



NATIONAL ASSOCIATION OF REALTORS®

*The Voice For Real Estate®*

500 New Jersey Avenue, N.W.  
Washington, DC 20001-2020  
202.383.1194 Fax 202.383.7580  
[www.realtors.org/governmentaffairs](http://www.realtors.org/governmentaffairs)

Richard F. Gaylord  
CIPS, CRB, CRS, GRI  
President

Dale A. Stinton  
CAE, CPA, CMA, RCE  
EVP/CEO

GOVERNMENT AFFAIRS  
Jerry Giovaniello, Senior Vice President  
Walter J. Witek, Jr., Vice President  
Gary Weaver, Vice President

**HEARING BEFORE THE**

**U.S. HOUSE OF REPRESENTATIVES**

**COMMITTEE ON SMALL BUSINESS**

**ENTITLED**

**RESPA AND ITS IMPACT ON SMALL BUSINESS**

**WRITTEN TESTIMONY OF**

**ADAM D. COCKEY, JR.**

**NATIONAL ASSOCIATION OF REALTORS®**

**MAY 22, 2008**

---

REALTOR® is a registered collective membership mark which may be used only by real estate professionals who are members of the NATIONAL ASSOCIATION OF REALTORS® and subscribe to its strict Code of Ethics.



## **INTRODUCTION**

On behalf of 1.2 million members of the NATIONAL ASSOCIATION OF REALTORS® (NAR), I am pleased to provide comments to the U.S. House of Representatives Committee on Small Business concerning the proposed rule<sup>1</sup> of the U.S. Department of Housing and Urban Development (HUD) to amend the Real Estate Settlement Procedures Act (RESPA) Regulation X. The proposed rule is intended to simplify and improve the disclosure requirements for mortgage settlement costs and to protect consumers from unnecessarily high settlement costs.

My name is Adam D. Cockey, Jr. I am the Senior Vice President for Prudential Carruthers REALTORS®, a real estate services firm located in DC, Maryland and Virginia. I have also served as a member of the NAR RESPA Presidential Advisory Group and the chairman of the NAR Business Issues Committee. I started in the real estate profession as a sales agent 33 years ago, the same year Congress passed the Real Estate Settlement Procedures Act. RESPA and I have been together a long time.

The NATIONAL ASSOCIATION OF REALTORS® is America's largest trade association, including five commercial real estate institutes and its societies and councils. REALTORS® are involved in all aspects of the residential and commercial real estate industries and belong to one or more of some 1,500 local associations, and 54 state and territory associations of REALTORS®.

## **REALTORS® AND RESPA**

REALTORS® have a strong stake in providing consumers with simplified disclosures of mortgage settlement costs early in the loan transaction because:

- Real estate agents typically are the first contact in the home buying process, develop close working relationships with clients, and stay with the consumer through settlement. As a result, consumers look to real estate professionals to help them understand the homebuying process from beginning to end.
- Abusive lending practices are most likely to occur when uninformed consumers are overwhelmed by a transaction laden with unfamiliar financial terms and a confusing array of compensation models and settlement services.
- Early disclosures, clearly presented, will help consumers identify the mortgage product which provides the optimal combination of cost and value for their particular circumstances.
- Thorough disclosures that use similar structure and terms in the closing documents will make it easier for consumers and their representatives to identify changes and previously undisclosed charges.

---

<sup>1</sup> 73 Fed. Reg. 14030 (March 14, 2008)

## **THE PROPOSED RULE FAILS TO SIMPLIFY DISCLOSURES**

One of the primary objectives of the RESPA statute is to provide disclosures so that homebuyers will better understand mortgage and settlement costs. HUD has approached this task committed to improving required RESPA disclosures. NAR supports many of the innovations HUD has developed, including an improved look for the Good Faith Estimate (GFE) and putting complex financial information into language consumers will understand. But HUD has not found the right formula for determining what information to include and how to present it. As a result, HUD's proposed disclosure provisions fall short of the mark and must be improved before they are finalized.

NAR believes that the proposal would have been greatly improved if HUD had collaborated with industry and consumer groups during the past two and a half years since the RESPA Roundtables and tested its ideas with those who must implement them. For purposes of this testimony, NAR will focus on six areas:

1. The four-page Good Faith Estimate;
2. The decision not to disclose all charges;
3. The "closing script" addendum to the HUD-1;
4. Anti-kickback exemption for volume discounts;
5. The need to harmonize proposed RESPA disclosures with those required by the Truth in Lending Act (TILA); and
6. HUD's flawed economic analysis.

## **THE GOOD FAITH ESTIMATE (GFE)**

Taken together, HUD's proposed changes do not simplify the disclosure process. Despite the suggestion of its own design consultants and a broad consensus of industry and consumer groups, HUD did not reformat the GFE to match the HUD-1 – an obvious design change that should have been given the highest priority. Marrying the two forms so that they each mirror the other is a common sense solution. NAR believes this change would greatly assist consumers in understanding whether or not the terms and expenses that were disclosed to them at loan application are those that are the governing terms and costs at closing. It would also obviate the need for the cumbersome and expensive "closing script" that provides information too late in the process to be useful to consumers.

Such a change has been advocated by a number of organizations for some time now. NAR, along with the Center for Responsible Lending, recommended to HUD two years ago that it provide consumers with a one-page summary GFE for shopping purposes, accompanied by a full GFE designed to mirror the format of the HUD-1.

We also believe the new four-page GFE will serve as a psychological barrier to many consumers who will be overwhelmed by four pages of data, fine print and instructions. It is

certainly unclear whether consumers will understand the system proposed for the disclosure of discount points and yield spread premiums (YSP).<sup>2</sup>

NAR also believes it is imperative that the consumer has access to all relevant cost information. HUD's decision to not include all costs in its revised GFE will result in consumers getting less than the full disclosure Congress intended in the original statute.<sup>3</sup> While HUD's intent in not itemizing all charges is to eliminate junk fees, the result will be just the opposite as the change creates the opportunity to imbed additional, undisclosed fees into "packages" to the detriment of consumers.

Finally, HUD's "closing script" comes too late in the process to help consumers and will add significant time and costs to the closing. Some closing companies have indicated that they will have to add another closing room and double their staff to maintain the current level of closings. This proposal, in particular, is ill-conceived and should be eliminated. It exposes closing agents to charges of the unauthorized practice of law and doesn't explain what alternatives should be used for non-English speaking or hearing-impaired consumers.

This one-size-fits-all requirement also fails to account for various closing models used across the country which cannot incorporate the "closing script" without making fundamental changes to how closings are conducted, e.g. Southern California's escrow model, or by adding prohibitive costs to the closing, e.g. New York's attorney model.

## **THE PROPOSED RULE ATTEMPTS TO LOWER COSTS THROUGH GOVERNMENT-DIRECTED PRICING MECHANISMS**

HUD's proposed rule attempts to lower prices through government-directed pricing mechanisms.<sup>4</sup> HUD's focus on lower prices in the proposed rule ignores the plain intent of Congress that RESPA not be a rate-setting statute. Proposed allowable volume discounts and price tolerances will favor large lenders and firms to the detriment of local, small settlement service providers. HUD's proposed GFE allows lenders to "package" unnamed third party settlement services such as title, title insurance, appraisals and inspections in a lump sum. Undoubtedly, the largest lenders will be able to apply the greatest market pressure on

---

2 A recent FTC study recommended that the YSP and points not be disclosed as too confusing to the consumer. (Comments of the Staff of the Bureau of Consumer Protection, the Bureau of Economics, and the Office of Policy Planning of the Federal Trade Commission, April 8, 2008, In the Matter of Request for Comments on Truth in Lending, Proposed Rule, Docket No. R-1305, p. 14-15)

3 "Each lender shall include with the booklet a good faith estimate of the amount or range of charges for **specific** settlement services the borrower is likely to incur in connection with the settlement as prescribed by the Secretary." 12 USC 2604(*emphasis added*).

4 The proposed rule appropriately makes few changes with regard to the elimination of kickbacks and referral fees. RESPA's Regulation X adequately covers this Congressional purpose and NAR applauds HUD for taking the right steps in recent years to expand enforcement of those anti-kickback provisions.

independent small settlement service providers to reduce their prices in order to be included in the lender's package. We believe that such a move would drive independent small providers out of business and allow these larger in-house providers to then raise prices. Either way, the result will be anti-competitive, reduce consumer choice and be detrimental to small business.

In addition, large lenders will promote HUD's new price tolerances to their advantage. HUD has allowed large lenders to "guaranty" the cost of their packaged services within 10% of the quoted packaged price, while also allowing the large lenders to tell potential borrowers that their competition has no limits on what they can charge and that the charges can change right up to closing without limit.

HUD's proposed pricing mechanisms also ignore the role of value in the real estate transaction. NAR believes most consumers do not shop for a mortgage, settlement services, or any other significant product based on price alone. Many consumers willingly pay more for the kind of enhanced services that ensures the job is done right. While NAR strongly supports HUD's interest in increased competition and lower prices, government's role should be limited to eliminating kickbacks and strong enforcement efforts. HUD's attempt to achieve price reductions through regulation is contrary to the purposes of RESPA, artificially distorts market forces, and can promote low-quality settlement services that are not in the homebuyers' best interest.

The current mortgage market crisis provides the best evidence needed to demonstrate that quality does matter. A thorough and professional appraisal offers assurance of the value of a property. The quality of a loan officer's review of a credit report can mean a borrower gets a better interest rate and/or the most appropriate loan for their circumstances. The quality of a title report helps ensure that the buyer has unencumbered ownership of the property purchased and that title risks to lenders and other parties in the transaction are minimized.

If recent experience has taught us anything, it is that cutting corners in this business has led to shredded family dreams. The mortgages that have been most troublesome for consumers were the cheapest and easiest to close because they included no documents, no income verification and limited appraisals. The proposed rule, with its extra-statutory mechanisms to lower costs, will only encourage the kind of services that have resulted in so many inappropriate mortgages and the problems we continue to see in the mortgage and housing markets.

Creating a system promoting the lowest cost providers as HUD has done with its government-directed volume discounts and price tolerances will favor large lenders and will squeeze quality and local experience out of the system to everyone's detriment. When competition is based on price alone, consumers may receive poor service and more risk.

## **COST & CONFUSION: THE GFE, CLOSING SCRIPT & TILA**

### **A. The Proposed Good Faith Estimate**

Under the proposed rule, a guaranteed GFE will be required *prior* to loan application. While some components of closing costs are predictable, e.g. the origination fee, other components are not. These costs can change from day to day. Lenders will either have to hedge this risk, or issue a new GFE once an application has been received. Either approach will involve costs that are not considered in the Department's estimates.

The Department states that it "hopes" that the four page GFE form – along with its accompanying guarantees – will be delivered to consumers free of charge. Even if this is the case, lenders will undoubtedly seek to recoup their additional costs as part of the origination fee. Originators may also incur additional costs from doing the GFE twice. In the end, such additional costs are likely to be passed through to the consumer.

If, on the other hand, lenders decide to charge for the form, the GFE could actually *decrease* the amount of shopping that occurs – thereby negating the very benefits that the Department is attempting to achieve.

### **B. The Proposed Closing Script**

HUD assumes that reading the closing script will take about 45 minutes of the closing agent's time, which would almost double the amount of time typically required to close a loan. While HUD calculates the cost of this requirement on the settlement agent's part, it makes no attempt to recognize the costs to the other participants at the closing table, including the borrower/buyer, the seller and their respective real estate agents. This oversight could potentially multiple the projected "opportunity costs" by a factor of four or more, raising the projected cost per loan significantly.

The Department also fails to document the alleged benefits that flow from the closing script. By the time the borrower reaches the closing table, it is highly unlikely that he or she will walk away from the transaction unless serious misrepresentations or issues are uncovered. It is more likely that in cases where a variance exists, someone – either the buyer, seller or the real estate agents – will reach into their pocket and pay for an excess that was the responsibility of the loan originator.

In addition, the proposal would have the closing agent act as the consumer's representative but without any ability to control the information being explained. Some have argued that the proposed changes would force the closing agent to assume the role of the "RESPA police." Aside from legal questions regarding whether closing agents, other than attorneys, can play such a role, the requirement would expose the closing agent to additional legal and regulatory risk, which would once again increase the cost of closing.

### **C. RESPA AND Truth in Lending Act Disclosures**

HUD also has more work to do on harmonizing RESPA disclosures with the Federal Reserve Board's TILA disclosures. Harmonization is necessary to make sure the consumer is not confused by two different sets of disclosures which cover some of the same information and which could be interpreted as being inconsistent with regard to when charges must be disclosed and when and by how much they are allowed to change.

### **CONCLUSION**

The proposed rule imposes wholesale changes on the settlement service industry at a time when the troubled housing market can least afford the fundamental changes, inefficiencies, inequities and understated expenses which NAR believes will result<sup>5</sup>. The proposed rule will require the industry to modify existing software programs, assume additional risks associated with mandated tolerance levels on the GFE, and provide additional services (e.g. closing script) that may be of dubious value to the consumer.

NAR believes in better disclosures of mortgage terms and third party settlement services to help consumers understand the products they are buying. NAR also supports the Administration's policy of ensuring a fair and competitive economic system. But we believe that HUD's RESPA reform proposal should be reworked to focus on common sense disclosures while eliminating the volume discount and tolerances provisions.

On May 9, 2008, the White House Chief of Staff, Mr. Joshua Bolten, stated in a memorandum sent to the heads of all executive branch agencies:

The President has emphasized that the American people deserve a regulatory system that ... ensures a fair and competitive economic system .... We need to continue this principled approach to regulation as we sprint to the finish, and resist the historical tendency of administrations to increase regulatory activity in their final months. We must recognize that the burden imposed by new regulations is cumulative and has significant effect on all Americans.... Every regulatory agency and department has a responsibility for continuing to ensure regulations issued in this final year are in the best interests of the American public.

NAR couldn't agree more and urges HUD to listen carefully to Mr. Bolten's good advice. NAR urges all stakeholders involved in this effort to put aside the time constraints of the political

---

<sup>5</sup> NAR is currently studying the 590-page economic analysis provided by HUD in support of the proposed rule. NAR's initial analysis indicates that HUD's estimates of costs are underestimated and that secondary negative effects on small businesses were not considered by HUD. The Department admits that "a new business model is being put in place for the mortgage industry" but dismisses the issue by stating that "It is difficult to provide comments on a market structure that does not yet exist." (Economic Analysis, p. 3-87). And, while the Department spends hundreds of pages justifying its estimates of consumer benefits, the reality is that any such benefits are extremely difficult to quantify.

calendar and focus RESPA reform on clear disclosures formatted to provide simple, clear, and relevant information to consumers. We have the ability to do RESPA reform right and we cannot afford a “good enough” approach.

Thank you for the opportunity to submit comments on the proposed rule to address improving disclosure of mortgage settlement costs.