

Testimony of
Peter J. Birnbaum
President, Attorneys' Title Guaranty Fund, Inc.
on
HUD's Proposal to Reform RESPA

Before the
Subcommittee on Housing and Community Opportunity
Committee on Financial Services
United States House of Representatives
Washington, D.C.

February 25, 2003

Good afternoon. My name is Peter Birnbaum. I am President of Attorneys' Title Guaranty Fund, Inc., an Illinois-based title insurance underwriter. I am here today to speak with you regarding the Proposed Rule, on behalf of the National Association of Bar-Related Title Insurers (NABRTI), the national trade association of title insurance companies and their more than 15,000 attorney agents and law firms engaged in title insurance and settlement services across the country.

There is consensus within both the lending and settlement services industries that the current RESPA rules fail to adequately and appropriately address current conditions. While we agree that the present disclosure requirements are not as effective as was hoped in ensuring that consumers receive accurate, understandable and early disclosure of mortgage loan settlement costs, we are nonetheless gravely concerned that the solution proposed by HUD will worsen, not improve, the current situation. Our concerns are as follows.

First, under the guaranteed packaging proposed by HUD, borrowers would pay a lump sum for "all of the settlement services and charges required to complete your mortgage." There would be no required itemization of charges, services or providers included in the package. Presumably, this is based on the notion that consumers do not care what services they are purchasing, how much they are paying for those services or from whom those services are being purchased. This is not only contrary to our everyday experiences as consumers but it is 180° opposite from the statutory scheme that Congress adopted for RESPA. After weighing various alternatives, including a packaging proposal then called "Lender Pay," Congress determined that full and

complete disclosure was the appropriate course to follow. From our perspective, disclosures to consumers should be strengthened and enhanced, not eliminated.

Second, packaging occurs under the present regulatory regime without the proposed safe harbor from Section 8 liability and truncated disclosures provided in the HUD proposal. While it is not now the primary method of providing services, it does exist. If the concept underlying packaging is valid, we are confident that the marketplace will conclude that it is a “better mousetrap” and its use will become more widespread. There appears to be no compelling reason to force HUD’s version of packaging on the marketplace.

Third, the packaging that does occur today is fundamentally different than the packaging that would occur under the HUD proposal. Under the current regulations, the economic benefits of packaging discounts, or other price preferences, must be passed on to consumers. Packagers or other parties may not retain this money. If they do, it is considered a kickback and Section 8 of RESPA applies. This is not true in the HUD proposal. Packagers would be able to retain any or all of the economic benefits of packaging and not be subject to Section 8 liability if they stayed within the safe harbor created by HUD. Conceivably, none of the supposed benefits of packaging could be passed on to consumers.

Fourth, the HUD proposal does not recognize that buyers and sellers of property across the country have a long history of allocating costs among themselves. In some areas it is customary for sellers to pay the cost of title assurance. In other areas, the parties will split the cost of loan discount points. Transaction by transaction, buyers and sellers are able to negotiate how costs will be allocated. Under the HUD proposal, all of “the charges required to complete the

mortgage” would be incurred by the borrower in the HUD proposed package. As a result, in some areas, the HUD package could significantly increase borrower costs.

Finally, although the Proposed Rule does not explicitly say so, the only way that HUD’s packaging scheme could be implemented would be to preempt the myriad state laws, regulations and rulings that have been developed to protect consumers. Throughout our entire history as a nation, the regulation of real estate and insurance has been primarily the province of our state governments. Most states have a body of law that governs the transfer and/or insuring of real property interests. For example, many states require that all insureds be charged the same premium for the same insurance coverage. This provision is intended to ensure that all insureds are treated fairly and that some are not discriminated against or favored over others. As we understand the HUD proposal, this type of state statute would be preempted in favor of a federal regime that would likely provide widely varying costs to consumers, based only on the amount of “clout” that some larger mortgage lenders may have to get providers to give them discounts. And, of course, all of these costs would be hidden from consumers within the single package price.

While we believe that HUD should be commended for recognizing that the current RESPA statute is not as effective as we all hoped, its proposed solution would not achieve the objectives established by Congress and in fact, in our view, is at odds with those objectives. What do we have to offer as a solution to this difficult problem? We would like to propose several steps.

First, we should recognize that the process of transferring and financing of residential real estate is complicated. There is no single path by which these ends are achieved. We should further

recognize that it is not realistic to assume that HUD will be able to establish and maintain a staff with the breadth of knowledge necessary to stay abreast of the constantly evolving marketplace. We suggest that HUD take advantage of the expertise found in all of the settlement services industries and the consumer movement by forming an advisory body that could act as a resource to the Department. This advisory body could act as a sounding board for HUD staff and a source of suggestions as to how the statute could be managed more effectively.

Second, we suggest that Congress direct HUD to collect and analyze information on settlement costs and practices before suggesting any further significant regulatory changes. Congress has recognized the need for data before making decisions on housing policy. In 1970, it directed HUD and the VA to study settlement costs across the country. The 1972 report of this study was a primary basis for the RESPA statute. Recognizing the need for data, Congress directed HUD in Section 14 of RESPA to report back to Congress on the effectiveness of the statute. In 1979, HUD and its contractors collected and analyzed thousands of HUD-1 forms and conducted hundreds of interviews with consumers and industry representatives. Based on these research findings, Congress elected not to accept HUD's 1983 recommendation to adopt a package regime and, instead, amended the statute in other ways. The key point is that good, solid, empirical information should be the basis for policy making, not anecdote, hunch or pre-conceived notions.

Finally, and most importantly, significant changes to RESPA should be accomplished through the legislative process, not by regulation. Housing is an important sector of our national economy and the foundation of wealth for most families. Changes that would significantly affect how residential properties are transferred and financed warrant careful scrutiny and deliberation.

Congress, and not an administrative agency, should decide whether the statutes it has enacted should be substantially revised. Indeed, the HUD proposals are essentially identical to the proposals contained in the 1998 Joint HUD-Federal Reserve report that made those recommendations as proposals for legislative amendments to RESPA.

On behalf of our members, we would welcome an opportunity to work with all interested parties to revise RESPA in a way that would make the statute more effective in meeting its objectives.

Once again Mr. Chairman, thank you for allowing me to participate in today's hearings. I would be happy to answer any questions you may have.