



RESPA REVISITED

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Apparently it is time for title insurance companies and other settlement service providers to brush up on HUD's current rules and regulations involving "sham controlled business arrangements," and title insurance practices covered under the Real Estate Settlement Procedures Act RESPA for short).

This remedial study is in order now that the Colorado Division of Insurance, Texas Department of Insurance, HUD, OCC, and OTS have gone after title insurance companies and agencies, challenging their practices as being non-compliant with RESPA.

The State of Colorado entered into a Stipulation for Entry of Final Agency Order with First American wherein the company agreed to cease and desist from operating under captive re-insurance arrangements with homebuilders, lenders and Realtors. Without conceding any wrongdoing, First American also agreed to refund to consumers in Colorado and elsewhere any portion of the title insurance premium that had been paid by consumers that was paid to a re-insurance entity pursuant to the now-abandoned reinsurance agreements.

The OTS, HUD and the OCC jointly announced that they had entered into a consent agreement with Chicago Title Insurance Company. Chicago Title had been accused of engaging in a pattern of violating Section 4 of RESPA by providing inaccurate HUD-1 Settlement Statements to lenders and their borrowers, which failed to accurately reflect the actual settlement costs in connection with home mortgage loans.

HUD also had alleged that Chicago Title's conduct was part of the agreement for the referral of business in violation of RESPA's Section 8 anti-kickback provision. Chicago Title agreed to revamp the manner in which it conducts real estate settlements nationwide, including training of employees and officers to properly complete the HUD-1 Settlement Statement. While Chicago Title denied that it has violated Sections 4 and 8 of RESPA, it nevertheless agreed to the terms of the Settlement Agreement which called for the payment of significant sums.

Another simplification try

It is certainly likely that HUD will once again address the need to simplify and improve RESPA. The lengthy rule that was proposed July 29, 2002 — including the guaranteed mortgage package, which would allow for the bundling of settlement services — is likely to resurface.

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Nevertheless, the current rules that have been around since 1996, which set forth the factors that HUD uses to determine whether a controlled business arrangement is a sham or whether such an arrangement constitutes a bona fide provider of settlement services, must be strictly followed.

There appears to be widespread abuse of the rules by settlement service providers in a continuing effort to steer business. There was a concerted effort in the mid-1990s by HUD to rein in this type of activity. However, too many settlement service providers have attempted creative,

although illegal, means to avoid the limitations of RESPA, or have simply ignored the limitations of RESPA, without suffering adverse consequences. Within the last year, however, these practices have come under closer scrutiny by the federal agencies and the state agencies, resulting in significant challenges to activities that are not RESPA-compliant.

The 1996 Statement of Policy issued by HUD set forth 10 specific factors that would be weighed by the federal housing agency to determine whether an entity is a bona fide settlement services provider.

Some of the factors include:

- an analysis of the net worth,
- an analysis of the employees,
- the management of the business,
- the separate identity of the business from its joint ventures.

HUD also set forth four specific questions that would be asked in considering whether a payment was a return on ownership interest as opposed to a payment for referrals of settlement services including:

1. Has each owner or participant in the new entity made an investment of its own capital, as compared to a “loan” from an entity that receives the benefits of referrals?
2. Have the owners or participants of the new entity received an ownership or participant’s interest based on a fair value contribution as opposed to based upon expected referrals?
3. Are the dividends or partnership distributions made in proportion to ownership interest as opposed to a reflection of the amount of business referred to the new entity?
4. Are the ownership interests free from tie-ins to referrals of business, or are they constantly adjusted based upon the amount of business referred?

HUD went on to set forth examples of how HUD will use these factors in an analysis of specific circumstances.

Unique questions

With respect to title insurance companies in particular, HUD set forth a Statement of Enforcement Standards around practices in Florida. This Standard is illustrative of the unique questions that title insurance companies and agencies must address in evaluating the bona fide nature of their joint ventures.

Those issues include, among others, the extent that the payment for services performed by the joint venture are in excess of the reasonable value thereof; and whether the joint venture has the resources to perform the functions for which it is being compensated.

Core title services are defined in this 1996 Statement of Enforcement to include the examination and evaluation of title evidence to determine insurability, the preparation and issuance of title commitments, the clearance of underwriters’ objections, the preparation and issuance of the policy or policies of title insurance and the handling of the closing or settlement, when customary for title insurance agents to provide such services. Title insurance agents must actually perform such core title services and generally may not subcontract out these services, or the receipt of payment may be deemed not RESPA compliant.

Unless and until RESPA and Regulation X are revised, vendors should not lose sight of these old, but important, RESPA guidelines.