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REQUEST FOR BLANKET AUTHORITY

FROM: Dennis I. Belcher, Chair, Section of Real Property, Probate and Trust Law

SUBJECT: Proposed Rule on Real Estate Settlement Procedures Act (RESPA); Simplifying and Improving the Process of Obtaining Mortgages to Reduce Settlement Costs to Consumers (the "Proposed Rule")

OBJECTION DEADLINE: May 14, 2003, 12:00 Central Time

PROPOSED SUBMISSION DATE: May 16, 2003, 2:00 Central Time

The Section of Real Property, Probate and Trust Law of the American Bar Association ("ABA") has voted to submit the attached comments to the U.S. Department of Housing and Urban Development ("HUD") in response to HUD's Proposed Rule that seeks to simplify an improve the process of obtaining mortgages to reduce settlement costs to consumers. The Section also has voted to submit these comments to the House Financial Services Committee, the Senate Banking Committee, and the House Small Business Committee.

The Section desires to submit these comments for the purpose of advising HUD (and the congressional committees noted above) of certain issues and concerns the Proposed Rule raises for Section members who are attorney agents for title companies and who are engaged in the real estate practice and title insurance and settlement services across the country. Although the formal comment period has closed, the Section understands that HUD is still receptive to receiving comments from interested parties on this important issue.

The subject matter of the Proposed Rule is within the primary jurisdiction and expertise of the Section's Real Property Division and is not in conflict with any Association policy.

The Executive Committee of the Section of Real Property, Probate and Trust Law adopted the positions set forth in the enclosed comments on May 9, 2003. There is no material interest in the subject matter of this request for blanket authority on the part of any member of the Section's Real Property Division that initiated the proposal or of any member of the Executive Committee that approved the submission of the request by reason of specific employment or representation of clients.

cc: H. Thomas Wells, Jr., Chair, House of Delegates
Ellen Rosenblum, Secretary
Robert D. Evans
Alpha Brady
Bruce Nicholson
All Section and Division Chairs and Staff Liaisons



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May 16, 2003

The Honorable Mel Martinez, Secretary
U.S. Department of Housing and Urban Development
451 Seventh St., SW
Washington, DC 20410

Re: Proposed Rule on Real Estate Settlement Procedures Act (RESPA); Simplifying and Improving the Process of Obtaining Mortgages to Reduce Settlement Costs to Consumers (the "Proposed Rule"); Docket No. FR-4727-P-02; 67 Fed. Reg. 49134 (July 29, 2002)

Dear Secretary Martinez:

We are writing to you regarding the Proposed Rule on behalf of the Real Property, Probate and Trust Law Section of the American Bar Association, and its members who are attorney agents for title companies and who are engaged in the real estate practice and title insurance and settlement services across the country. Recent events have indicated that you may be considering the issuance of a new rule proposal and a re-worked economic analysis. We would encourage you to take those actions. These views are being presented only on behalf of the Section of Real Property, Probate and Trust Law. They have not been approved by the House of Delegates nor the Board of Governors of the American Bar Association and should not be construed as representing the position of the American Bar Association.

There is consensus within both the lending and settlement services industries that the current RESPA rules fail to address current conditions adequately and appropriately. We agree that the present disclosure requirements are ineffective to insure that consumers receive accurate, understandable and early disclosure of mortgage loan settlement costs, making it impossible for them to shop for the best mortgage terms and prices. Nonetheless, we are concerned about the limitations that the Proposed Rule places on consumer choice of settlement and title insurance services and the significant erosion in consumer protection the Proposed Rule will bring about.

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Our biggest areas of concern involve the proposed Guaranteed Mortgage Package Agreement (GMPA) regime. We are concerned that the proposed exemption of the GMPA from the RESPA Section 8 prohibitions exceeds the authority of the Department of Housing and Urban Development and is injurious to the consumer.

Under RESPA, the Secretary may determine that a particular state law is inconsistent with RESPA, but may not reach that determination if the state law gives greater protection to the consumer. A number of state laws provide greater protection, such as those prescribing that fees for title insurance may not be inadequate or discriminatory, that rebates or inducements may not be given by an insurer or an insurance agent to induce the placement of business or that the use of a particular title insurance provider may not be required as a condition to making a mortgage loan. These state law provisions would likely remain in effect without preemption, even if the Proposed Rule were to be adopted with an exemption of the GMPA from the prohibitions of RESPA Section 8. These fundamental consumer protection interests should not be presumed to be abrogated by the actions of a federal agency, but instead should be left for Congress to resolve.

In many jurisdictions across the country, by custom, the seller provides title insurance for the buyer at the seller's expense. Accordingly, the seller selects the settlement services and title insurance provider. The Proposed Rule would have a dramatic and adverse impact on these long-standing procedures and customs. The Proposed Rule would increase the transactional costs to the buyer by requiring the buyer to pay charges customarily paid by the seller and would deprive the seller of choices in providers that sellers have historically enjoyed. The lender would now dictate the package of authorized providers and services even for those portions of the transaction not directly related to the loan. This is but one example of many in which the Proposed Rule gives too much power and authority to the lender to control, limit and direct the entire transaction.

In the Proposed Rule, one of the interesting distinctions between the proposed revised Good Faith Estimate (GFE) and the GMPA regimes is that, in the GFE regime, the lender must pass through to the consumer all of the third-party charges without any mark-up. In contrast, in the GMPA regime, the lender has no obligation to disclose package costs and no obligation to pass through discount prices that the lender may have obtained for those services. We believe it unlikely that competition among lenders will cause any meaningful number or portion of the discounts to be passed on to the consumer, as HUD suggests in its economic analysis of the Proposed Rule. HUD appeared as amicus in three recent federal appellate court cases involving mark-ups of third-party charges, arguing that RESPA prohibits such mark-ups. Two of the cases involved mark-ups by lenders. If lenders mark up third-party charges today without the Section 8 exemption contained in the Proposed Rule, it seems that lenders would be even more inclined to do so with a Section 8 exemption in place. HUD's own experience, then, belies its economic analysis and conclusion that competition under the GMPA regime will prevent mark-ups. It is also ironic that HUD has filed amicus briefs in cases involving mark-ups of third-party charges while proposing a rule that would

allow exactly that.

It seems that lenders are not waiting for adoption of the Proposed Rule with its promised Section 8 exemption for packaging (and not disclosing up-charging). In Kenneth R. Harney's *The Nation's Housing* column published on February 15, 2003, in *The Washington Post*, entitled "Bundled Settlement Fees Attracting Rate Shoppers," he states that "fixed-price, guaranteed packages of closing costs . . ." are "the hottest trend of 2003." Harney mentions a number of lenders that are providing such loans today. Many industry participants have been saying for years that packaging fees is permissible under existing RESPA rules without the necessity of an exemption from Section 8. The difference between what is permissible today and what would be permissible under the Proposed Rule would, of course, be the ability of lenders to up-charge the consumer for the fixed settlement charges the lender negotiates with third-party settlement service providers, without having to disclose the amount or the existence of the up-charge to the borrower.

By eliminating the requirement that all settlement costs be itemized, the GMPA proposal eliminates a core principle of RESPA that consumers are empowered by a full and meaningful disclosure of all services and related charges that are passed on to them at closing. Some lender comments on the Proposed Rule have stated that the consumer has to understand that packager items provided for the loan are for the packager and not the consumer. Thus, disclosure of what services are in the package (and their cost) is not necessary. We do not subscribe to this view. Allowing loan originators to conceal individual service charges invites increased loan costs and prevents consumers from making true price comparisons. HUD has apparently chosen simplicity over disclosure, having pre-determined for consumers that their interests are better served without any disclosure of charges as is currently required.

Although the Proposed Rule states that anyone can be the packager of the GMPA, in reality the lender will be in control of all of the settlement and title insurance arrangements, deciding who will participate and who will not. Small, local, or even regional settlement services providers, lenders and mortgage brokers will be unable to strike bargains and command discount prices like the country's largest banks and lenders will be able to do. No lender will put its required signature on a GMPA without having previously selected and approved the providers it has bargained with and whose prices it will in effect be guaranteeing. Others may offer a package of settlement services (e.g., flood and tax certification, surveys, appraisals and escrow services), but those services will be offered in a discounted package – not to the consumer, but to the lender that will be the ultimate packager and the ultimate decision maker as to who is selected. Far from increasing competition in the mortgage lending and settlement services industry, the Proposed Rule will instead significantly concentrate the business in a few national lenders and their chosen providers. Thus, the Proposed Rule will decrease competition to the ultimate detriment of the consumer. The adverse impact on the local independent business person who provides title insurance and settlement services (whether lawyer or non-lawyer) will be significant.

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The Proposed Rule would have the effect of serving the interests of the large lenders while depriving the consumer of choices, including the selection of counsel of the consumer's choice, because of the economic disincentive to do so that the Proposed Rule would provide.

Various members of the House Financial Services Committee at its hearing on RESPA reform on October 3, 2002, and by the members of the Senate Banking Committee at its meeting on April 8, 2003, expressed a great deal of concern over the issues of "hidden" fees, reduced competition and the negative impact on small businesses including attorney settlement agents. We share the concern of the members of those Committees regarding the reduction of competition, reduction of choice of providers and concentration of control of the entire consumer home loan transaction in a few large, national lenders.

Only those title and settlement services providers that are willing to slash their costs to the lowest levels will be selected for inclusion in lenders' GMPAs. It is doubtful whether consumers will receive the benefit of those cut rates, but they may receive poorer service from providers whose fees are reduced to qualify for the lender's select list. These providers may in turn be beholden to the lender for selecting them to provide services. Their natural inclination will be to satisfy the lender's demands at the expense of the consumer who had no hand in selecting the service providers. The consumer's best interests will not necessarily be well served in such an environment, and the consumer may indeed pay a higher price for services than would be otherwise necessary because of undisclosed mark-ups benefiting the lender. In this scenario, the consumer has no representative to serve his or her interests; the focus is entirely on the lender and its demands and requirements.

The GMPA represents a procedure previously considered and rejected by Congress when RESPA was first adopted in 1974. Since its enactment nearly 30 years ago, Congress has specifically declined to amend the RESPA statute in the manner described in the Proposed Rule. In fact, a disclosure scheme similar to that now being proposed by HUD was contained in the 1974 statute and repealed in 1975 as being unworkable. The proposed exemption of GMPAs from RESPA Section 8 strikes at the heart of the RESPA statute in its attempt to provide meaningful disclosure of settlement charges to the consumer and to minimize the cost of a consumer loan transaction.

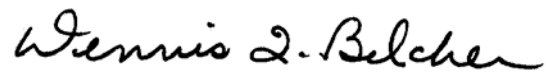
In conclusion, we must express our serious concerns for any rule or regulation that would limit, interfere with or increase the cost to consumers of retaining independent lawyers to provide counseling, closing and title assurance services in residential real estate transactions. The American Bar Association has a long standing position that consumers should have unfettered access to counsel of their choice. This choice is very important in complicated and critically important transactions involving one's home. Buying and selling a home is probably the largest financial investment a person will make in his or her lifetime. It is necessary and appropriate that consumers

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be free to engage lawyers and service providers of their choice, unimpaired by artificially created economic impediments.

Thank you for your consideration of our views.

Very truly yours,

A handwritten signature in black ink that reads "Dennis I. Belcher". The signature is written in a cursive style. To the right of the signature, there is a vertical red line.

Dennis I. Belcher
Chair, Section of Real Property, Probate and Trust Law