgage or deed of trust and *not* on the value of the property. The length of these documents varies before the closing and, therefore, actual costs are likely to change - potentially outside the tolerance levels. This proposed rule fails to address these types of issues.

The proposed rule is vague and confusing in that it gives the impression that owner's coverage is perhaps not an important consideration. Reference owner's coverage in the proposed GFE appears to be made almost as an afterthought.

The proposed rule would likely discourage consumer shopping

As described above, the new GFE form creates the illusion that the consumer is better off if it accepts the lender's charges and those of its required service providers. This illusion will likely discourage consumers from shopping if they think that by shopping they will only incur greater costs.

Additionally, since the lender is permitted to charge a fee for the GFE, shopping (getting other GFEs from other lenders) will only increase the costs to the consumer. This, too, will discourage shopping.

The proposed rule disrupts the traditional role of the closer

The role of the closer in the transaction has always been that of an objective, independent third party who takes instructions from the various parties to the transaction and assures that those instructions are met at or prior to the closing for the benefit of all parties to the transaction. Requiring the closer to prepare, read, and explain the closing script puts the closer in the role of "representing" the borrower. This change to the role of the closer appears to have been intentional by HUD. At the American Land Title Association's Federal Conference in Washington, D.C. on March 11, 2008, a representative of HUD stated, "I think the title company has a duty to the consumer to help assure the consumer gets the loan they were promised." I agree that "someone" should be looking out for the consumer's best interest and advising the consumer when those interests are not being met. However, it should not be the role of the closer in the transaction, who has duties to all of the parties and cannot, and should not, represent one party's interests over those of another party to the transaction. That is the role of the consumer's agent, representative, or attorney – not the closer.

Furthermore, placing the duty on the closer to analyze legal documents and advise and explain them to the consumer constitutes the unauthorized practice of law in Colorado. The cases of Conway-Bogue Realty Investment Co. v. Denver Bar Assoc., 135 Colo. 298, 312 P.2d 998 (1957) and The Title Guaranty Co. v. Denver Bar Assoc., 135 Colo. 423, 312 P.2d 1011 (1957) address the practice of law by brokers and title companies in real estate transactions. The Colorado Supreme Court, in Conway-Bogue, held that preparing contracts, deeds and other documents, even if just filling in blanks on standard real estate forms, is the practice of law. That court went on to hold that despite the fact that those actions constituted the practice of law, the court held that real estate brokers and agents could perform these duties in a limited fashion (i.e., they could select, fill in, explain and advise regarding the legal effect of standard simple real estate forms "at the request of their customers.") The court in the Title Guaranty companion case, however, held that it was the unauthorized practice of law for title companies to do so. Title companies' abilities in this area were limited to following the written instructions of the parties to the transaction and to prepare the conveyancing deed under the direction of the real estate agent in the transaction. Colorado law would prevent a title company from performing the duties set forth by HUD's proposed rule.

The proposed rule is discriminatory in its application

The rule is discriminatory in its application in at least two areas. First, the rule addresses only borrower's settlement fees but completely ignores the settlement costs and fees of the seller. If the proposed rule is truly to protect consumers, it should protect all consumers and not just a narrow class of consumer.

A possible solution to this issue would be to have separate GFEs provided by the separate service providers to their specific customers.

Second, the proposed rule discriminates in its application among insurance providers. For instance, the proposed rule treats homeowner's insurance differently than title insurance. The proposed

rule states, "...and some third party charges such as homeowners' insurance are not subject to any tolerance." Unlike the treatment of title insurance, homeowner's insurance is not subject to any tolerance. Currently, consumers appear to know more about their homeowner's insurance policy coverage and costs than they do about their title insurance policy. One reason may be that the lender does not select the homeowner's insurance provider for the consumer (even though this type of insurance is required by lenders to approve the loan). The consumer must shop for this insurance.

To help the consumer better understand title insurance and be motivated to shop for it, HUD should not allow the lender to quote the price or control which title insurance company is used. It should treat title insurance similar to the way homeowner's insurance is treated. A possible solution to this issue would be to have separate GFEs provided by the separate service providers to their specific customers.

Finally, the proposed rule requires the closer to identify on the HUD1 the premium split between the title underwriter and its agent. However, no such requirement is made with relation to the premium split of the homeowner's insurance. There is no reasonable justification for such a discriminatory application.

The proposed rule will increase the costs to the consumer

HUD states in the introduction to the proposed rule that it "estimates that with the changes proposed to its RESPA regulations in this rulemaking, settlement costs will be lowered by \$6.5 to \$8.4 billion annually, with an average savings of \$518 to \$670 per transaction. According to Appendix II.C.2, 73 FR 14101, the estimated savings are "due to improved shopping for both originator and third-party services." This assumption, however, is without merit. In Colorado, as just one example, title insurance fees and charges are subject to extreme regulatory oversight. Title entities in Colorado must file their rates with the Division of Insurance and are not permitted to deviate from those filed rates and fees. Shopping will not create competitive forces enabling a consumer to get a discounted rate on their title insurance. HUD's analysis is further flawed, at least as it relates to the Colorado marketplace, when it is based on the following erroneous statement, "Because title fees account for over 70 percent of third-party fees and because there is widespread evidence of lack of competition and overcharging in the title and settlement closing industry ..." In Colorado, title insurance costs are typically less than lender fees and charges and are on average approximately 1/20th of the real estate agents' commissions (e.g., on a \$500,000 transaction, title insurance charges and fees would average approximately \$2,000 conservatively; the real estate commissions alone would be \$35,000).

In addition to the increased costs to the consumer from the lender charging for the GFE, the proposed rule will increase the costs to the consumer in other ways as well. The proposed rule recognizes that the costs for settlement service providers to comply with the proposed rule are initially \$570,000,000 (more than two-thirds of which, \$390,000,000, is borne by small business) and recurring costs are estimated to be \$1.231 billion annually or \$98.48 per loan. These costs will be added to the overall cost to the consumer.

The proposed rule makes no estimate for the increased cost to the consumer as a result of the closer having to increase its closing fees to account for the increased risk associated with the liability for preparing the script and policing the lender for compliance with its GFE. Many state regulatory agencies will likely require the collection by the title entity of some additional "premium" to cover the increased liability risks taken on by the closer as a result of the proposed rule.

Of greater detrimental impact to the consumer, leading to higher costs due to lessening competition, is the fact that the proposed new rule impacts small business to a greater extent than it does larger businesses. It is not unreasonable to estimate that the greater impact on small business will drive

some of these small businesses out of the marketplace reducing the competition that HUD is striving to generate.

Packaging and volume discounts are harmful to the consumer

The proposed rule continues HUD's misguided efforts to encourage or allow packaging. While not as blatant as the 2002 HUD proposed RESPA reform rule and while not providing Section 8 exemptions that were contained in the 2002 proposed rule, the current rule effectively provides a mechanism that creates packaging. This rule gives lenders who bundle their services (and the services of other providers) advantages to five or six of the largest national lenders encouraging monopolies by these lenders. My company employs approximately 35 people in three different states. Companies like mine would not be able to compete and would be forced out of the market.

It appears from HUD's proposal that it believes consumers have no interest in who provides such services and it is therefore appropriate to have the lender bear responsibility for the selection of the providers of these services and for the amounts to be charged for these services. Consumers do, in fact, often select other service providers other than the lender. They may select the title company, the appraiser, the home inspector, the home insurer, etc. Additionally, not all settlement charges are strictly for the benefit of the lender. Consumer choice for title services (and others) would likely become non-existent if the proposed revisions are implemented due to the encouragement for monopolies by those large national lenders.

Volume discounts merely benefit the referrer of business and not the ultimate consumer. Volume discounts have been traditionally viewed under RESPA as kickbacks or referral fees that only increase the costs of settlement services to the consumer who pays for those services and reduce competition. I would strongly caution HUD to prohibit volume discounting under any circumstance and especially volume discounting to those who refer the business to a settlement service provider.

The proposed rule ignores the practical timing of transactions

Providing for the script to be given at closing does not provide the consumer with the time necessary to get discrepancies remedied. The script really needs to be given to the consumer prior to the closing so that the consumer can make arrangements for taking possession of the property after the closing and arranging for the delivery of the personal property to the property. If the moving van is waiting to be unloaded after the closing, it puts too much pressure on the consumer to simply acquiesce in changes "sprung" upon the consumer at the closing.

A possible solution to this issue, and would provide remedies to other problems more fully described above, would be to have the lender prepare and present the script itself with the presentation of the script being some time (days) prior to the closing. This would allow the borrower to discuss directly with the lender any discrepancies or questions the borrower might have and get them resolved prior to the moving van appearing at the property.

The proposed rule violates the privacy of the parties to the transaction

The proposed rule will violate privacy considerations in Colorado. Colorado is a table funding state; meaning all of the parties are at the closing table at the same time. On purchase transactions, the closing script will be required to be read at the closing – in front of the seller – inappropriately disclosing the borrower's loan terms and details. This is a complete violation of privacy that would require a change in the very manner closings are conducted in Colorado. The proposed rule appears to give no consideration whatsoever for this problem it creates.

Conclusion

The goals identified by HUD in the proposed rule really focus on the need of the parties to the transaction to be represented in the transaction by someone who has a fiduciary duty to advise the consumer regarding what is in the consumer's best interest. Unfortunately, the approach taken by the proposed rule merely shifts the burden of explaining the costs and loan terms to the one party that should not be representing any one party to the transaction.

Like its attempt in 2002, the current proposed rule fails to provide the protections to consumers that HUD rightly desire to be provided because it continues to consolidate control of the pricing aspects of the transaction into one service provider – the lender. For price competition to legitimately exist, each service provider must be able to control the disclosure of its own pricing by encouraging the consumer to shop for each settlement service directly from the settlement service provider and not by referral or required use from another service provider. By requiring the lender to give an estimate of the settlement charges of non-lender service providers, HUD is actually discouraging the consumer from shopping for those services. HUD should provide a rule that would provide for each settlement service provider quoting its own charges and fees and requiring each then to abide by its own GFE without tolerance except for changes by the parties to the transaction that would generate changes to the fees or charges originally quoted.

To really protect consumers, HUD should mandate that buyers and sellers be represented by counsel at their real estate transactions. Attorneys have ethical rules that mandate that they represent the best interest of their client. The existence of fiduciary duties to look out for the best interest of the consumer, by a person who has no self-interest in the transaction being consummated, is the best, and perhaps only, way to protect consumers.

For these reasons, Attorneys Title Guaranty Fund, Inc. respectfully requests that HUD delay implementation of the proposed revisions to RESPA until Congress is given the opportunity to review and debate how RESPA is best amended or modified to meet the worthy goals of HUD.

Very truly yours,



Christopher J. Condie
President