

RESPA RESPA RESPA

Proposed Regulations, Increased Enforcement

MBA's Regulatory Compliance Conference
Washington, DC – September 15, 2008

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I. INTRODUCTION

A. Proposed Regulations

1. HUD casts its net too widely
2. Again tries to cure all ills

I. INTRODUCTION (cont'd)

B. Wrong Time

1. HUD had 6 years to get it right
2. Jackson seeks consensus
3. Rule rushed out March 2008

I. INTRODUCTION (cont'd)

C. Consensus

1. Only consensus . . . uniform dissatisfaction
2. Everybody finds something unworkable about the Rule
 - a. Lenders
 - b. Mortgage Brokers
 - c. Title Industry
 - d. Realtors
 - e. RESPRO
 - f. Builders
 - g. Consumers
 - h. Federal Reserve Board

I. INTRODUCTION (cont'd)

D. Let's Not Forget Congress

1. 243 Congressmen weigh in
2. Want HUD to collaborate with FRB
3. Reconsider impact on small business
4. Rule will hinder rather than help recovery of Housing market

I. INTRODUCTION (cont'd)

E. HUD Response

1. Blows off Congress
2. Insists now is the right time

I. INTRODUCTION (cont'd)

F. Wrong Place

1. Worst Housing market in decades
2. Industry just trying to survive
3. Costs to implement Rule will be staggering

I. INTRODUCTION (cont'd)

G. So What Factor

1. This Administrator leaves office January 2009
2. One-year phase-in period
3. New Administration will want to put their own stamp on reform

II. PREDICTIONS

A. HUD Needs To Save Face

1. Promised Reform
2. Has to do something

II. PREDICTIONS (cont'd)

B. White House Wants Rule

1. Had to have given thumbs up, otherwise Rule would not have been forwarded to OMB

II. PREDICTIONS (cont'd)

C. What Will Rule Look Like

1. RESPA-Lite
2. Good bye to Closing Script
3. Shorter version of GFE
4. Sync-up GFE and HUD-1
5. Permit all settlement service providers to offer volume discounts

II. PREDICTIONS (cont'd)

D. Will It Matter

1. New Administration will have plenty of time to re-write Rule

III. RESPA Enforcement

A. Frustrating Statute

1. Defies business logic
2. Ambiguous
3. Little or no guidance from HUD

III. RESPA Enforcement (cont'd)

B. Enforcement

1. Exploded last 3 years
2. 16-18 staffers and private investigative firm under contract
3. States in the mix
4. Two hotbeds of controversy
 - Marketing Agreements
 - Disgorgement of Profits

IV. MARKETING AGREEMENTS

A. Rule

1. Section 8(a) and 8(b) prohibitions
2. Section 8(c)(2) exemption
3. Two-Part Test
 - actual, necessary, distinct
 - payment commensurate with service

IV. MARKETING AGREEMENTS (cont'd)

B. How Do Marketing Agreements Work

1. Flat fee
2. Official advise from HUD
 - zero, nada, zip

IV. MARKETING AGREEMENTS (cont'd)

C. HUD-OIG Gets Into Act

1. July 2008 releases audit of First Magnus Financial Corp.
 - claims volume incentives
 - not quality incentives

IV. MARKETING AGREEMENTS (cont'd)

D. August 2008 OIG Issues Second Audit

1. Claims First Magnus marketing agreements = kickbacks under RESPA
2. Specifically, OIG criticizes:
 - a. transactionally based payments
 - b. exclusivity
 - c. terminated in short order
 - d. revised semi-annually
 - e. non-compete payments

IV. MARKETING AGREEMENTS (cont'd)

D. August 2008 OIG Issues Second Audit (cont'd)

3. OIG kicks FM when its down
 - company out-of-business
 - not around to refute charges

IV. MARKETING AGREEMENTS (cont'd)

E. Marketing Rules to Live By

1. Never tie fee to number of transactions
2. Exclusivity not per-se violation
3. Length of Marketing Agreement
4. Renegotiating terms

IV. DISGORGEMENT

A. May 2007

1. HUD sues 6 Realtors and Property ID claiming joint ventures to promote Natural Hazard Reports in California violate RESPA
2. HUD claims hazard reports are settlement services

IV. DISGORGEMENT (cont'd)

A. May 2007 (cont'd)

3. Defendants Claim

- not in statute
- not required to close loan
- often paid outside of closing

4. California class-action by consumers

IV. DISGORGEMENT (cont'd)

B. Defendants File Motion to Dismiss

1. Disgorgement not a statutory remedy
2. Injunctive relief only

IV. DISGORGEMENT (cont'd)

C. Court Denies MTD

1. Case of first impression
2. Ultimately Defendants settle class action, make refunds to consumers
3. HUD agrees to dismiss suit

IV. DISGORGEMENT (cont'd)

D. Bottom Line

1. Expect HUD to seek more disgorgement demands
2. Need more guidance, not more enforcement