February 23, 1999

The Honorable Gail W. Laster
General Counsel
Department of Housing and Urban Development
451 Seventh Street, S.W., Room 10214
Washington, D.C. 20410

Dear General Counsel Laster:

This letter requests your advice on the application of Section 8 of the Real Estate Settlement Procedures Act, 12 U.S.C. 2607 ("RESPA"), in the context where a title insurance company seeks to obtain reinsurance (a) for title insurance policies issued in residential transactions referred to the insurer by a particular real estate developer, mortgage lender, real estate broker, or other person in a position to refer title insurance business, and (b) where the reinsurance company is owned by or affiliated with the person that referred the insurance business. Our questions do not relate to any specific transaction, but seek guidance that will help our members ensure that any such arrangements are consistent with RESPA principles.

We have reviewed the letter dated August 6, 1997, from Assistant Secretary Retsinas to the General Counsel of Countrywide Funding Corporation, that sets forth HUD's views regarding the RESPA § 8 principles applicable to captive reinsurance programs involving mortgage insurance. In general, the two key principles articulated in that letter are that:

- payments to the captive reinsurer must be for reinsurance services actually furnished, and
- compensation paid to the captive reinsurer must not exceed the value of such services.

What we are seeking through this letter is guidance on how those principles apply in the context of title insurance, and, in particular, your views on several key questions that have arisen in the application of those two principles to the title insurance industry.

In considering these questions, some background information on reinsurance practices in the title insurance industry may be helpful.

In general, title insurance companies obtain reinsurance in one of two circumstances. First, all title insurers will obtain reinsurance in connection with high liability policies so as to avoid catastrophic losses from a single policy or transaction. Such reinsurance, referred to as "facultative" reinsurance, may be obtained because of statutory or regulatory limits on the amount of any single risk that can be retained by the company, because of limits established as a matter of prudence by the board of directors of the insurer, or because of concerns expressed by the potential insured under the high liability policy.

In addition to reinsuring specific risks, title insurers may obtain “treaty” reinsurance for their entire portfolio of risks. For example, smaller local and regional title insurance companies, whose reserves and financial strength may limit their ability to accept a significant amount of business, may obtain “treaty” reinsurance for their entire portfolio of policies so as to limit their exposure on any single policy or their annual exposure under all policies. In high-dollar residential transactions, smaller title insurers may also obtain reinsurance. Larger title insurers may obtain “excess loss” reinsurance that would reimburse them if their total losses in any single year exceeded a specific dollar amount.

Such facultative and treaty reinsurance have traditionally been available from several sources. These include other title insurance companies, as well as domestic and foreign companies who provide reinsurance services to the title insurance industry and to other lines of insurance.

In the past, there has been no demand from the title insurance industry for reinsurance in connection with most **residential** title insurance policies. Recently, however, lenders, builders, and others in a position to refer business have approached title insurers with proposals for establishing captive reinsurers for the purpose of reinsuring the title insurer’s residential title risks on transactions referred to the title insurer by the lenders, builders, or other similar parties.

In light of your earlier pronouncements on captive reinsurance in the mortgage insurance arena, we request your assistance on how those guidelines relate to captive reinsurance in the title insurance industry. Specifically, we would be concerned about the following:

1. Assuming that these residential reinsurance proposals involve the actual transfer of risk, is it relevant to whether HUD would give “particular scrutiny” to such arrangements if title insurers did not actively seek to reinsure such risks other than through captive reinsurers?

2. Since § 8 analysis involves determining whether payments made were “reasonable” in light of the services rendered, what methodology would HUD suggest for determining whether amounts paid to a captive reinsurer are reasonable?

We would greatly appreciate your consideration of the above questions and your earliest reply. Thank you.

Sincerely,

James R. Maher

xc: William C. Apgar, Jr., Assistant Secretary for Housing
Rebecca J. Holtz, Interstate Land Sales & RESPA Div. Dir.
Kenneth A. Markison, Assistant General Counsel for GSE-RESPA
Peter S. Race, Assistant General Counsel for Program Compliance Div.