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 In-Depth Reports

# Please do not kill the RESPA messenger

Column by Howard Lax

I was surprised by comments from attendees at a RESPA reform seminar earlier this year. Most reviews gave the presenters excellent marks, but a few attendees were sorely disappointed that the presenters could not sufficiently answer their questions.

Their disappointment was unexpected, but logical. More attendees are looking to the experts at seminars for "free" legal advice in lieu of hiring attorneys. This, in turn, results in tougher questions. As good as we "experts" are, there is simply too little guidance to confidently answer every question. When we say "I do not know," we really mean that the answer requires us to stretch existing guidance well beyond the bounds of reasonable interpretation.

Statutes and rules may be interpolated and extrapolated, bent, torqued and stretched. Under ideal conditions, statutes are accompanied by an extensive legislative history, which flows naturally into the rule-making process. Rules are preceded by plenty of opportunity to comment. The preambles to rules announce the agency's reasons for accepting or rejecting these comments. These sources help the "experts" extend the rule to new circumstances.

Unfortunately, the U.S. Department of Housing and Urban Development (HUD) threw out 35 years of informal advice and court decisions when it published the RESPA reform rule. Hence, the "experts" have little guidance upon which to base advice for real life situations.

Furthermore, HUD's 10-year path of rule-making has more twists than coastal Highway 1. Consequently, we have plenty of guidance on what nobody liked about HUD's proposals, but very little comment or guidance on the final rule.

HUD attempted to fill this void with informal guidance in the form of Frequently Asked Questions (FAQs), PowerPoint presentations, and e-mail responses to selected questions. Unfortunately, FAQs and public presentations are not rules, and informal guidance is not binding on HUD. Stretching a FAQ beyond its four corners often produces advice that HUD later contradicts. Having been burned more than once, the "experts" are understandably hesitant to respond to questions that are not expressly addressed by HUD FAQs and PowerPoint presentations.

The industry should not hold its breath waiting for further guidance from HUD. Significant changes in personnel were made at the HUD Office of Regulatory Affairs. **Ivy Jackson** moved out of that office, and her former supervisor, **William Matchneer**, is now a senior attorney advisor in the Office of General Counsel working on SAFE Act issues. **Barton Shapiro**, who worked for Jackson, is now doing his and Ivy's

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jobs. Bart reports to **Teresa Payne**, who has a background in Section 8 of RESPA. Rumors of other staff cuts at the Office of Regulatory Affairs were circulating. Consequently, HUD may have issued its final set of RESPA FAQs for the foreseeable future.

This leaves the "experts" with more new questions every day, but few answers. Here is a sampling of issues puzzling title agencies:

Is the second credit report that many lenders will obtain to satisfy Fannie Mae and Freddie Mac new loan quality initiatives disclosed as part of Line 801, Line 805 or a blank line in the 800 section of the HUD-1?

If a property insurance premium is shown on the GFE for a refinance loan (even though this is not required), but no premium is paid at closing, is Line 903 of the HUD-1 left blank or is a "0" shown in the borrower's column, and is hazard insurance included in the comparison table on Page 3 of the HUD-1?

If the lender conducts the closing and charges a closing fee, is the closing fee shown on Line 1102 or is it included in Line 801 of the HUD-1?

If the lender mails closing documents to the borrower for signature, is the notary fee paid by the borrower directly to the notary included in Line 1101 or in Line 801 of the HUD-1?

The borrower applied for a loan to buy a home in a short sale in May 2009. The borrower's purchase offers were rejected for two short sale properties before a purchase offer was accepted. Along the way, the loan officer provided six GFEs to the borrower, alternating between the old and new GFE forms. The most recent GFE form given to the borrower is not complete. Is the old HUD-1 form used at closing or the new HUD-1 form? If the new HUD-1 form is used, which GFE is used to complete the comparison charts on Page 3 of the HUD-1?

In a relocation loan, are costs reimbursed by the employer shown as credits in the 200 section of the HUD-1? Should the title agent revise the HUD-1 after the reimbursement is made to show a credit?

Michigan law (MCL 438.31b) states that most lenders "shall furnish a loan settlement statement to a borrower upon closing of the loan, indicating in detail the charges the borrower has paid or obligated himself to pay the lender or to any other person in connection with the loan." Does this permit the title agent to itemize costs included in Line 801, or should the lender prepare a separate closing statement to satisfy state law (similar to real estate brokers)?

May a HUD-1A Settlement Statement be used when the lender is paying some of the borrower's costs in a refinance loan? Some experts say that only credits tied to the interest rate are included on Line 802 of the HUD-1, and that lender credits not tied to the interest rate are shown in the 200 section, which only exists in the HUD-1 form.

This brings us to the next question: May a lender include some credits in the 200 section if they are not tied to the interest rate, and will this lead to lenders using Line 802 (which has a tolerance) only for discount points, and disclosing any credits in the 200 section (because there is no GFE disclosure and no tolerances for 200 section items)?

The FAQ says that a notation may be added to the HUD-1 to show the points included in Line 801. May a similar notation be added to show the discount points included in Line 802?

May a mortgage broker be fined for preparing an erroneous GFE, or is only the lender fined when the GFE is in error? May a title agent be fined for making an error when preparing the HUD-1?

Split closings (the real estate broker's title agency issues the owner's policy and the lender's title agency issues the lender's policy) are common in Michigan. What does the lender's title agency do if the real estate broker's title agency refuses to reveal the split of the owner's policy premium between the agency and the underwriter?

Do not think for one moment that title agencies have a lock on the list of unanswered issues in RESPA reform. The loan originator list of questions is just as long:

Does acceptance of the GFE by one borrower permit the loan originator to impose fees on the other co-borrower?

What constitutes an "intention to proceed?"

If the lender requires information from the purchase agreement as items necessary to have an application (HUD frowns on requiring a copy of the purchase agreement), but a mortgage broker does not require the purchase agreement, may the lender prepare a separate GFE from the broker, and which GFE is controlling?

How "voluntary" does the request to a borrower for a signed IRS form 4506-T have to be before the GFE is provided?

If the lender requires verifications in a preapproval process and the borrower identifies a property before the preapproval is issued, does the lender have to use any verifications received before the GFE is mailed to prepare the GFE, or may the lender rely upon the statements of the borrower to prepare the GFE, regardless of when verification is received?

If a settlement service provider charges fees well above market rates, may a lender ask the provider to reduce fees. According to Regulation X, high fees are an indication of a possible kickback, but asking a provider that is referred by the lender to reduce fees is also an indication of a kickback.

Is a service provider list included with each revised GFE?

May a loan originator revise its list of providers after providing a GFE?

How does a loan originator determine that a provider is "available?" Is the list of providers based on providers generally available in the area, or must the loan originator know that every provider on the list can perform the services in the specific transaction?

What should a lender do when a borrower revises the application from an investor property to a second home just before closing (and no GFE was previously provided)?

Little advice has been provided for construction loans. The GFE may be revised at least 60 days prior to closing if the loan originator notified the borrower of this option. Does this mean a whole new disclosure is provided, or are there limitations on what may change? What standards should be set to determine the changes? The rule also leaves open the questions of (1) how many revised GFE's can be issued for a construction loan; (2) whether the lender is bound to issue new GFE's when there are changes in circumstance, or whether these changes can be rolled into one new GFE delivered 60 days prior to closing; (3) whether the GFE can be changed for other reasons (*e.g.*, locking in the interest rate) within 60 days of closing; and (4) whether you can extend the closing date for 60 days if you want to change the GFE just prior to closing. Also, there are some off the wall issues, such as whether the borrower may sign a commitment and lock in the loan right after issuing a revised GFE (and provide Truth in Lending disclosures at that time), put an affidavit on record to cloud title and then have the mortgage signed 60 days later.

I am sure that you can add questions to this list. Unfortunately, the "experts" cannot provide concrete answers to these issues with a significant degree of certainty. We only ask that you allow us to do the best we can at these programs, and that you do not shoot the messenger standing at the podium.

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