

NAR SUPPORTS FINAL RESPA REFORM

After five months and 12,000 public comments on the proposed rule to reform the Real Estate Settlement Procedures Act (“RESPA”), the U.S. Department of Housing and Urban Development (“HUD” or “Department”) published its final RESPA rule on Monday, November 17, 2008. The National Association of Realtors® (“NAR”) had opposed the proposed RESPA rule on grounds that it was anti-competitive and failed to achieve its stated goal of simplifying the process for consumers. However, in the final rule, the Department makes a number of concessions and changes to the rule that NAR urged HUD to consider. While the final rule is not perfect, the Department largely addressed NAR’s concerns and produced a final rule that should ultimately benefit consumers. Below is a summary of HUD’s final RESPA rule, as well as NAR’s perspective on the Department’s RESPA changes.

I. Good Faith Estimate

The GFE is the signature piece of the final RESPA rule. While HUD adopts the same format for the disclosure as it had proposed, incorporates the use of certain charts to give comparative information to consumers, and imposes tolerances regarding the change in settlement charges at closing, the Department ultimately shortened the final form to three pages and clarified certain language. Effective January 1, 2010, HUD will require mortgage lenders and mortgage brokers to provide consumers with the standard GFE form within three days of receiving an “application.” Like the proposed form, the final GFE form includes a summary of the key terms of the loan, as well as an estimate of total settlement charges, which HUD expanded and reorganized in certain instances. The final rule also requires a mortgage lender or broker to keep the GFE’s stated settlement costs available for 10 business days to allow the consumer to comparison shop with other loan originators. Lenders will be allowed to charge consumers for a GFE, but this fee must be limited to the cost of a credit report.

II. Tolerances

In connection with the Department’s changes to the GFE, HUD did not alter its proposal to create three separate categories of settlement charges and subject them, absent “changed circumstances,” to different tolerances. The first category of fees is subject to a zero tolerance standard, meaning the fees estimated on the GFE may not be exceeded at closing. This category includes fees such as the lender’s or broker’s origination charge and transfer taxes. HUD will subject the sum of the fees in the second category to a 10% tolerance. While each individual fee may increase or decrease, the sum of the total increases may not exceed 10% at closing. This category includes government recording fees and fees for settlement services where the lender selects the provider or the borrower selects a provider recommended by the lender. Finally, the last category of fees is subject to no restriction under the final rule, meaning the Department will not limit the amount of any increase in the fees that may appear on the HUD-1. These fees, therefore, may increase by more than 10% at closing, including the cost of settlement services where the borrower shops for his own provider, daily

interest charges, and homeowners insurance. If a lender exceeds these tolerance limitations, the final rule allows a 30-day period to cure any excess fees.

III. Disclosure of Broker Fees

The Department moved forward with its proposed disclosure of broker fees, including yield spread premiums, as a “credit or charge (points) for the specific interest rate chosen.” Despite many public comments that urged the Department to reconsider this disclosure, HUD will require that a “credit” field be used to disclose the presence of a yield spread premium and a “charge” field be used to denote the presence of discount points on the GFE.

IV. HUD-1 Settlement Statement

Unlike HUD’s overhaul of the final GFE form, the Department makes fewer changes to the HUD-1. HUD generally adopts its proposed form, which alters page two of the HUD-1 to allow consumers to directly compare the fees identified on the GFE to those fees charged at closing. The final HUD-1 also identifies the settlement charges using the same terms as the GFE (*i.e.*, “our origination charge” for lender fees and “owner’s title insurance”), and the Department includes parenthetical text next to most itemized fees that identifies the section of the GFE where a consumer will find the estimated charge. As the GFE requires a single lender’s origination charge and single title services fee to be disclosed to the borrower, the final HUD-1 similarly requires the disclosure of a single lender’s origination charge and title services fee.

V. Closing Script

In the proposed rule, HUD planned to create a new addendum to the HUD-1, or a closing script, and require the settlement agent to prepare it, read it aloud to the consumer at closing, and provide it in hard-copy format to obtain the consumer’s written acknowledgment. In the final rule, HUD agrees to abandon the idea of the closing script. Instead, the Department developed a new page three to the HUD-1 that incorporates much of the same information proposed for the closing script. Notably, HUD includes a chart for the comparison of the GFE fees and the final charges on the HUD-1, as well as a final summary list of the loan terms.

VI. Average Charges

The final rule authorizes the use of average charges for settlement services. While the proposed rule planned to allow only mortgage lenders and brokers to use “average cost pricing,” HUD extended the ability to use average charges to all settlement service providers. A provider is also free to calculate average charges in any manner, but a provider is prohibited from using an average charge for settlement services where the charge is based on the loan amount or the value of the property. The average charge also is permitted only for third party vendor charges and not a provider’s own internal charges.

VII. Volume Discounts

HUD had proposed to amend the definition of “thing of value” in RESPA’s regulation to exclude discounts negotiated by settlement service providers in the price of a third party settlement service, as long as no more than the discounted price is charged to the borrower and disclosed on the HUD-1. The Department, however, received a myriad of negative comments to this proposal, many of which raised concerns about the impact the rule could have on small businesses’ ability to offer discounts and compete with larger providers. As a result, HUD does not finalize the proposed amendment. The Department, however, makes clear its belief that discounts negotiated by a settlement service provider and passed on to the borrower in full are generally not a violation of RESPA.

VIII. Required Use

In perhaps the most controversial component of the final rule, the Department amends the definition of “required use” in three primary ways. First, the definition of “required use” now includes both economic incentives and disincentives that are contingent on a borrower’s use or failure to use a particular provider of settlement services. Second, while the proposed rule would have allowed only borrowers to receive discounts under the revised definition, HUD expanded the language of the definition to apply to a “person.” Accordingly, both buyers and sellers are eligible to receive discounts under the final definition.

Third, with regard to affiliated business arrangements, HUD’s proposal would have prohibited a “settlement service provider” from offering a discount or incentive to a consumer and linking the discount to the consumer’s use of affiliate companies. The provider’s affiliate companies, however, would be allowed to offer their own discounts. In the final rule, HUD makes clear in the Regulatory Impact Analysis that owners of affiliated companies may offer discounts and incentives to consumers and link those discounts to the consumers’ use of affiliate companies. This provision continues to apply only to “settlement service providers,” which includes real estate brokers and agents and excludes homebuilders. HUD continues to be intent on restricting the ability of builders to offer discounts and other incentives to encourage the use of their affiliates.

IX. Effective Dates

Although the final rule generally allows one year to adapt to the use of the new GFE and HUD-1 forms, the final rule provides for varying effective dates. Notably, the following components of the final rule become effective **January 16, 2009**: (1) the revised definition of required use; (2) the use of average charges; and (3) certain miscellaneous modifications.

The remaining following components of the final rule become effective **January 1, 2010**: (1) use of the new GFE, including disclosure of yield spread premiums and the tolerance restrictions; (2) use of the new the HUD-1; and (3) all revised definitions (except required use) in Section 3500.2 of RESPA’s regulation.

X. NAR's Reaction to the Final Rule

Given each of the changes summarized above, NAR believes the Department enacted an acceptable, albeit imperfect, final rule. Notably, with regard to the disclosures, NAR advocated for a shorter GFE form and clearer language to make the form easier to follow. HUD made some of these adjustments. As an example, rather than disclose the presence of escrow-related information on page one and four of the proposed form, the final GFE contains a separate section on page one devoted solely to escrow account information. HUD also revised the terms used for lender fees from "service charge" to "origination charge" and re-titled "optional owner's title insurance" as merely "owner's title insurance." Each of these changes should help a consumer better understand the loan terms and settlement fees disclosed on the GFE. Furthermore, HUD settled on a single definition for "application" to trigger the GFE requirement, and the Department will give lenders thirty days to cure any settlement fees that exceed the applicable tolerances. NAR supported both of these actions and believes these changes will avoid complicating the transaction. While NAR would have preferred HUD to also restructure the tolerances to avoid lender packaging of preferred providers, consumers should benefit from the final GFE.

Moreover, to ensure the consumer can directly compare the information on the GFE to the final HUD-1, NAR pushed for more consistency in the documents, which HUD achieved by modifying certain language used on the HUD-1. HUD also eliminated the requirement for a closing script, which could have extended the time required for closing, increased the consumer's closing fees, and raised questions a settlement agent should not be responsible for answering. Although HUD incorporated much of the proposed closing script into a new page three to the HUD-1, the Department obligates the mortgage lender to supply the settlement agent with the necessary information to complete this page. This should balance NAR's concerns about the proposed closing script with HUD's desire to ensure the consumer understands the transaction.

Finally, with regard to other RESPA changes, the Department backed away from its plan to revise the definition of "thing of value" to explicitly allow volume discounts. NAR had expressed concern that such a rule would substantially disadvantage small businesses and create an uneven playing field, and we commend HUD for considering these anti-competitive effects. The Department also extended the use of average charges to all settlement service providers, including real estate brokers and agents, and redefined "required use" to allow real estate brokers and agents to tie their customer discounts to the use of affiliated companies. In both cases, HUD recognized that consumers will benefit from the discounts real estate brokers and agents may be able to offer.

NAR has long recognized the need for RESPA reform and has advocated for improved disclosures and transparency in the mortgage and settlement process. Although HUD could have done more, NAR believes the Department sincerely listened and considered our comments, as well as those of our members, and crafted a final rule with consistent disclosures and a better basis to encourage consumers to shop for settlement services.