

*RESPA Guidance
for Real Estate Attorneys,
Title Agents and
Escrow Closing Officers*

By Eugene R. McCullough
Senior Vice President
Southern Title Insurance Corp.

Note: Items that appear in [Blue](#) are hyperlinks to the referenced exhibits

Discussion Issues:
**Recently proposed changes to RESPA,
the proposal of “Guaranteed Mortgage Package” as an exception to Section 8
prohibitions of RESPA
and marketplace’s adoption of a “single/bundled price” products**

A. Origins of RESPA

1. [Historically, payments made for the referral and receipt of business](#) (See A)
2. In early 70's, Senator Proxmire led a legislative initiative to address problems perceived to exist in the real estate mortgage lending and closing industry
 - (A) Widespread consumer confusion
 - (B) Excessively high fees
3. Good Faith Estimate - designed to eliminate consumer confusion
4. HUD-1 was developed to create uniformity in disclosures of fees charged
5. [Maximum fees originally proposed](#) (See B) to address excessively high fees
 - (A) Lobbying by ALTA and closing industry avoided maximum fees
 - (B) Analysis of reasons for high fees focused on ‘kickbacks’
 - (C) eventual compromise was to prohibit ‘kickbacks’ which caused fees of individual service providers to be inflated - Section 8
6. Real Estate Settlement Services Protections Act (12 U.S.C. 2601 et.seq.) enacted in 1974
 - (A) Stated Congressional intent
[12 USCA § 2601...](#) (See C) *Congressional findings and purpose*
 - (a) *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.*
 - (b) *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;

(2) in the elimination of kickbacks or referral fees that tend to increase unnecessarily the costs of certain settlement services;

(B) Statutory provisions related to 'kickbacks'

12 USCA § 2607 **(See D)** Prohibition against kickbacks and unearned fees

(a) Business referrals. No person shall give and no person shall accept any fee, kickback, or thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or a part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person.

7. HUD was regulatory agency charged with enacting regulations

B Brief Overview of Evolution of RESPA Regulations

1. 1976 - HUD enacts **CFR Section 3500.14** **(See E)** with regard to **Section 8** of the US Code as passed in 1976 (and still in effect today)

“No person shall give and no person shall accept (Note- both the giver and the receiver have liability) **any fee, kickback, or other thing of value** (Note- that "thing of value" is a broadly defined term) **pursuant to any agreement or understanding** (Note- that "agreement or understanding" is a broadly defined term), **oral or otherwise, that business incident to or part of a settlement service involving a federally related mortgage loan shall be referred to any person. Any referral of a settlement service is not a compensable service** (Note- that referrals are not prohibited, only the compensation paid for the referral is prohibited) **except as set forth in 3500.14 (g)(2). A company may not pay any other company or the employees of any other company for the referral of settlement service business.”**

2. 1992- **“Controlled Business” / “Affiliated Business” Exemption from Section 8 Prohibitions**

In November 1992, HUD issued its first regulation covering controlled business arrangements, 57 FR 49599 (Nov. 2, 1992), codified at **24 CFR 3500.15**. **(See F)** That rule acknowledged the exemption to the prohibitions and penalty provisions of Section 8 for CBA's and *allowed referrals* of business to an affiliated settlement service provider so long as:

- (1) The consumer receives a written disclosure of the nature of the relationship and an estimate of the affiliate's charges;
- (2) the consumer is not required to use the controlled entity; and
- (3) the only thing of value received from the arrangement, other than payments for services rendered, is a return on ownership interest.

If the CBA did not meet all 3 of the foregoing, it did not achieve the

exemption status and would be in violation and subject to all penalty provisions.

3. 1996 - [Sham “Controlled Business” / “Affiliated Business” Statement of Policy 1986-2](#) (See G)
 - A In June 1996, HUD develops new CBA ‘Compliance Test’ and the Regulations were amended to clarify HUD’s interpretation of the intent of Congress in this area so that CBA’s, such as the ones above, could be easily evaluated.
 - A. See copy of [Joint Venture Evaluation Checklist](#) (See H)
 - B See copy of [“JV Examples” evaluated by HUD](#) (See I)

4. 1996 - HUD defines [“Core Title Services”/Statement of Policy 1996-4](#) (See J)
 - A. HUD provides guidance on what minimum activity a title insurance agent must perform in order to be entitled to a reasonable compensation:
 1. *The examination and evaluation, based on relevant law and title insurance underwriting principles and guidelines, of the title evidence (as defined below) to determine the insurability of the title being examined, and what items to include and/or exclude in any title commitment and policy to be issued.*
 2. *The preparation and issuance of the title commitment, or other document, that discloses the status of the title as it is proposed to be insured, identifies the conditions that must be met before the policy will be issued, and obligates the insurer to issue a policy of title insurance if such conditions are met.*
 3. *The clearance of underwriting objections and the taking of those steps that are needed to satisfy any conditions to the issuance of the policies.*
 4. *The preparation and issuance of the policy or policies of title insurance.*
 5. *The handling of the closing or settlement, when it is customary for title insurance agents to provide such services and when the agent's compensation for such services is customarily part of the payment or retention from the insurer.*
 - B. Cornerstone for evaluation of ‘RESPA Compliant’ JVs

5. 2002 - HUD’s Current Initiatives - [“Home Buyer’s Bill of Rights”](#) (See K)
 - A. Conclusion of HUD’s Mel Martinez that current system is still too confusing
 - B. Stated goal is to simplify process for easier consumer understanding
 - C. Proposed revisions were anticipated to lower consumer costs
 - D. In 2002 HUD releases Proposed RESPA revisions of GFE and offers a new alternative, “Guaranteed Mortgage Package”

6. 2003 - December 16th, HUD submits [RESPA Rule Revisions](#) (See L) to OMB for Final Review before approval and release

7. March 22, 2004 - Under increasing public and legislative pressure, HUD asked OMB for withdrawal of proposed revisions that were scheduled to be released by April 16th.
- C. Brief overview of Proposed (and now withdrawn) RESPA Revisions - TWO ALTERNATIVES for Lenders
1. Revised Good Faith Estimate (GFE) Rules (See M)
 - A. Within 3 days post-Application, pre- receipt of fees for credit/appraisal, consumer must be provided *disclosure* outlining
 1. Interest rate, APR and monthly payment information, and
 2. an ‘aggregate’ price for all ‘settlement services’ which includes the HUD 1100 (See N) series for “Title services and title insurance”, and
 3. these ‘estimates’ are to remain ‘valid’ for 30 days - essentially the charges related to ‘title services and title insurance’ will not be allowed to vary at all if lender picks the provider
 - B. Lender can not require immediate payment for credit report and appraisal but Lender is allowed to charge a ‘nominal fee’ for GFE’s preparation
 - C. No expressed penalty provisions for failure to comply
 - D. Section 8 prohibitions of RESPA still applies to lender
 2. NEW alternative/additional Proposal for a “Guaranteed Mortgage Package form” (GMP) (See O)
 - A. Within 3 days post-Application, and without any pre-payment charge to consumer, a ‘Bundler’ will be *allowed* to provide a “Guaranteed Mortgage Package Agreement” (GMPA) which:
 1. commits lender to a ‘guaranteed’ interest rate, good for 30 days and subject to very limited adjustment and
 2. offers a ‘Guaranteed Mortgage Package’ (GMP) at a single price that must include the following:
 - (a) all lender charges (including discount points and origination fees)
 - B. all third party charges for services required by lender to make the loan (appraisal, credit reports, etc.) and
 - (c) all title and closing related charges, including loan title insurance policy, if any, but not optional Owner’s Insurance and
 - (d) all governmental charges (taxes, recording fees, transfer taxes, etc.)(see all included from HUD-1) (See P)

- B. The GMPA is not required to disclose the individual charges for the services, or even if some of the indicated services are not required or performed - only a single, aggregate price
- C. If the borrower signs the GMPA, the lender may charge an ‘acceptance fee’ determined by the lender
- D. Proposal would exempt any payments, discounts or mark-ups (i.e. Kickbacks or Rebates) between service providers from being a violation of Section 8 of RESPA
- E. Proposal would eliminate the current requirement of disclosure of an Affiliated Business Relationship

D. **Title Industry Concerns**

- 1. Most of the projected \$1.8 Billion consumer **savings will come from the settlement service providers** like title agents and closing services
 - A. Lenders/Bundlers are likely to pressure title and closing service providers for reductions in closing and title agent charges to maximize lender’s profitability
 - B. Lenders/Bundlers are likely to pressure title and closing service providers to assume risks of unanticipated 1100 series charges
 - C. Since Section 8 RESPA penalties are not imposed if a Lender opts for the GMP business plan, downward pricing pressure will be significant and straightforward
 - D. Although Lenders/Bundlers may extract lower prices from the settlement service and third party providers, there is no guarantee that this will result in any reduction of the prices charged to the consumer
- 2. In the interest of reducing ‘Package’ costs, **lenders will resort to lesser coverage or ‘alternative coverage’ title assurance products**
 - A. This undermines the strength of the secondary market for mortgages
 - B. Borrowers, who in the past have assumed that adequate search and title insurance had been procured, will be unaware of the lack of lender due diligence therefore assume greater risk under their Note liability
 - C. If a lender only requires a ‘short or no search’ policy product, the borrowers may be required to pay an *additional* fee for an independent search and full rates for Owner’s Title Insurance
- 3. The proposal fails to take into account the “seller pay” concepts which makes the borrower end up paying for services that would have been provided at no cost

- E. Title Industry’s Position on authority of HUD to enact proposal by rulemaking

1. Publically released proposal essentially only allows Lenders to become a “packager” (although programs like **JurisTrust** or Attorney Mortgage Services may give Attorneys a chance to “package”)
 2. Recent Proposal was not permissible in light of intent of Congress
 3. Consumers will not reap proposed benefits
 4. This approach will drive most small independent agents and closing entities who cannot ‘bundle services’ out of business, and that will fundamentally affect the title insurance industry
- F. Current Expectations of HUD’s *Re-revised* Regulations anticipated to be Released
1. Not expected before mid to late 2005 but new Secretary of HUD has publically committed to a modified version
 2. ‘Expected’ to be modified to allow for a ‘Lender Package’ to be bundled and a separate ‘Settlement Services Package’ to be independently offered.
 3. ‘Expected’ to provide Section 8 exemption to all ‘packagers’
 4. If released in current proposed form, litigation is anticipated challenging HUD’s authority to impose these changes by regulation
- G. The concept of “Bundling / Packaging” is already being adopted in marketplace
1. Several Lenders ([Ditech.com](#), [ANB AMRO](#), [Ocwen Financial](#) and **others**) (See Q) are already actively marketing ‘one fee’ pricing for real estate loan closings
 2. Many attorneys are already using **JurisTrust** and Attorney Mortgage Services to provide services that could easily be conformed into a ‘one fee’ price