

Sheshunoff™

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Dear Valued Subscriber:

Enclosed you will find your second 2009 update of *The Mortgage Industry Guide to RESPA*. This update brings your manual current by incorporating significant developments that have occurred in the past several months and enhances the manual by including additional materials.

Regulation X:

- **RESPA FAQs.** On October 7, 2009, HUD issued a set of Frequently Asked Questions on the November 2008 changes to Regulation X, most of which are scheduled to take effect January 1, 2010. This set expanded a previous set of FAQs issued August 13, 2009. The October set is reproduced as Appendix D on the CD included with this update.
- **Required Use Definition.** The Obama Administration decided to leave in place the HUD Regulation X changes published in November 2008, except for the revised definition of “required use,” which was withdrawn for further consideration. The November 17 rule had revised the existing definition of “required use” to “enhance protections for consumers from deceptive mortgage practices that result from certain affiliated business transactions.” After twice delaying implementation of the revised definition, HUD withdrew it on May 15, 2009. According to the Federal Register notice, “HUD remains committed to the RESPA reform goals of the November 17, 2008, final rule and concerned about some of the practices reported by commenters, and will initiate a new rulemaking process on required use.” 74 Federal Register 22,822 (May 15, 2009). HUD concluded that its revised definition did not strike the right balance between HUD’s goals of enhancing consumer protection consistent with the statutory scheme of RESPA and providing needed guidance to industry participants. By leaving in place the prior definition of “required use,” HUD thought the prior definition could be used to address some deceptive referral arrangements, even though it does not achieve the enhanced consumer protections HUD sought with respect to mortgage loans involving affiliated business arrangements. New rulemaking will allow HUD to further refine its regulations on practices prohibited under other RESPA provisions and provide consumers, industry, and other interested members of the public additional opportunity for input into this aspect of RESPA reform. See Chapters 10 and 15.
- **Future of November 2008 Changes.** Some mortgage industry participants remain hopeful that the November 2008 changes to Regulation X will be postponed or withdrawn. On July 1, 2009, a group of trade organizations sent a letter to the Secretary of the Treasury, the Chairman of the Federal Reserve Board, and the Secretary of HUD, urging HUD to withdraw the November 2008 rule and that HUD and the Federal Reserve Board commence a joint rulemaking to produce a single federal disclosure. Section 106 of H.R. 1728, the Mortgage Reform and Anti-Predatory Lending Act, passed by the U.S. House of Representatives on May 7, 2009 but not the Senate, would require HUD to suspend implementation of the November 2008 revisions and require HUD and the Board to, within six months after enactment of the Act, “jointly issue for public comment proposed regulations providing for compatible disclosures for borrowers to receive at the time of mortgage application and at the time of closing.” The regulations would then take effect not later than 12 months after

enactment of the Act. If the Board and HUD were unable to agree on compatible disclosures, the Act would allow them to separately issue regulations.

Enforcement Actions

- ***Illegal Rebating.*** State enforcement actions are often brought under state laws that mirror RESPA requirements. For example, on March 30, 2009, the California Department of Insurance (CDI) announced that it had reached an agreement with Fidelity National Title Company to resolve allegations of the company's illegal rebating activities from 2000 to 2002. Although CDI charged Fidelity with violating the California Insurance Code, similar charges have routinely been alleged by HUD under RESPA. CDI alleged that Fidelity provided printing, miscellaneous gifts, travel, and entertainment, amounting to \$345,000, to various real estate agents and lenders as an inducement for the referral of title insurance business. Fidelity agreed to pay \$345,000 in penalties and \$20,000 to CDI for the reimbursement of attorney fees and costs. "When referrals by Realtors, lenders or homebuilders are driven by kickbacks from title insurers, the consumer's best interests are compromised," said California Insurance Commissioner Steve Poizner. See Chapters 8 and 10.
- ***AfBA Disclosure Failures.*** Failure to disclose affiliated business arrangements (AfBA) can result in suspension from FHA-insured mortgage programs, as demonstrated in a 2009 enforcement action. On June 10, 2009, HUD announced that its Mortgagee Review Board had suspended three lenders based on evidence of serious violations under HUD's regulations. One of the three, Great Country Mortgage Bankers, Inc. (GCMB), was suspended as a result of evidence compiled by HUD that the lender "violated multiple HUD/FHA requirements," including failure to disclose business affiliations between GCMB and real estate and title service providers. HUD noted that the Helping Families Save Their Homes Act President Obama signed on May 20, 2009, granted FHA more authority to keep bad actors out of the FHA programs and provided additional enforcement tools to police those lenders who employ false or misleading marketing tactics. See Chapter 10.

Court Decisions

- ***Earnings Credits.*** A federal district court in Washington granted summary judgment for an escrow company when the plaintiffs brought a class action challenging wire transfer fees imposed by the escrow company when the plaintiffs financed their purchase of a condominium. The plaintiffs also alleged that the escrow company had violated Section 8(a) by accepting earnings credits from the company's affiliated bank lender in exchange for referring business to the bank. *Contos v. Wells Fargo Escrow Co.* See Chapters 8 and 16.
- ***Overcharges.*** The U.S. Courts of Appeals for the Fourth and Eleventh Circuits affirmed the dismissal of Section 8(b) actions, holding that Section 8(b) does not provide a cause of action for excessive fees—that is, charges where a service was performed but the plaintiff feels she was overcharged by the service provider. *Hazewood v. Foundation Financial Group* and *Arthur v. Ticor Title Ins. Co.* See Chapter 8.
- ***More Overcharges.*** A federal district court in the District of Columbia denied a motion to dismiss a Section 8 claim that a lender had charged fees outside the norm for a borrower with the creditworthiness of the plaintiff, and that the excessive fees reflected payment for services not performed. While the factual support underlying the allegations "may be thin," the plaintiff had adequately alleged that the total compensation paid to a mortgage broker was not "reasonably related to the total value of the goods or services actually provided." Likewise, a federal district court in California denied a motion to dismiss a challenge to an allegedly unreasonable yield spread premium. *Palmer v. GMAC Commercial Mortgage* and *Reyes v. Premier Home Funding, Inc.* See Chapters 8 and 12.

- **Statements of Policy on Mortgage Broker Fees.** Two recent decisions applied HUD’s two-pronged test set forth in Statements of Policy 1999-1 and 2001-1 for determining the legality of mortgage broker fees. *Garcia v. Fidelity Mortgage Co.* and *Whitworth v. Fidelity Mortgage Co.* See Chapter 12.
- **Servicing Provisions.** A Section 6 claim was dismissed because, even if the complaint filed to initiate the plaintiff’s lawsuit constituted a qualified written request, the plaintiff could not plausibly allege that the servicer failed to respond to the qualified written request in the same document that contained the qualified written request. *Walker v. Equity Lenders Group.* Another court held that a borrower’s inquiry letter was not a qualified written request because it did not offer any reason for the borrower’s dispute of the amount due. *Pettie v. Saxon Mortgage Services.* See Chapters 14 and 16.
- **Servicer; Escrow Account.** A Pennsylvania state court held that a closing agent was not a “servicer” within the meaning of RESPA, nor was the escrow account used for settlement proceeds and distribution an “escrow account” within the meaning of RESPA. *Dahl v. Ameriquest Mortgage Co.* See Chapter 14.
- **Thin Pleading.** Several courts dismissed thinly pleaded complaints. *Montoya v. Countrywide Bank, Paek v. Plaza Home Mortgage, Inc.* and *Moret v. Select Portfolio Servicing, Inc.* See Chapter 16.
- **Damages Pleading.** Several courts, including the U.S. Court of Appeals for the Eleventh Circuit, dismissed complaints asserting violations of the qualified written request or servicing transfer notice provisions of Section 6 but failing to adequately allege damages, e.g., *Sellers v. GMAC Mortgage Group, Gorham-Dimaggio v. Countrywide Home Loans, Inc., Mamerto v. Deutsche Bank Nat. Trust Co., Hepler v. Washington Mutual Bank,* and *Moret v. Select Portfolio Servicing, Inc.* See Chapter 16.
- **Sufficiency of Pleading.** A California state appeals court reversed a lower courts dismissal of a RESPA claim without leave to amend the complaint. While the complaint was insufficient, its failure was primarily an issue of form, not substance, and the plaintiff should have been granted leave to amend the complaint. *Warkentin v. Countrywide Home Loans.* See Chapter 16.

Other Regulatory Developments

In May 2009, the Federal Reserve Board amended Regulation Z, effective July 30, 2009, to implement the early disclosure provisions contained in the Mortgage Disclosure Improvement Act (MDIA), part of the Housing and Economic Recovery Act of 2008. Among other things, the MDIA expands the early transaction-specific disclosures to closed-end mortgage loans secured by dwellings other than the consumer’s principal dwelling and requires waiting periods between the time early disclosures are given and loan consummation. (Previously, early disclosures were only required for closed-end loans that financed the purchase or initial construction of the consumer’s principal dwelling and were subject to RESPA.) See Chapters 3, 5, and 6.

Our goal with *The Mortgage Industry Guide to RESPA: Compliance, Disclosures, and Procedures* is to help you understand and comply with RESPA requirements. Please let us know how we are doing or if you have suggestions. Call us at 1-800-456-2340, or visit our web site at www.sheshunoff.com.

Sincerely,

Catherine Dillon
Editor