Comptroller of the Currency
Administrator of National Banks

Real Estate Settlement Procedures

Comptroller's Handbook

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Consumer Compliance Examination

Real Estate Settlement Procedures

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Background and Summary

The Real Estate Settlement Procedures Act of 1974 (RESPA) (12 USC 2601-17) became effective on June 20, 1975. The act requires lenders, mortgage brokers, or servicers of home loans to provide borrowers with pertinent and timely disclosures of the nature and costs of the real estate settlement process. The act also protects borrowers against certain abusive practices, such as kickbacks, and places limitations upon the use of escrow accounts.

HUD promulgated Regulation X (24 CFR 3500), which implements RESPA. The National Affordable Housing Act of 1990 amended RESPA to require detailed disclosures for the transfer, sale, or assignment of mortgage servicing. It also mandates disclosures for mortgage escrow accounts at closing and annually, thereafter, itemizing the charges to be paid by the borrower and from the account by the servicer.

On February 10, 1994, Regulation X was amended to extend coverage to subordinate lien loans. The amendments were effective on August 9, 1994. Exemptions from coverage of RESPA and Regulation X, stated in section 3500.5(b), were effective on March 14, 1994. Technical corrections and amendments to the rule were issued on March 30, 1994 and July 22, 1994.

On October 26, 1994, HUD issued its final rule changing the accounting method for escrow accounts. The rule also establishes formats and procedures for initial and annual escrow accounting statements. The rule became effective on May 24, 1995.

On December 19, 1994, HUD also published a final rule for the transfer of servicing of mortgage loans. The rule replaces the interim one dated April 26, 1991, and implements the provisions of section 6 of RESPA. The rule became effective on June 19, 1995.

Coverage (24 CFR 3500.5)

RESPA is applicable to all "federally related mortgage loans." They are:

- Loans (other than temporary loans), including refinancings, secured by a first or subordinate lien on residential real property that is improved with either:

– A one-to-four family structure (including individual units of condominiums and cooperatives), either existing or to be constructed on the real property, using loan proceeds.
– A manufactured home, either existing or to be placed on the real property, using loan proceeds.

And to which any one of the following applies:

– Loans made by a lender, creditor, or dealer.
– Loans made or insured by an agency of the federal government.
– Loans made in connection with a housing or urban development program administered by an agency of the federal government.
– Loans made and intended to be sold by the originating lender or creditor to Federal National Mortgage Association (FNMA), Government National Mortgage Association (GNMA), or Federal Home Loan Mortgage Corporation (FHLMC), or its successor.
– Loans that are the subject of a home equity conversion mortgage or reverse mortgage issued by a lender or creditor subject to the regulation.
– Instalment sales contracts, land contracts, or contracts for deed on otherwise qualifying residential property, if the contract is funded in whole or in part by proceeds of a loan made by a lender or creditor subject to the regulation.

Exemptions (24 CFR 3500.5(b))

Transactions exempt from RESPA include loans:

- Secured by parcels of 25 acres or more, whether or not the property is improved.

- For which the primary purpose is business, commercial, or agricultural (definition parallels Regulation Z, 12 CFR 226.3(a)(1)). However, a business purpose loan made to one or more persons, acting in an individual capacity (natural persons) to acquire, refinance, improve, or maintain a one-to-four family residential property used or to be used to rent or lease to other persons is a covered transaction. An action by a sole proprietorship is not considered to be conducted in an individual capacity.

- That are temporary, such as construction loans. (The exemption does not apply, and the transaction becomes covered by RESPA, if the loan is used as, or may be converted to permanent financing by the same bank. A

lender's commitment for permanent financing is covered by the regulation. Any construction loan with a term of two years or more is covered by the regulation, unless it's made to a bona fide contractor. Bridge or swing loans are not covered by the regulation.)

- Secured by vacant or unimproved property when none of the loan proceeds will be used to construct a one-to-four family residential structure. (If the proceeds will be used to locate a manufactured home or construct a structure within two years from the date of settlement, the loan is covered.)

- That are assumptions of existing mortgages in which the lender has no right to approve subsequent persons as borrowers.

- That are conversions of federally related mortgage loans to different terms consistent with the original mortgage instrument, as long as a new note is not required. Examples include transactions involving the renewal of:

  – Single payment loans with no change in terms.
  – Loans on which the APR is lowered, with a corresponding reduction in the payment schedule.
  – Loans involving a court ordered agreement.
  – Workout arrangements of a problem loan.
  – Loans on which optional insurance is added.

- Bona fide transfers of loan obligations in the secondary market. (However, the mortgage servicing transfer disclosure requirements of 24 CFR 3500.21 still apply.) (Mortgage broker transactions that are table funded (the loan is funded by a contemporaneous advance of loan funds and an assignment of the loan to the person advancing the funds) are not secondary market transactions and are covered by RESPA.)

Special Information Booklet (24 CFR 3500.6)

A bank must provide the borrower with a copy of the Special Information Booklet either at the time a written application is submitted, or no later than three business days after the application is received. If the application is denied before the end of the three-business-day period, the bank need not provide the booklet. If the borrower uses a mortgage broker, the broker, rather than the bank, must provide the booklet.

An application includes the submission of a borrower's financial information, either written or computer-generated, for a credit decision on a federally

related mortgage loan. It must identify a specific property. The subsequent addition to the submission of an identified property converts it to an application for a federally related mortgage loan.

The booklet need not be given for refinancing transactions, closed-end subordinate lien mortgage loans, and reverse mortgage transactions, or for any other federally related mortgage loan unintended for the purchase of a one-to-four family residential property.

A bank that complies with Regulation Z (12 CFR 226.5b) for open-end home equity plans has conformed with this section.

Part one of the booklet describes the settlement process and the nature of charges, and suggests questions to be asked of lenders, attorneys, and others to clarify their services. It also contains information on the rights and remedies available under RESPA and alerts the borrower to unfair or illegal practices.

Part two of the booklet contains an itemized explanation of settlement services and costs, and sample forms and worksheets for cost comparisons. The Appendix of the Special Information Booklet contains a listing of government offices from which to obtain consumer information and literature on home purchasing and other related topics.

Good Faith Estimates (GFE) of Amount/Range of Settlement Costs (24 CFR 3500.7)

A bank must provide, in a clear and concise form, a good faith estimate of the amount of, or range of, settlement charges the borrower is likely to pay. The GFE must include all charges that will be listed in section L of the HUD-1 Settlement Statement. It must be provided no later than three business days after receipt of the written application. If the application is denied before the end of the three-business-day period, the bank is not required to provide the GFE.

The GFE may disclose either an estimate of the dollar amount or a range of dollar amounts for each settlement service. The estimate of the amount or range for each charge must:

- Bear a reasonable relationship to the borrower's ultimate cost for each settlement charge.

- Be based upon experience in the locality in which the property involved is located.

A bank that complies with Regulation Z (12 CFR 226.5b) for open-end home equity plans is deemed to have met the GFE disclosure requirement of 24 CFR 3500.7. For no cost or no point loans, the GFE must disclose any payments to be made to affiliated or independent settlement service providers. These payments should be shown as POC (Paid Outside of Closing). For dealer loans, the bank must provide the GFE either directly or through the dealer.

For brokered loans, if the mortgage broker is the bank's exclusive agent, either it or the broker shall provide the GFE within three business days after the broker receives or prepares the application. When the broker is **not** the bank's exclusive agent, it is not required to provide the GFE if the broker has already done so, but the funding lender must ascertain that the GFE has been delivered.

When the bank requires the use of a particular settlement service provider and the borrower to pay all or a portion of the cost of those services, the bank must include with the GFE:

- A statement that the use of the provider is required and the estimate is based on the charges of the designated provider.
- The name, address, and telephone number of the designated provider.
- A description of the nature of any relationship between each such provider and the bank. A relationship exists if:
  - The provider is an associate of the bank, as defined in 24 CFR 3500.15(c)(1) (12 USC 2602(8));
  - The provider has maintained an account with the bank or had an outstanding loan or credit arrangement with the bank within the last 12 months; or
  - The bank has repeatedly used or required borrowers to use the provider's services within the last 12 months.
- The statement that, except for a provider that is the bank's chosen attorney, credit reporting agency, or appraiser, if the bank is in a controlled business relationship with the provider, it may not require use of that provider (24 CFR 3500.15).

If the bank maintains a controlled list of required providers (five or more for each discrete service) or relies on a list maintained by others and at the time

of application has not decided which provider will be selected, the bank may comply with this section by:

- Providing a written statement that the bank will require a particular provider.

- Disclosing in the GFE the range of costs for the required providers and on the HUD settlement statement the name of the specific provider and the actual cost.

If the list is less than five providers of service, the names, addresses, telephone numbers, costs, and the business relationship are required.

Uniform Settlement Statement (HUD-1 or HUD-1A) (24 CFR 3500.8)

The HUD-1 and HUD-1A must be completed by the person conducting the closing (settlement agent) and must conspicuously and clearly itemize all charges related to the transaction. The HUD-1 is used for transactions in which there is a borrower and seller. For transactions in which there is a borrower and no seller (refinancings and subordinate lien loans), the HUD-1 may be completed by using the borrower's side of the settlement statement. Alternatively, the HUD-1A may be used. However, no settlement statement is required for open-end home equity plans subject to the Truth in Lending Act and Regulation Z. Appendix A of 24 CFR 3500 contains the instructions for completing the forms.

Printing and Duplication of the Settlement Statement(24 CFR 3500.9)

Banks have numerous options for layout and format in reproducing the HUD-1 and HUD-1A that do not require prior HUD approval, such as size of pages; tint or color of pages; size and style of type or print; spacing; printing on separate pages, front and back of a single page, or on one continuous page; use of multi-copy tear-out sets; printing on rolls for computer purposes; addition of signature lines; and translation into any language. Other changes not specifically listed in 24 CFR 3500.9 may be made only with the approval of the Secretary of Housing and Urban Development.

One-Day Advance Inspection of the Settlement Statement (24 CFR 3500.10)

Upon request by the borrower, the HUD-1 or HUD-1A must be completed and made available for inspection during the business day immediately

preceding the day of settlement, listing those items known at that time by the person conducting the closing.

Delivery

The completed HUD-1 or HUD-1A must be delivered to the borrower, the seller, and the lender at or before settlement. However, the borrower may waive the right of delivery by executing a written waiver at or before settlement. The HUD-1 or HUD-1A shall be mailed or delivered as soon as practicable after settlement if the borrower or borrower's agent does not attend the settlement.

Retention (24 CFR 3500.10(e))

The bank must retain each completed HUD-1 or HUD-1A and related documents for five years after settlement, unless the bank disposes of its interest in the mortgage and does not service it. If the loan is transferred, the bank shall provide a copy of the HUD-1 or HUD-1A to the owner or servicer of the mortgage as part of the transfer. The owner or servicer shall retain the HUD-1 or HUD-1A for the remainder of the five-year period.

Prohibition of Fees for Preparing Federal Disclosures (24 CFR 3500.12)

For loans subject to RESPA, no fee may be charged for preparing the settlement statement or the escrow account statement or any disclosures required by the Truth in Lending Act.

Prohibition Against Kickbacks and Unearned Fees (24 CFR 3500.14)

Any person who, pursuant to any agreement or understanding, gives or receives a fee or a thing of value (including payments, commissions, fees, gifts, or special privileges) for the referral of settlement business violates RESPA (section 8). Payments in excess of the reasonable value of goods provided or services rendered are considered kickbacks. Appendix B and OCC bulletin 96-8 (section 8 transactions) provide guidance on the meaning and coverage of the prohibition against kickbacks and unearned fees.

Computer Loan Originations (CLO)

A borrower that intends to pay for the service of a CLO operator should be given the computer loan origination fee disclosure. This disclosure should include the charges to be paid, the services to be rendered, and a disclosure that the fee may be avoided by contacting directly a lender or mortgage broker. (See Appendix E of the regulation for a sample CLO disclosure form).

Controlled Business Arrangements (24 CFR 3500.15)

If the bank has either an affiliate relationship or a direct or beneficial ownership interest of more than 1 percent in a provider of settlement services and the lender directly or indirectly refers business to the provider, it is a controlled business arrangement. That arrangement does not violate section 8 of RESPA and section 3500.14 of Regulation X, if:

- The bank discloses on a separate piece of paper either at the time of loan application or with the GFEs:
  - The nature of the relationship (explaining the ownership and financial interest) between the provider and the bank.
  - The estimated charge or range of charges generally made by such provider.
- The bank does not require the use of such a provider, with the following exceptions: the bank may require a buyer, borrower, or seller to pay for the services of an attorney, credit reporting agency, or real estate appraiser chosen by the bank to represent its interest.
- The bank receives only a return on ownership or franchise interest or payment otherwise permitted by RESPA in section 3500.14(g).

Title Companies (24 CFR 3500.16 and 12 USC 2608)

Banks that hold legal title to the property being sold (i.e., sellers of property) are prohibited from requiring borrowers, either directly or indirectly, to use a particular title company.

Civil liability to the buyer for violating the provision that a bank (seller) cannot require a borrower to use a particular title company is an amount equal to three times all charges made for the title insurance.

Escrow Accounts (24 CFR 3500.17)

HUD has issued a final escrow rule, which was effective on May 24, 1995 (see *Banking Regulations for Examiners*, Volume 4, Part 3500.17). The rule establishes a national standard accounting method, known as aggregate accounting. Existing escrow accounts are allowed a three-year phase-in period to convert to the aggregate accounting method. The final rule also establishes formats and procedures for initial and annual escrow account statements.

The amount that a bank can require a borrower to place in an escrow account is limited. The amount of escrow funds that can be collected at settlement is restricted to an amount sufficient to pay charges, such as taxes and insurance, that are attributable to the period from the date such payments were last paid until the initial payment date.

Throughout the life of an escrow account, the servicer may charge the borrower a monthly sum equal to one-twelfth of the total annual escrow payments that the servicer reasonably anticipates paying from the account. In addition, the servicer may add an amount to maintain a cushion no greater than one-sixth of the estimated total annual payments from the account.

Escrow Account Analysis

Before establishing an escrow account, a servicer must conduct an analysis to determine the periodic payments and the amount to be deposited. The servicer shall use an escrow disbursement date that is on or before the earlier of the deadline to take advantage of discounts, if available, or the deadline to avoid a penalty. The servicer shall analyze each account anew at the completion of the computation year to determine the borrower's monthly payments for the next computation year.

Escrow Accounting Methods

Servicers may use either single-item analysis or aggregate analysis during the phase-in period of pre-rule accounts. On the conversion date (10/27/97), all pre-rule accounts shall comply with the requirements for post-rule accounts.

Servicers shall use only aggregate accounting to conduct an escrow analysis of post-rule accounts.

The rule prescribes the arithmetic operations for both the aggregate analysis and the single-item accounting methods.

Restrictions on Pre-Accrual

The rule limits the amount of pre-accruals for pre-rule accounts. For post-rule accounts, a servicer shall not practice pre-accrual accounting.

Transfer of Servicing

If the new servicer changes the payment or accounting method, it must provide an initial escrow account statement within 60 days of the date of servicing transfer. When a new servicer provides an initial escrow account statement upon the transfer, it shall use the effective date of the transfer of servicing to establish the new escrow account computation year.

Pre-rule accounts remain pre-rule accounts upon the transfer of servicing to a new servicer as long as it occurs before the conversion date.

Shortages, Surpluses, and Deficiencies — Requirements

Servicers must analyze escrow accounts to determine whether a surplus, shortage, or deficiency exists prior to adjusting the account. Adjustments must be made according to the requirements outlined in section 3500.17(f).

A servicer must notify the borrower at least once during the escrow account computation year if a shortage or deficiency exists in the account.

Initial Escrow Account Statement

After analyzing each escrow account, the servicer must submit an initial escrow account statement to the borrower at settlement or within 45 calendar days of settlement for escrow accounts that are established as a condition of the loan.

The initial escrow account statement must include the monthly mortgage payment; the portion going to escrow; itemized estimated taxes, insurance, premiums, and other charges; the anticipated disbursement dates of those charges; the amount of the cushion; and a trial running balance.

Annual Escrow Account Statement

A servicer shall submit to the borrower an annual statement for each escrow

account within 30 days of the completion of the computation year. The servicer must conduct an escrow account analysis before submitting an annual escrow account statement to the borrower.

Annual escrow account statements must contain the account history; projections for the next year; current mortgage payment and portion going to escrow; amount of last year's mortgage payment and the portion going to escrow; total amount paid into the account during the past year; amount paid from the account; balance at the end of the period; explanation of how the surplus, shortage, or deficiency is being handled; and, if applicable, the reasons why the estimated low monthly balance was not reached.

Short-year Statements

Short-year statements will end the escrow account computation year and establish the beginning date of the new computation year. Short-year statements may be provided upon the transfer of servicing and are required upon loan payoff. The statement is due to the borrower within 60 days after receiving the pay-off funds.

Timely Payments

The servicer shall pay escrow disbursements by the disbursement date. In calculating the disbursement date, the servicer must use a date on or before the earlier of the deadline to take advantage of discounts, if available, or the deadline to avoid a penalty.

Record Keeping

Each servicer shall keep records that are easily retrievable, reflecting the servicer's handling of each borrower's escrow account. The servicer shall maintain the records for each escrow account for at least five years after the servicer last serviced the account.

Mortgage Servicing Transfer Disclosures (24 CFR 3500.21)

The disclosures related to the transfer of mortgage servicing are required for first mortgage liens of federally related mortgage loans, including all refinancing transactions of such loans. HUD has exempted from the requirements of this section any subordinate lien and has excluded all open-end lines of credit (home equity plans), whether secured by a first or

subordinate lien, that are covered under the Truth in Lending Act and Regulation Z. In addition, these requirements shall not apply when the application for credit is denied within three business days after receipt of the application.

A bank that receives an application for a federally related mortgage loan is required to disclose to the borrower at the time of application, or within three business days after its submission:

- Whether the servicing of the loan may be assigned, sold, or transferred.

- The percentages (rounded to the nearest quartile (25 percent)) of loans made by the bank in each of the last three calendar years for which servicing has been assigned, sold or transferred or, in the alternative, a statement that the bank has previously assigned, sold, or transferred the servicing of federally related mortgage loans.

- The best available estimate of the percentage of loans to be made by the bank that may be assigned, sold, or transferred during the 12-month period beginning on the date of origination.

- A summary of the information that will be provided to the borrower if the loan is transferred.

- A disclosure of the duty of the bank to:

  – Provide a written acknowledgment of the borrower's qualified written request for information relating to the loan within 20 business days.
  – Make corrections, if necessary, or provide a written explanation of why the account is correct, within 60 days of notice.
  – Withhold, during the 60-day period, information about any overdue payment to a credit reporting agency.

- A written acknowledgment that the applicant has read and understood the disclosure, evidenced by the signature of the applicant.

When the servicing of a federally related mortgage loan is assigned, sold, or transferred, the transferor servicer (present servicer) must provide a disclosure not less than 15 days before the effective date of the transfer. The same notice from the transferee servicer (new servicer) must be provided not more than 15 days after the effective date of the transfer. Both notices may be combined into one notice delivered to the borrower not less than 15 days

before the effective date of the transfer. The disclosure must include:

- The effective date of the transfer of servicing.
- The name, address for consumer inquiries, and toll-free or collect-call telephone number of the transferee servicer.
- A toll-free or collect-call telephone number for a person employed by the transferor servicer that can be contacted by the borrower to answer servicing questions.
- The date on which the transferor servicer will cease accepting payments relating to the loan and the date on which the transferee servicer will begin to accept such payments. These dates must either be the same or consecutive dates.
- Any information about the effect of the transfer on the availability of optional insurance and any action the borrower must take to maintain coverage.
- A statement that the transfer does not affect any other terms or conditions of the mortgage, except as related directly to servicing.

During the 60-day period beginning on the date of transfer, no late fee can be imposed on a borrower who has made the payment to the wrong servicer.

The following transfers are not considered an assignment, sale, or transfer of mortgage loan servicing for purposes of this requirement if there is no change in the payee, address to which payment must be delivered, account number, or amount of payment due:

- Transfers between affiliates.
- Transfers resulting from mergers or acquisitions of servicers or subservicers.
- Transfers between master servicers, when the subservicer remains the same.

Servicers Must Respond to Borrower's Inquiries

A bank servicer must respond to a borrower's qualified written inquiry and take appropriate action within established time frames after receipt of the

inquiry. Generally, the bank must provide written acknowledgment within 20 business days and take certain specified actions within 60 business days of receipt of such inquiry.

During the 60-business-day period following receipt of a qualified written request from a borrower relating to a disputed payment, a bank may not provide information on any overdue payment, or relating to this period or the qualified written request, to any consumer reporting agency.

Relationship to State Law

In general, state laws shall not be affected by the act, except to the extent that they are inconsistent and then only to the extent of the inconsistency. However, banks complying with the mortgage servicing transfer disclosure requirements of RESPA are considered to have complied with any state law or regulation requiring notice to a borrower at the time of application or transfer of a mortgage.

Penalties and Liabilities

Escrow Accounts

A servicer's failure to submit to a borrower an initial or annual escrow account statement shall constitute a violation of RESPA. For each such violation a civil penalty of $50 may be assessed, except that the total of the assessed penalties shall not exceed $100,000 for any one servicer for violations that occur during any consecutive 12-month period. If the violation is due to intentional disregard, a penalty of $100 is assessed for each failure to submit the statement, without any annual cap on liability.

Kickbacks

Civil and criminal liability is provided for violating the prohibition against kickbacks and unearned fees, including:

- Civil liability to the parties affected, equal to three times the amount of the referral fee, kickback, or unearned fee.
- The possibility that the costs associated with any court proceeding and reasonable attorney's fees could be recovered.
- A fine of no more than $10,000 or imprisonment for no more than 1 year or both, for each violation.

Mortgage Servicing

In an action brought by an individual, failure to comply with any provision of section 3500.21 will result in actual damages, attorneys fees, and additional damages (in the case of a pattern or practice of noncompliance), as the court allows, up to $1,000. In class action suits, each borrower will receive actual and additional damages, as the court allows, up to $1,000 for each member of the class, except that the total amount of damages in any class action may not exceed the lesser of $500,000 or 1 percent of the net worth of the servicer.

1. To appraise the quality of the bank's compliance management system for the Real Estate Settlement Procedures Act.

2. To determine the reliance that can be placed on the bank's compliance management system, including internal controls and procedures performed by the person(s) responsible for monitoring the bank's compliance review function for the Real Estate Settlement Procedures Act.

3. To determine the bank's compliance with the Real Estate Settlement Procedures Act.

4. To initiate corrective action when policies or internal controls are deficient, or when violations of law or regulation are identified.

1. Obtain from the examiner, who completed the Compliance Management System program, information pertinent to the area of examination (historical examination findings, complaint information, and significant findings from compliance review/audit).

2. Through discussions with management and review of the following documents, determine whether the bank's internal controls are adequate to ensure compliance in the area under review. Identify procedures used daily to detect errors/violations promptly. Also review the procedures used to ensure compliance when changes occur (e.g., changes in service charges, computation methods, and software programs).

   - ☐ Organizational charts.
   - ☐ Process flowcharts.
   - ☐ Policies and procedures.
   - ☐ Loan documentation and disclosures.
   - ☐ Checklists/worksheets and review documents.
   - ☐ Computer programs.

3. Review compliance review/audit work papers and determine whether:

   a. The procedures used address all regulatory provisions (see Transactional Testing section).

   b. Steps are taken to follow-up on previously identified deficiencies.

   c. The procedures used include samples that cover all product types and decision centers.

   d. The work performed is accurate (through a review of some transactions).

   e. Significant deficiencies, and the root causes of the deficiencies, are included in reports to management/board.

   f. Corrective actions are timely and appropriate.

g. The area is reviewed at an appropriate interval.

Transactional Testing

4. Determine the departments or areas of the bank that originate, buy, sell, transfer, or receive federally related mortgage loans.

5. Interview mortgage lending personnel to determine:

   a. When the special information booklet is given to the applicant.

   b. The timing of the good faith estimate and how estimated fees are determined.

   c. Settlement service providers used by the bank.

   d. The existence of either affiliate relationships or direct beneficial ownership interests of more than 1 percent in provider(s) of settlement services (controlled business arrangement).

   e. If the bank requires borrowers to use particular providers of settlement services.

   f. If the bank, since the last exam, sold any RE financed by a federally related mortgage loan.

   g. If the bank refers mortgage borrowers to other lenders or settlement service providers, or has mortgage borrowers referred to the bank. If it does obtain a description of services performed and determine whether:

      – The bank collects or pays a fee for the referral (24 CFR 3500.14(b)).
      – The bank is in compliance with 24 CFR 3500.14 and the guidance provided in the Appendix on Section 8 Transactions.

   h. If the bank has transferred or received mortgage loans or mortgage servicing rights.

   i. Whether escrow arrangements exist on mortgage loans.

   j. If initial and annual escrow statements are provided to customers.

k. The bank's record retention policy for HUD-1 statements (12 CFR 3500.10(e)).

l. How borrower inquiries about loan servicing are handled and within what time frame.

m. If customers are charged for preparation of RESPA and truth in lending documents.

n. If the bank conducts the settlement. If it does, determine whether:

- The borrower, upon request, is allowed to inspect the HUD-1 or HUD-1A at least one business day prior to settlement (24 CFR 3500.10(a)).
- The HUD-1 or HUD-1A is provided to the borrower and seller at or before settlement (24 CFR 3500.10(b)).
- When the right to delivery is waived or the transaction is exempt, the statement is mailed as soon as possible after settlement (24 CFR 3500.10(c);(d)).

6. Assess the overall level of knowledge and understanding of mortgage lending personnel.

7. Through interviews with management and personnel, file reviews, the review of good faith estimates, and HUD-1 and HUD-1A, determine if federally related mortgage loan transactions are referred by the bank, brokers, affiliates, or other parties. Identify those parties and:

   a. Designate the types of services rendered by the bank, broker, affiliate, or service provider.

   b. By a review of the bank's general ledger or otherwise, determine if fees were received or paid by the bank.

   c. Confirm that any fees paid to the bank, broker, affiliate, service provider, or other party meet the requirements of section 3500.14(g) and are for goods or facilities actually furnished or services actually performed. This includes payments to an affiliate or the affiliate's employees.

   d. When a borrower has paid for a computer loan origination, confirm that its disclosure, as set forth in Appendix E of the regulation, has been provided to the borrower.

8. Select a sample of credit files of loans subject to RESPA. Using the RESPA worksheet, review the files to determine compliance with the various aspects of RESPA. Include in your sample, if applicable, loans:

    a. Originated and retained by the bank.

    b. Originated by the bank, but on which the servicing rights were transferred to another entity.

    c. Not originated by the bank, but on which the servicing rights were transferred to the bank.

    d. Subject to escrow accounts.

9. Using the bank's RESPA forms, complete the RESPA Forms Review Worksheet.

10. Summarize your findings from the RESPA worksheet.

Conclusions

11. Summarize here *all* violations of law, regulation, or ruling and use when making SMS entries. Refer to EC 263, "SMS Documentation Policy."

	Citation	Department	Violation	Recommendation	Policy Guide	Reference
a.	_____	__	__	__	__	__
b.	_____	__	__	__	__	__
c.	_____	__	__	__	__	__
d.	_____	__	__	__	__	__
e.	_____	__	__	__	__	__

12. If the violation(s) noted above represent(s) a pattern or practice, determine the root cause by identifying weaknesses in internal controls, compliance review, training, management oversight, or other factors. Consider whether civil money penalties (CMP), suspicious activity reporting, or an enforcement action should be recommended (see CMP matrix). RESPA enforcement actions are not delegated and must be sent to Washington Enforcement and Compliance for final review.

13. Identify action needed to correct violations and weaknesses in the bank's compliance system, as appropriate. Form a conclusion about the reliability of the compliance system for the area under review and provide conclusions to the examiner performing the Compliance Management System program.

14. Determine, in consultation with the examiner-in-charge, if violations or deficiencies in the compliance system are significant enough to merit bringing them to the board's attention in the report of examination. If so, prepare items for inclusion under the heading Matters Requiring Board Attention and under a Type 75 Follow-up Analysis.

15. Determine whether any items identified during this examination could materialize into a supervisory concern before the next on-site examination (consideration should be given to any planned increase in activity in this area, planned personnel changes, planned policy changes, planned changes to outside auditors or consultants, planned changes in business strategy, etc.). If so, summarize your concerns and assess the potential risk to the institution and discuss with the examiner-in-charge and/or appropriate bank personnel.

16. Discuss findings with bank management and obtain commitment(s) for corrective action.

RESPA Worksheet

The worksheet is designed as a decision tree that will lead the examiner to appropriate conclusions on compliance with the act.

Name of Borrower: Loan #	Yes	No	Yes	No	Yes	No	Yes	No	Yes	No
Special Information Booklet										
1. Was the application for a refinancing transaction, a closed-end loan as defined in 12 CFR 226.2(a)(10) in which the lender takes a subordinate lien, a reverse mortgage, or any other federally related mortgage loan whose purpose is not the purchase of a one-to-four family residential property (24 CFR 3500.6(a)(3)(i),(ii),(iii),(iv))? If yes, the special information booklet is not required. Go to step 3. If no, go to step 2.										
2. If the bank maintains a record showing when the booklet was provided, was it provided or mailed within three business days of application (24 CFR 3500.6(a)(1))?										
Good Faith Estimate										
3. Was the GFE delivered or mailed within three business days of the application (24 CFR 3500.7(a))?										
4. Does the GFE include: a. The lender's name (Appendix C)? b. The estimate of charges listed in section L of the HUD-1 or HUD-1A (24 CFR 3500.7(c)(1))? c. The estimate of all other charges customary to the locality (24 CFR 3500.7(c)(2))?										

Name of Borrower: Loan #	Yes	No	Yes	No	Yes	No	Yes	No	Yes	No
5. Are amounts on GFE reasonably similar to actual amounts paid and shown on HUD-1 (24 CFR 3500.7(c)(2))?										
6. Was the borrower required to use any particular providers of settlement services? If yes, go to step 7. If no, go to step 8.										
7. Does the GFE disclose: a. The requirement (24 CFR 3500.7(e)(i))? b. The name, address, and telephone number of each required provider (24 CFR 3500.7(e)(ii))? c. The nature of the relationship between each provider and the bank (24 CFR 3500.7(e)(iii))? d. The fact that the estimate is based on the charges of the designated provider (24 CFR 3500.7(e)(i))?										
Uniform Settlement Statement (HUD-1 or HUD-1A)										
8. Was a HUD-1 or -1A properly completed for the transaction (24 CFR 3500.8 and Appendix A)? Were: a. Charges itemized properly for both borrower and seller according to the instructions for completion of the HUD-1 or HUD-1A? b. All charges paid to a party other than the lender itemized and the recipient named? c. Charges required by the bank but paid outside of closing, itemized on the settlement statement, marked as paid outside of closing or POC, but not included in totals? d. Is the accounting adjustment on Line 1,000 correct (24 CFR 3500.8(c)(1))?										

Name of Borrower: Loan #	Yes	No	Yes	No	Yes	No	Yes	No	Yes	No
9. Was the transaction exempt from the delivery requirements of 24 CFR 3500.10(b) (24 CFR 3500.10(c) and (d))? If yes, go to 12. If no, go to 10.										
10. Was the HUD statement delivered to the borrower and seller, or lender, as appropriate, at or before settlement (24 CFR 3500.10(b))?										
11. Does the HUD statement reflect any charges paid by the customer to the bank to prepare RESPA or Truth in Lending documents (24 CFR 3500.12)?										
Controlled Business Arrangements If earlier exam steps indicated that no such arrangements exist, go to 15. If such arrangements exist, go to 12.										
12. Was the customer referred to a provider of settlement services with which the bank has a controlled business arrangement? If yes, go to 13. If no, go to 15.										
13. Other than an attorney, credit reporting agency, or appraiser representing the lender, was the use of a provider required (24 CFR 3500.15(b)(2))?										
14. Was the controlled business arrangement disclosure statement given to the customer (24 CFR 3500.15(b)(1) and Appendix D)?										
Servicing Disclosure Statement										
15. Did the applicant receive a properly completed servicing disclosure statement at the time of application or, if the application was not face-to-face, within three business days of the application (24 CFR 3500.21(b) and Appendix MS-1)?										

Name of Borrower: Loan #	Yes	No	Yes	No	Yes	No	Yes	No	Yes	No
16. Did the bank obtain a written acknowledgment of the disclosure from the customer (24 CFR 3500.21(c))?										

Name of Borrower: Loan #	Yes	No	Yes	No	Yes	No	Yes	No	Yes	No
Responsibilities of Servicer										
17. Through a review of late notices or otherwise, were no late fees imposed and no payments treated as late within 60 days following a transfer of servicing (24 CFR 3500.21(d)(5))?										
18. As loan servicer for mortgage loans and refinancings subject to RESPA, does the bank respond to borrower inquiries relating to these loans as prescribed in the regulation: a. Provide the notice of receipt of inquiry for qualified written correspondence from borrowers within 20 business days (unless the action requested is taken within that period and the borrower is notified in writing of that action) (24 CFR 3500.21(e)(1))? b. Provide, not later than 60 business days after receipt of the qualified written correspondence from the borrower, written notification of the corrections taken on the account, or statement of the reasons the account is correct or explanation of why the information requested is unavailable (24 CFR 3500.21(e)(3))? c. Does not provide information to any consumer reporting agency on overdue payment when investigating a qualified written request from borrower about disputed payments during this 60-business-day period (24 CFR 3500.21(e)(4))?										
Notice of Transfer of Mortgage Servicing If previous exam steps indicate that the bank has not transferred or received any mortgage servicing rights, go to 32. If the bank has transferred or received mortgage servicing rights, go to step 21.										
19. Did the bank, as transferor, notify the borrower at least 15 days in advance of transfer with the notice of transfer (24 CFR 3500.21(d)(2))?										

Name of Borrower: Loan #	Yes	No	Yes	No	Yes	No	Yes	No	Yes	No
20. Or as transferee, within 15 days after the effective date of the transfer (24 CFR 3500.21(d)(2))?										
Escrow accounts If previous steps indicate that the bank does not establish escrow accounts in connection with federally related mortgage loans, or if the loan was originated prior to May 24, 1995, go to 27. Otherwise, proceed to step 21.										
21. Did the bank perform an escrow analysis at the creation of the account (24 CFR 3500.17(c)(2) and (7), and 24 CFR 3500.17(d))? Did it contain: a. Amount of monthly mortgage payments? b. Portion of payment going into escrow? c. Charges to be paid from the escrow account during the first 12 months after the account is established? d. Disbursement dates? e. Amount of cushion? f. Trial running balance?										
22. Did the customer receive an initial escrow statement within 45 days after the escrow account was established (24 CFR 3500.17(g))?										
23. Was it accurate?										
24. Does the bank perform an annual analysis of the escrow account (24 CFR 3500.17(c)(3),(7) and 17(d))?										

Name of Borrower: Loan #	Yes	No	Yes	No	Yes	No	Yes	No	Yes	No
25. Did the customer receive a properly completed annual escrow account statement within 30 days of the end of the computation year (24 CFR 3500.17(i))? Did it contain the: a. Amount of current monthly payment and portion of the monthly payment being placed in escrow (24 CFR 3500.17(i)(1)(i))? b. Amount of the past year's monthly mortgage payment and the portion of the monthly payment that went into the escrow account (24 CFR 3500.17(i)(1)(ii))? c. Total amount paid into escrow for the 12-month period (24 CFR 3500.17(i)(1)(iii))? d. Total amount paid for taxes, insurance, and other charges (24 CFR 3500.17(i)(1)(v))? e. Balance in the escrow account at the end of the period (24 CFR 3500.17(i)(1)(v))? f. An explanation of how any surplus is being handled by the servicer (24 CFR 3500.17(i)(1)(vi))? g. An explanation of how any shortage is to be paid by the borrower (24 CFR 3500.17(i)(1)(vii)? h. If applicable, why the estimated low monthly balance was not reached (24 CFR 3500.17(i)(1)(viii))?									
26. Are the monthly escrow payments following settlement within the limits of 24 CFR 3500.17(c)(1)(ii)?										
27. Did the bank use an acceptable accounting method to determine escrow limits (24 CFR 3500.17(4))?										

Name of Borrower: Loan #	Yes	No	Yes	No	Yes	No	Yes	No	Yes	No
28. Is the escrow cushion no greater than that allowed by 24 CFR 3500.17(c)(5)? If the loan was originated by the bank, go to 30. If the loan was not originated by the bank, go to 29.										
29. As the new servicer of the loan, did the bank change the monthly payment amount or the accounting method of the escrow account? If no, go to 31. If yes, go to 30.										
30. Did the bank provide to the customer an initial escrow account statement within 60 days of the transfer of the servicing (24 CFR 3500.17(e))?										
31. Were the payments to be made from the escrow account made promptly by the bank (24 CFR 3500.17(k))?										
Purchase of Title Insurance If the bank was the titleholder of property sold and the sale was financed by a federally related mortgage loan.										
32. Was the buyer required to purchase title insurance from a particular company (24 CFR 3500.16)?										

RESPA Forms Review Worksheet

Complete this worksheet after file review. Do not complete this worksheet for individual transactions. To complete, review applicable forms and place a check in each applicable box. All no answers indicate a possible violation of law and must be explained fully in the work papers. You also can insert an NA, if the line item is not applicable.

Forms Review Worksheet										
Product Type	Yes	No	Yes	No	Yes	No	Yes	No	Yes	No
1. Is the special information booklet used by the bank the most current version published by HUD in the Federal Register (24 CFR 3500.6(b))?										
2. Is the good faith estimate form used by the bank similar to the one in Appendix C of 24 CFR 3500?										
3. Is the HUD-1 or HUD-1A closing statement used by the bank the current form as contained in Appendix A of 24 CFR 3500? Any changes must conform to 24 CFR 3500.9.										

Forms Review Worksheet										
Product Type	Yes	No	Yes	No	Yes	No	Yes	No	Yes	No
4. Does the mortgage servicing disclosure statement conform to the model disclosure in Appendix MS-1 of 24 CFR 3500 and contain the following information: a. A statement on whether the loan may be assigned or transferred while outstanding (24 CFR 3500.21(b)(3)(i))? b. The percentage of loans made during the past three calendar years that have been assigned or transferred, or in the alternative, the statement that "We have previously assigned, sold, or transferred the servicing of federally related mortgage loans." (24 CFR 3500.21(b)(3)(ii))? c. An estimate of the percentage of loans that will be transferred in the 12-month period following origination (24 CFR 3500.21(b)(3)(iii))? d. A summary of information that will be provided at the time a loan is transferred, including information on servicing procedures, transfer practices, and requirements (24 CFR 3500.21(b)(3)(iv))? and e. A summary of the loan servicer's duty to respond to borrower inquiries (24 CFR 3500.21(b)(3)(iv))?										
5. Is the customer acknowledgment form consistent with the format for acknowledgment contained in the model form, at Appendix MS-1 of 24 CFR 3500 (24 CFR 3500.21(b)(3)(v))?										

Forms Review Worksheet										
Product Type	Yes	No	Yes	No	Yes	No	Yes	No	Yes	No
6. Does the notice of transfer of mortgage servicing used by the bank conform to 24 CFR 3500.21(d)(3), and does the form disclose: a. Effective date of the transfer (24 CFR 3500.21(d)(3)(i))? b. New servicer's name, address for consumer inquiries, and toll-free or collect call telephone number (24 CFR 3500.21(d)(3)(ii))? c. A toll-free or collect call telephone number of the transferor servicer to answer inquiries relating to the transfer (24 CFR 3500.21(d)(3)(ii))? d. Date on which the present servicer will cease accepting payments and the date the new servicer will begin accepting payments relating to the transferred loan (24 CFR 3500.21(d)(3)(iv))? e. Any information concerning the effect of the transfer on the availability of terms of optional insurance and any action the borrower must take to maintain coverage (24 CFR 3500.21(d)(3)(v))? f. A statement that the transfer does not affect the terms or conditions of the mortgage, other than terms directly related to its servicing (24 CFR 3500.21(d)(3)(vi))?										
7. Does the initial escrow statement form used by the bank conform with 24 CFR 3500.17(h) (Appendix G)?										
8. Does the annual escrow statement form used by the bank conform with 24 CFR 3500.17(i)(1) (Appendix I)?										

RESPA Enforcement Procedures

Memorandum

Date: July 28, 1995

To: District Deputy Comptrollers, District Administrators, District Counsels, District Compliance Directors, and Compliance Managers

From: Daniel P. Stipano, Director, Enforcement & Compliance Division

As you are aware, significant jurisdictional and interpretive issues currently exist concerning the enforcement of RESPA, especially the anti-kickback provision contained in 12 USC § 2607 and 24 CFR §§ 3500.14 and 3500.15. We are participating in an interagency work group with HUD and the other financial institution regulatory agencies to attempt to resolve these issues, but in the meantime, it is important that the agency continue to review cases involving RESPA violations for possible referral and enforcement action.

Effective immediately, in order to ensure that the OCC is addressing RESPA violations in consistent fashion, cases involving such violations should be handled on a nondelegated basis. However, as with other nondelegated enforcement matters, the district should continue to take such cases to the district SRCs prior to submitting them to Washington. If the district SRC determines that a substantive violation has occurred, it should refer the case to E&C with a recommendation for appropriate action, including whether to refer the matter to HUD and whether reimbursement is necessary. E&C will consult with the Compliance Management Division (Compliance) and E&C and Compliance will present the matter to the Washington SRC for a final determination.

These procedures may be revised once the jurisdictional and interpretive issues have been resolved. However, please follow them until you receive further guidance. We will also be sure to keep the districts apprised of the progress of the interagency work group and any other developments in this area.

Because of the lack of definitive guidance with respect to many RESPA-related interpretive issues, the OCC should be cautious about citing violations, except in clear cases. Interpretive questions on substantive RESPA issues should be directed to Compliance and the Community and Consumer Law Division.

Please call me or Beth Knickerbocker if you have any questions or comments or wish to discuss these matters further.

Section 8 Transactions Under RESPA

Interagency and HUD Letters to IBAA Mortgage; Unofficial Interpretation

Below are excerpts of letters from the U.S. Department of Housing and Urban Development (HUD) to the IBAA Mortgage Corporation (IBAMC) and an interagency letter to the Independent Bankers Association of America (IBAA). These letters provide important guidance on enforcement of RESPA Section 8 in connection with transactions involving fees paid or received for services performed.

Although the HUD letters are unofficial interpretations and provide no protection under Section 19(b) of RESPA, they do provide the industry with guidance to avoid violations of 24 CFR §3500.14 (prohibition against kickbacks and unearned fees). As described in the interagency letter to the Independent Bankers Association of America, until HUD issues alternative guidance, such as an official interpretation, OCC examiners will use these letters as guidance when examining national banks for compliance with RESPA.

February 14, 1995 Letter to IBAMC, IBAA, and PHH US Mortgage Corporation:

Since November 2, 1992, HUD has had a two-prong system for exercising its regulatory authority under RESPA. See 24 CFR §3500.4. HUD may publish in the Federal Register a ''rule, regulation or interpretation.'' There is no liability under the statute for any acts done in conformity with such ''rule, regulation or interpretation.'' In addition, ''in response to requests for interpretations not adequately covered'' by published rules, HUD may provide ''unofficial interpretations'' at the discretion of staff or counsel. Such unofficial interpretations provide no protection under Section 19(b) of RESPA.

Since the effective date of the November 2, 1992 rule, which withdrew all informal counsel opinions and staff interpretations issued prior to that date, HUD has been inundated with requests to provide RESPA interpretations to guide individual business planning. It has been our policy to concentrate on providing rules, regulations and interpretations, which are of general applicability, rather than unofficial interpretations addressing specific business plans. However, since in excess of 6,000 individual institutions and their customers potentially could be affected by the IBAMC program, we have decided to provide you with this unofficial interpretation.

HUD consistently has interpreted Section 8 of RESPA and Regulation X to provide that the mere taking of an application is not sufficient work to justify a fee under RESPA. Your inquiry seeks a determination of what services **are** sufficient to justify a fee. This letter sets forth the framework that HUD uses in enforcement to determine when fees for origination services are justified under RESPA.

A determination whether or not sufficient work is performed to justify a fee under Section 8 of RESPA must be based on the specific facts. HUD must look not merely at whether an agreement calls for certain work to be performed in exchange for a fee, but also at whether such work was actually performed, whether those services were necessary for the transaction, and whether they were duplicative of services also performed by others.

Some or all of the following services are normally performed in the origination of a loan:

a. Taking information from the borrower and filling out the application;
b. Analyzing the prospective borrower's income and debt and pre-qualifying the prospective borrower to determine the maximum mortgage that the prospective borrower can afford;
c. Educating the prospective borrower in the home buying and financing process, advising the borrower about the different types of loan products available, and demonstrating how closing costs and monthly payments would vary under each product;
d. Collecting financial information (tax returns, bank statements) and other related documents that are part of the application process;
e. Initiating/ordering VOEs (verifications of employment) and VODs (verifications of deposits);
f. Initiating/ordering requests for mortgage and other loan verifications;
g. Initiating/ordering appraisals;
h. Initiating/ordering inspections or engineering reports;
i. Providing disclosures (truth in lending, good faith estimate, others) to the borrower;
j. Assisting the borrower in understanding and clearing credit problems;
k. Maintaining regular contact with the borrower, realtors, lender, between application and closing to apprise them of the status of the application and to gather any additional information as needed;
l. Ordering legal documents;
m. Determining whether the property was located in a flood zone or ordering such service; and
n. Participating in the loan closing.

In determining whether or not to bring an enforcement action under RESPA, HUD generally would be satisfied that no RESPA violation had occurred, if it found that:

- the lender's agent or contractor took the application (item a);

- the lender's agent or contractor performed at least five additional items on the list above; **and**

- the fee was reasonably related to the market value of the services that were performed.

In addition, HUD has particular concern that a fee for steering a customer to a particular lender, which is prohibited under Section 8 of RESPA, could be disguised as compensation for counseling-type activities. Therefore, if an agent or contractor is relying on taking the application and performing only counseling-type services — b, c, d, j, and k on the above list — to justify its fee, HUD also will look to see that meaningful counseling — not steering — is provided. In determining whether or not to bring enforcement action under RESPA in these circumstances, HUD would be satisfied that no RESPA violation had occurred, if it found that:

- the counseling gave the borrower the opportunity to consider products from at least three different lenders;

- the agent or contractor performing the counseling would receive the same compensation regardless of which lender's product was ultimately selected; **and**

- any payment made for the counseling-type services reasonably related to the services performed and not based on the amount of loan business referred to the lender.

I trust this letter will allow you to shape and develop IBAMC programs during the interim as we work to develop an interpretative rule on this and related subjects. In accordance with the requirements of Regulation X, the matters stated in this letter are unofficial interpretations as identified in Section 3500.4(c) of Regulation X, and any interpretation stated here is subject to change in future rulemaking on this subject.

June 20, 1995 Letter to IBAMC:

In your letter you ask whether it is our view that in order to be compensated under RESPA for purposes of your particular program a lender's agent or contractor must actually fill out the loan application or may perform substantially equivalent activity. You indicate that in your program, member banks obtain the prospective borrower's income and debt information, and this is used in conjunction with an in-file credit report to develop a worksheet showing the loan programs and maximum amounts for which the prospective

borrower would qualify. You indicate that you view that as one of the key origination functions. On the other hand, you believe that in your program filling out an application is not a key origination function, and for reasons of efficiency you prefer to have applications filled out in a central location. Upon review and consideration, we agree that for purposes of my letter of February 14, 1995, the filling out of a borrower's work sheet for the particular program you describe may be substituted for the act of filling out a mortgage loan application. This is consistent with Section 8(c) of RESPA which provides a Section 8 exception for compensation for ''facilities actually furnished or for services actually performed.''

Your second inquiry is whether you are interpreting my February 14, 1995, letter correctly to mean that if your member banks perform only non-counseling services (a, e, f, g, h, i, l, m, n in that letter) or a mix of counseling and non-counseling services (but never rely only on the five counseling services (b, c, d, j, and k) specified in my letter, the concerns I express regarding steering will never be reached, and no further test would be applicable to the IBAMC program. That is the clear meaning of my letter, and I hereby confirm this interpretation.

December 12, 1995 Letter to IBAA:

This letter responds to your letter of July 27, 1995, in which you requested that the financial institutions regulatory agencies provide interagency guidance on how the IBAA Mortgage Company (IBAMC) program will be reviewed for Real Estate Settlement Procedures Act (RESPA) compliance. This response has been prepared jointly by staff of all four financial institutions regulatory agencies and represents the interagency view of RESPA compliance with regard to banks and thrifts participating in the IBAMC program.

As discussed below, the agencies conclude that financial institutions participating in IBAMC's Tier 1 program may lawfully receive compensation for services rendered as long as the institutions actually perform all of the duties required of them under the Tier 1 program. It follows that participating financial institutions may also legally receive compensation for services actually performed under the IBAMC's Tier 2 and Tier 3 programs, which both require institutions to provide more services. Under all programs, of course, compensation must be reasonably related to the fair market value of the services that are performed.

As you know, HUD has primary interpretive and regulatory authority regarding RESPA. (12 USC §2617(a). See also 24 CFR §3500.4.)

Nicholas P. Retsinas, Assistant Secretary for Housing — Federal Housing Commissioner, on behalf of HUD, responded to two inquiries from the IBAA

about the IBAMC mortgage program. See letter from Nicholas P. Retsinas (February 14, 1995) (February letter) and letter from Nicholas P. Retsinas (June 20, 1995) (June letter). In his letters, Mr. Retsinas interpreted RESPA and HUD's Regulation X by setting forth a framework that HUD will use for enforcement purposes in determining when fees for origination services are justified under Section 8 of RESPA. The agencies intend to conform their RESPA Section 8 enforcement to the framework prescribed by HUD in these letters. However, you should be aware that these letters are "unofficial staff interpretations" as described in 24 CFR §3500.4(c), which provide no protection under Section 19(b) of RESPA, and are subject to change. If, in the future, HUD changes its interpretation, the agencies will likely conform to the new interpretation.

You have stated that IBAMC intends to reinstitute Tier 1 of its program because IBAMC believes, based on the February and June letters, that the program, as described in your letter and the attached checklists, complies with RESPA. According to the materials you provided, financial institutions participating in the Tier 1 program will perform the following services:

- Complete a worksheet detailing a prospective borrower's income and debt and calculate the prospective borrower's prequalification ratios in conjunction with pulling an in-file credit report. (The institution should request this type of report from a credit reporting agency after obtaining written authorization from the customer.)
- Educate the prospective borrower on the home buying and financing process, advise the borrower about the different types of loan products available, and demonstrate how closing costs and monthly payments would vary under each product.
- Collect financial information and other related documents that are part of the application process, including (a) the fully executed contract of sale for new property on a purchase or copy of deed to property if a refinance; (b) the most recent paystub or earnings statement; and (c) copies of bank statements for the last two months.
- Assist the borrower in understanding and clearing credit problems.
- Maintain regular contact with the borrower, real estate agents, and PHH during the processing of the loan to apprise them of the status of their application.
- Determine if the property is located in an area requiring flood hazard insurance or order a flood determination.

You have identified the first responsibility as an activity that will substitute for taking the borrower's application, the central activity in the February letter's compliance framework. Mr. Retsinas' June letter states that, for purposes of

compliance with Section 8 of RESPA, "filling out a borrower's work sheet for the particular program ... may be substituted for the act of filling out a mortgage loan application. As such, a financial institution may be compensated for this activity because it is a "service actually performed." (12 USC §2607(c).)

HUD's February letter states that HUD will generally be satisfied that no RESPA violation has occurred if:

- The participating financial institution took the application;
- The participating financial institution performed at least five additional items on the list of items in the letter; and
- The fee was reasonably related to the market value of the services that were performed.

Under IBAMC's Tier 1 program, participating financial institutions perform five items from HUD's list in addition to completing the borrower's work sheet, which HUD's June letter states is equivalent to taking the application. The second through fifth activities in the list of participating bank or thrift responsibilities above are identified as counseling-type activities in the February letter. They correspond with activities c, d, j, and k described in that letter. The final activity is a non-counseling service and corresponds to activity m in HUD's February letter.

HUD's February letter indicated that HUD is concerned that, when an agent or contractor is compensated for only counseling-type activities in addition to taking the application, the compensation may actually be a disguised fee for steering a customer to a particular lender, which is prohibited under Section 8. If an agent or contractor performs only counseling-type activities in addition to taking the application, then certain other requirements must be met.

HUD's June letter clarifies this concern with regard to the IBAMC programs. This letter states that if participating financial institutions perform a mix of counseling and non-counseling services, HUD's concerns regarding steering will not arise. The Tier 1 program contains a mix of four counseling-type services and one non-counseling service in addition to filling out the worksheet. In that regard, it meets the minimum requirements of HUD's June letter.

If participating financial institutions actually perform all six activities on the Tier 1 checklist, the institutions may lawfully receive compensation. However, in the past, our examiners have indicated that some participating banks and thrifts do not in fact perform all of the services on the program check list. If participating financial institutions do not actually perform all six services,

examiners may cite a violation of Section 3500.14 of HUD's Regulation X and request that the institution take appropriate corrective action.

You also detailed the activities in the Tier 2 and Tier 3 programs. Because these programs contain additional activities identified in HUD's February letter, they are of less concern to the financial institutions regulatory agencies as regards compliance with Section 8 of RESPA. Again, however, participating banks and thrifts must actually perform the activities entailed on the program checklists to receive compensation.

Under all three IBAMC programs, we note that it is also a requirement under Section 8 of RESPA that any fee received as compensation must be reasonably related to the market value of the services that were performed.

Disclosure of Mortgage Broker Fees Under RESPA

Below is an excerpt of an August 14, 1992, letter from HUD. While all informal opinions and staff interpretations were rescinded by HUD November 2, 1992, the information provided below on mortgage broker fees continues to be relevant.

August 14, 1992 Letter

Background: Methods of Loan Origination

Residential mortgage lenders make or acquire residential mortgage loans through retail and wholesale methods. The traditional retail mortgage lenders establish and maintain their own office or offices to originate, process, underwrite, close and fund loans in their own name, using their own employees and facilities. The borrower seeks out the loan officer, or more frequently is found through the loan officer's relationships with various settlement service providers. In the traditional retail lending process, the lender can control the entire process through its employees. In the mid-seventies, when RESPA was being formulated, retail lending was the predominant loan origination practice in the United States.

In the eighties, a number of wholesale mortgage lending programs evolved, which allowed lenders to purchase loans from other lenders or brokers which had performed some or all of the front end loan origination work. In one type of program, a mortgage lender purchases closed loans made by other mortgage lenders, generally known as wholesale buying. These transactions have always been considered secondary market transactions, that is, commercial transactions beyond the general scope of RESPA. (See discussion regarding secondary market exception, below.) A second wholesale method of acquiring loans is through mortgage brokers. In this approach, mortgage lenders accept the assignment of loans which are originated and processed by a mortgage broker and which fit the requirements of the mortgage lender. There is no uniform generalization regarding the activities which a mortgage broker must undertake to prepare the loan package. However, it is customary that the closing of the loan will be arranged by the mortgage broker in the name of the mortgage lender.

A third wholesale method, also used in the FHA program, is correspondent lending. In this arrangement the mortgage broker or correspondent performs

the necessary originating functions and closes the loan in the name of the mortgage broker with the expectation that the loan will be sold and assigned to the mortgage lender immediately after closing. The mortgage broker relies on table funding, a simultaneous advance of loan funds from the lender to the mortgage broker and an assignment of the loan from the mortgage broker to the lender to repay the advance. The essence of the table funding relationship is that the mortgage broker identifies itself as the creditor on the loan documents even though the mortgage broker is not the source of funds.

These various mortgage lending practices (there are variations of these practices and a single lender may use more than one method) have evolved to respond to a variety of business conditions, and most are related to the burgeoning of the secondary market in residential real estate loans.

Mortgage Broker Fees and Charges

Mortgage brokers are a key element in the functioning of wholesale loan programs. They assist borrowers with information regarding eligible loan programs and assist borrowers through the loan application process. The availability of mortgage brokers allows lenders to expand operations to areas which they would otherwise not reach because of the substantial costs of opening and maintaining retail offices. The effect of wholesale loan programs is to increase the number of lenders and loan programs available to borrowers in many areas of the country. Typically, the mortgage broker acts as the borrower's agent and helps the borrower to select a loan program and to negotiate loan terms with the lender on the borrower's behalf and also provides origination type services to the lender. The mortgage broker is usually an independent contractor, unrelated to any lender. The mortgage broker's compensation varies, but is generally between 1 and 2 percent of the loan amount.

RESPA was not intended to be a rate-setting statute (cf. S. Rep. No. 93-866, 93rd Cong., 2nd Sess. p. 1, et seq., 1974). HUD's authority is limited under RESPA to preventing compensated referrals and the payment of fees other than for services "actually performed." The department has neither the mandate nor the intent of limiting mortgage brokers' legitimate fees and charges.[1] We do recognize that the market sets fees and the cost of a specific service in Omaha, NE. may bear little resemblance to the cost of a similar service in Los Angeles, CA. However, we also recognize that an effective market is an informed market, as will be discussed below. Under Sections 4 and 5 of RESPA, the department is made responsible for setting forth the procedures for which charges relating to real estate settlement services are

[1] HUD, of course, will continue to investigate cases involving fees that may violate Section 8(a), where the payments are for illegal referrals of business, or Section 8(b), where the payments are unearned. See 24 CFR 3500.14(e).

disclosed in an open and effective market.

Disclosure under the RESPA statute

Section 4 of RESPA requires the Secretary to create a uniform settlement statement which "shall conspicuously and clearly itemize **all charges imposed upon the borrower** and all charges imposed upon the seller. ..." Section 4(a) (emphasis added).

Section 2 of RESPA (Findings and Purpose) states:

> The Congress finds that significant reforms in the real estate settlement process are needed to insure that consumers throughout the Nation are provided with greater and more timely information on the nature and costs of the settlement process and are protected from unnecessarily high settlement charges caused by certain abusive practices that have developed in some areas of the country. ... It is the purpose of this act to effect certain changes in the settlement process for residential real estate that will result (1) in more effective advance disclosure to home buyers and sellers of settlement costs. ...

The legislative history of RESPA further stated: "Federal rate controls are warranted only if ... there is no other practical way to deal with the problem." (S. Rep. 93-866, at p. 5.) We read this history to favor a market-based approach to fee setting, particularly since RESPA, *inter alia*, replaced a rate-setting authorization in the Emergency Home Finance Act of 1970. There should not be a perceived need for the installation of Federal rate controls, so long as there exists a disclosure practice that makes basic information regarding the cost of service available to all parties to the transaction, particularly the consumer.

Disclosure to the consumer is a *sine qua non* to a free market determination of the reasonable fair market value of any settlement service. The fees of third-party settlement service providers (attorneys, title companies, mortgage insurance companies, hazard insurance companies, appraisers, termite inspectors, and any other provider of settlement services) are routinely disclosed and are most frequently funded at or about the settlement of the loan.[2] We see no basis under Section 4 and 5 of RESPA (which require disclosure of amounts paid by or imposed upon borrowers and sellers on the

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[2] Mortgage broker fees are not one of the listed items on the HUD-1 Settlement statement, 800 series, because mortgage brokers were largely non-existent when the form was devised in the mid-seventies. (A June 1992 NAMB study confirms this.) Because of the substantial costs in form revisions and software changes for a form used 7-10 million times a year, the Department has concluded that the existing form is sufficiently flexible for use without prescribing changes.

Good Faith Estimate and the HUD-1 Settlement Statement) for exempting any significant class of charges imposed upon borrowers by third-party providers, including mortgage brokers. We read "imposed upon borrowers" to include all charges which the borrower is directly or indirectly funding as a condition of obtaining the mortgage loan. We find no distinction between whether the payment is paid directly or indirectly by the borrower, at closing or outside of closing.

My February 4, 1992 letter stated:

> The substantive limitations on referral fees contained in Section 8 of RESPA and the disclosure requirements contained in Section 4 of RESPA were intended to work together to provide borrowers with information about who was receiving compensation in connection with their loan transaction and how much compensation was being received. ...

I hereby restate my opinion that RESPA requires the disclosure of mortgage broker fees, however denominated, whether paid for directly or indirectly by the borrower or lender. Such fees must be referenced on the Good Faith Estimate and disclosed on the HUD-1 Settlement Statement. Further, the failure to disclose may well raise the inference that a Section 8 violation is being concealed.

We consider mortgage broker transactions commonly called table funding wherein the loan is closed in the mortgage broker's name with a short term advance of a lender's funds to be a covered RESPA transaction and not excepted from RESPA as a secondary market transaction (see secondary market exception discussion below). The lender made the funding decision and put forward the necessary loan funds before the loan was made. The mortgage broker is never responsible for loan funds, either out of its own capital or from a warehouse line for which it is liable. Accordingly, the compensation paid to the mortgage broker and the mortgage lender should be set forth on the Good Faith Estimate and the HUD-1 settlement statement. Similarly, other compensation paid by a lender to a mortgage broker, such as service release premiums or yield spread premiums, or any other type of payment or premium tied to the origination of the loan should also be disclosed. Where mortgage broker compensation is similar to lender points, and thus has tax implications under Revenue Ruling 92-2 and Revenue Procedures 92-11 and 92-12, it should be disclosed on a blank line in the 800 series of the HUD-1 Settlement Statement, and denominated mortgage broker fee, points paid to mortgage broker, discount points paid to mortgage broker, loan origination fee paid to mortgage broker, or similar language. If the amounts are paid from amounts other than from funds disbursed at settlement, including from the loan balances for the life of the loan, they should be identified as Paid Outside of Closing (POC). Examples of filled out

HUD-1s for different funding situations are attached to this letter.

No point loans

It has been suggested that disclosures regarding no point or no cost loans (loans in which the settlement service costs of the loan are paid for out of loan yield rather than out of borrower's funds at closing or withheld from loan proceeds) present problems in characterization for disclosure purposes. In such cases, the mortgage broker fee should be disclosed in the appropriate line on the Good Faith Estimate and on the HUD-1 Settlement Statement and shown as Paid Outside of Closing (POC). Alternatively a narrative statement such as "A mortgage broker fee of _____is being paid by the lender to [name of company or mortgage broker] for this transaction" can be used on the Good Faith Estimate and on the HUD-1 Settlement Statement and shown as POC.

Secondary market exception

In the past several years, a number of informal opinions have attempted to define what constituted a secondary market transaction (when a loan becomes a commercial commodity) because this has been the point when the coverage of RESPA stopped for most purposes. (Escrow accounts continue to be covered by Section 10 of RESPA, and with the 1990 RESPA amendments, the transfer of mortgage servicing is covered). In devising this line, these opinions determined that a secondary market transaction occurred after the first real funding transaction, that is, after the first real commitment of funds has been made, whether by a lender from its own funds, or in the case of a mortgage broker, from its own funds or from funds for which the broker had liability, normally described as a warehouse line. Transactions occurring after this point have been viewed as secondary market transactions, and the conclusion of these opinions has lead [sic] to what is familiarly known to those in the industry interested in these matters as the RESPA secondary market exception. The term is imprecise, and not, of course, statutorily based, since the rise of the secondary market occurred after the passage of RESPA. The issue is the extent of RESPA coverage, and what is excluded from RESPA coverage, and at a minimum I hold that the disclosure requirements of Sections 4 and 5 of RESPA cover the costs of the original funding transaction for which the borrower provides most or all of the funding in order to complete the transaction (costs imposed upon the borrower), and these are the costs we deem necessary to be disclosed. While I believe that the coverage line could be drawn elsewhere, such as after the first accrual date, I continue to retain HUD's recognition of a secondary market exemption to RESPA after the first real funding of a covered mortgage loan.

It has been suggested that HUD's interpretations favor mortgage bankers over

mortgage brokers. We do not believe that an interpretation which requires disclosure to the consumer of third party provider fees of mortgage brokers is discriminatory. Mortgage bankers also disclose their origination fees and discount points. They do not disclose the actual compensation to mortgage loan officers, the salaries and payments to other employees, or overhead costs, but neither do mortgage brokers. The main distinction between a mortgage broker and a mortgage banker in a disclosure context is that benefits accruing to the mortgage banker in selling its loans into the secondary market are not disclosed. As noted, we view these transactions as beyond the reach of the general provisions of RESPA. Nor are we attempting to limit legitimate compensation to mortgage brokers, so long as it is disclosed.

We recognize that the real estate industry has substantially evolved since the initial attempts by Congress in the mid-seventies to deal with settlement costs. However, we do not see any deviation from the original congressional conclusion that disclosure of costs in the settlement services process is desirable from the point of view of the consumer, and that is the basis for our conclusions here.

EXAMPLES

All examples assume a $100,000 loan, with funds coming from the borrower or the obligation of the borrower. If seller funds some of the fees, the Seller's Funds portion of the HUD-1 should be utilized.

1. Mortgage Broker performs some origination work, orders verifications, appraisals, credit reports, etc. and forwards package to Lender, who completes origination, makes credit decision and closes in its own name. Borrower pays three points to lender. Lender keeps two points and remits one point to mortgage broker. Lender's fee should be disclosed as origination fee or as loan discount under lines 801 and/or 802. Mortgage broker's fee is disclosed on line 808 as loan origination fee, or other alternative names shown below.

L. Settlement Charges

700. Total Sales/Brokers Commission based on Price $ @ % Division of Commission (Line 700) as follows:	Paid From Borrower's Funds at Settlement	Paid From Seller's Funds at Settlement
701. $ To		
702. $ To		
703. Commission Paid at Settlement		

704.		
800. Items Payable in Connection w/ Loan		
801. Loan Origination Fee 2% Lender*	$2,000	
802. Loan Discount %		
803. Appraisal Fee To		
804. Credit Report To		
805. Lender's Inspection Fee		
806. Mortgage Insurance Application Fee To		
807. Assumption Fee		
808. Loan Origination Fee** to Mortgage Broker* - 1%	$1,000	
809.		
810.		
811.		

* Or use company name.
** Also may be called mortgage broker fee, points paid to mortgage broker, discount points paid to mortgage broker, or similar language.

2. Mortgage Broker assembles complete application package, forwards to wholesale lender. Lender makes credit decision and closes in own name. Borrower pays three points in origination fees and discount points. Lender pays mortgage broker two points.

L. Settlement Charges

700. Total Sales/Brokers Commission based on Price $ @ % Division of Commission (Line 700) as follows:	Paid From Borrower's Funds at Settlement	Paid From Seller's Funds at Settlement
701. $ To		
702. $ To		
703 Commission paid at settlement		
704.		
800. Items payable in connection w/ loan		
801. Loan origination fee 1% Lender*	$1,000	

802. Loan discount %		
803. Appraisal fee To		
804. Credit Report To		
805. Lender's inspection fee		
806. Mortgage Insurance Application Fee To		
807. Assumption fee		
808. Loan Origination Fee** Paid to Mortgage Broker 2% *	$2,000	
809.		
810.		
811.		

* Or use name of company
** Also may be called mortgage broker fee, points paid to mortgage broker, discount points paid to mortgage broker, or similar language.

3. Same as 2, but Mortgage Broker receives a 2 point origination fee plus one half of one percent servicing release premium. Servicing release premium is paid in connection with the origination, and is not the product of a secondary market transaction.

L. Settlement Charges

700. Total Sales/Brokers Commission based on Price $ @ % Division of Commission (Line 700) as follows:	Paid From Borrower's Funds at Settlement	Paid From Borrowers Funds at Settlement
701. $ To		
702. $ To		
703. Commission Paid at Settlement		
704.		
800. Items payable in connection w/ loan		
801. Loan origination fee .50% Lender*	$ 500	
802. Loan Discount %		
803. Appraisal Fee To		

804. Credit Report To		
805. Lender's Inspection Fee		
806. Mortgage Insurance Application Fee To		
807. Assumption Fee		
808. Loan Origination Fee** to Mortgage Broker* - 2%	$2,000	
809. Service Release Premium** to Mortgage Broker* - .50%	$ 500	
810.		

* Or use name of company.

** Also may be called mortgage broker fee, points paid to mortgage broker, discount points paid to mortgage broker, or similar language.

4. Mortgage Broker closes in its own name, transaction is table funded by Lender and loan immediately assigned to Lender. Lender to whom the loan is assigned is identified on line 808 and Mortgage Broker's compensation is listed on line 801. The lender should be identified on the HUD-1.

L. Settlement Charges

700. Total Sales/Brokers Commission based on Price $ @ % Division of Commission (Line 700) as follows:	Paid From Borrowers Funds at Settlement	Paid From Seller's Funds at Settlement
701. $ To		
702. $ To		
703. Commission paid at settlement		
704.		
800. Items payable in connection w/ loan		
801. Loan origination fee** 2% Mortgage Broker*	$2,000	
802. Loan Discount %		
803. Appraisal Fee To		
804. Credit Report To		
805. Lender's inspection fee		
806. Mortgage insurance application fee To		

807. Assumption Fee		
808. Loan Origination fee to Lender* 1%	$1,000	
809.		
810.		
811.		

* Or use name of company.
** Also may be called mortgage broker fee, points paid to mortgage broker, discount points paid to mortgage broker, or similar language.

5. Yield Spread Premium. Mortgage Broker closes in own name, using table funding. Lender takes immediate assignment. Mortgage Broker's compensation is 1 percent yield spread premium (loan is at above market rate) and one half of one percent servicing release premium. Borrower pays one point origination fee.

L. Settlement Charges

700. Total Sales/Brokers Commission based on Price $ @ % Division of Commission (Line 700) as follows:	Paid From Borrower's Funds at Settlement	Paid From Seller's Funds at Settlement
701. $ To		
702. $ To		
703. Commission paid at settlement		
704.		
800. Items payable in connection w/ loan		
801. Loan origination fee 1% to Lender*	$1,000	
802. Loan discount %		
803. Appraisal fee To		
804. Credit report To		
805. Lender's inspection fee		
806. Mortgage insurance application fee To		
807. Assumption fee		

808. Yield spread premium** To Mortgage Broker* 1% (POC) $1,000		
809. Servicing release fee** To Mortgage Broker* ½% (POC) $500		

* Or use name of company.
** Also may be called mortgage broker fee, points paid to mortgage broker, discount points paid to mortgage broker, or similar language.

6. No point loans. Borrower pays no compensation directly to Lender, but Lender covers costs out of loan yield. Mortgage Broker receives 1½ points from Lender.

L. Settlement Charges

700. Total Sales/Brokers Commission based on Price $ @ % Division of Commission (Line 700) as follows:	Paid From Borrower's Funds at Settlement	Paid From Seller's Funds at Settlement
701. $ To		
702. $ To		
703. Commission paid at settlement		
704.		
800. Items payable in connection w/ loan		
801. Loan origination fee		
802. Loan discount %		
803. Appraisal fee To		
804. Credit report To		
805. Lender's inspection fee		
806. Mortgage insurance application fee To		
807. Assumption fee		
808. Origination fee** To Mortgage Broker* Paid by Lender* 1½% (POC) $1,500		

* Or use name of company.
** Also may be called mortgage broker fee, points paid to mortgage broker, discount points paid to mortgage broker, or similar language.

Creditor. In section 103(f) of the Consumer Credit Protection Act (15 USC 1602(f)), RESPA covers any creditor that makes or invests in residential real estate loans aggregating more than $1,000,000 per year.

Dealer. In Regulation X dealer is defined in the context of home improvement loans, a seller, contractor, or supplier of goods or services. For manufactured home loans dealer means one who engages in the business of manufactured home retail sales. Dealer loans are covered by RESPA if the obligations will be assigned, before the first payment is due, to any lender or creditor otherwise subject to the regulation.

Lender. Financial institutions either regulated by, or whose deposits or accounts are insured by any agency of the federal government.

Laws

12 USC 2601, et seq., Real Estate Settlement Procedures Act

Regulations

24 CFR 3500, Real Estate Settlement Procedures Regulation (HUD Regulation X)

OCC Issuances

OCC Bulletin 95-29, RESPA: Availability of Escrow Software
OCC Bulletin 96-23, RESPA: Final Rule
Examining Circular 263, SMS Documentation Policy