

Following is a reprint of a letter from the Secretary of the Department of Housing and Urban Development.

To: Mortgage Broker Applicants

Re: Loan Broker services required by HUD in order to justify fees under RESPA.

On February 14, 1995, HUD deviated from its policy of issuing only rules, regulations and interpretations of general applicability and provided two mortgage corporations with an unofficial interpretation relative to the mortgage program they operate. HUD did this, in part, because the interpretive rule it was developing was not likely to be finished in the "near future." While non-binding and providing no protection under section 19(b) of RESPA, the letter provides the first guidance from HUD as to what services justify the payment of a fee relative to the origination of a mortgage loan under Section 8 of RESPA.

The February letter also reaffirms the mere taking of a mortgage application "is not sufficient work to justify a fee under RESPA" and that HUD will look at each fact pattern to determine whether the work alleged was actually performed, whether the services involved were necessary for the transaction, and whether they were "duplicative of services also performed by others."

HUD then listed 14 services normally involved in the origination of a loan, including counseling services, as follows:

- (a) taking information from the borrower and filling out the application;
- (b) analyzing the prospective borrower's income and debt and pre-qualifying the prospective borrower to determine the maximum mortgage that the prospective borrower can afford;
- (c) educating the prospective borrower in the home buying and financing process, advising the borrower about the different types of loan products available, and demonstrating how closing costs and monthly payments would vary under each product;
- (d) collecting financial information (tax returns, bank statements) and other related documents that are part of the application process;
- (e) initiating/ordering VOEs (verifications of employment) and VODs (verifications of deposits);
- (f) initiating/ordering requests for mortgage and other loan verifications;
- (g) initiating/ordering appraisals;
- (h) initiating/ordering inspections or engineering reports;
- (i) providing disclosures (truth-in-lending, good faith estimate, others) to the borrower;
- (j) assisting the borrower in understanding and clearing credit problems;
- (k) maintaining regular contact with the borrower, realtors, lender, between application and closing to appraise them of the status of the application and to gather any additional information as needed;
- (l) ordering legal documents;
- (m) determining whether the property was located in a flood zone or ordering such service; and
- (n) participating in the loan closing.

HUD went on to explain that no RESPA violation would be found if: "the lender's agent or contractor took the application; the lender's agent or contractor performed at least five additional items on the list above; and the fee was reasonably related to the market value of the services that were performed."

However, where an agent or contractor is relying on taking an application and performing only counseling-type services to justify a fee, HUD will look to see that "meaningful counseling", not steering, is provided. In these circumstances, HUD would find no violation if the counseling gave the borrower at least three different lenders; the agent or contractor receives the same compensation no matter which lender's product is selected; and any payment for counseling-type services are reasonably related to the services performed and not based on the amount of business referred to the lender.

In its more recent June letter, HUD has, concluded that the filling out of a loan application is not required to justify a fee where the other services listed are performed and that "filling out a borrower's work sheet" could be "substituted for the act of filling out a mortgage loan application" in the context of one of the mortgage corporation's program.

HUD went on to clarify that if one performs only non-counseling services or a mixture of counseling and non-counseling services (and not solely the five counseling services in the February letter) then HUD's concerns as to steering would be eliminated and no further test would apply to the subject mortgage program. This presumably means that the test of "meaningful counseling: and the three specific tests noted above (loan products from at least three lenders, etc.) would not have to be met.