



Summary of Department of Housing and Urban Development RESPA Policy Statement 1999-1

Prepared by the Michigan Financial Institutions Bureau

HUD released its long-awaited statement on mortgage broker fees under the Real Estate Settlement Procedures Act (RESPA) on March 1, 1999. The policy statement was effective upon issuance. Unlike a controversial proposal on the subject released for comment in 1997, the final issuance is supported by the National Association of Mortgage Brokers, the Mortgage Bankers Association of America, the Consumer Mortgage Coalition, the National Consumer Law Center, and the Consumers Union.

In his introduction to the policy statement, HUD Secretary Cuomo notes that the Congressional intent of RESPA [12 U.S.C. 2601] was to protect consumers from unnecessarily high settlement charges caused by abusive practices. He also cites a clarification that appeared in the Conference Report on FY99 HUD Appropriations Act:

"Congress never intended payments by lenders to mortgage brokers for goods or facilities actually furnished or for services actually performed to be violations of [Sections 8] (a) or (b) (12 U.S.C. 2607) in its enactment of RESPA." (H. Rep. 105-769 at 260)

Secretary Cuomo distinguished reasonable compensation for service from illegal kickbacks. Thus the policy statement focuses on provision of goods, facilities or services and the reasonableness of compensation to the broker for such provision.

[HUD continues to recommend broad legislative reform to resolve legal uncertainties under RESPA and Truth-in-Lending as preferable to what the policy statement describes as piecemeal actions.]

Coverage: Policy Statement 1999-1 covers payments to brokers in table-funded and intermediary broker transactions only. 24 CFR 3500.5(b)(7) exempts from RESPA bona fide transfers of loan obligations in the secondary market.

The Policy: The policy statement enunciates HUD's position that lender payments to mortgage brokers, including yield spread premiums, are not illegal, per se. Payments are illegal if they violate RESPA Section 8 prohibitions.

The Test: The policy statement establishes a two-part test to determine whether payments are permissible.

- Goods or facilities are actually furnished or services actually are performed.
- Total compensation for goods, facilities, or services received by a broker must be reasonably related to their value.

Compensable Services, Goods, Facilities: The policy statement relies on a February 14, 1995 letter from HUD to the IBAA identifying services normally performed in loan origination and states that HUD will look at these "to help determine whether compensable services are performed."

Sale of a loan to a lender does not qualify as furnishing a good or facility for purposes of the Policy Statement. Credit reports, appraisals, and other loan documents necessary to complete a loan file may be regarded as goods and "a reasonable portion of the broker's retail or "store front" operation may generally be regarded as a facility for which a lender may compensate a broker."

Reasonable Relation to Value: Payments must be commensurate with the amount normally charged for similar services, goods or facilities in that market. The market rate used to determine reasonableness may not include a referral fee or unearned fee because these are prohibited by RESPA. The excess above the market value of services, goods or facilities may be used as evidence of a compensated referral or an unearned fee in violation of Section 8(a) or (b) of RESPA.

Because the borrower ultimately pays for all the services needed to create the loan, HUD uses in the policy statement a "total compensation" approach to reasonableness of payments.

Disclosures: The policy statement reaffirms RESPA disclosure requirements regarding broker fees. HUD points out that unclear and confusing disclosures are contrary to the statute and regulation. The policy statement sets forth an expectation that all fees to the mortgage broker are to be clearly labeled and properly estimated on the Good Faith Estimate and that fees from a lender to the broker are to be clearly labeled and listed separate from borrower payments to the broker on the settlement statement.

While existing law does not require disclosure to the prospective borrower of the broker's services and compensation prior to the provision of the Good Faith Estimate, HUD is encouraging such disclosure and obtaining the consumer's agreement to the arrangement "as early as possible in the process" in order to facilitate the consumer's shopping for product and price.