

Consumer Financial Services

LAW REPORT

Route to:

Focusing on Significant Caselaw and Emerging Trends

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Fair Housing

Not 'publisher' of discriminatory ads, ISP not liable under FHA

The U.S. Department of Housing and Urban Development, its Federal Housing Administration arm, the Federal Trade Commission, the federal financial institutions' regulatory agencies, and the relevant segments of the consumer financial services industry have been paying a lot of attention to the issues of discriminatory housing practices and related marketing and advertising. HUD's proposed new Real Estate Settlement Procedures Act rules (see article below) are just a singular example of that focus.

So it seems somehow fitting now that the 7th U.S. Circuit Court of Appeals should hand down a decision in favor of an Internet service provider, holding that it did not act as a "publisher" of advertising that violated the discrimination provisions of the Fair Housing Act. (*Chicago Lawyers' Committee for Civil Rights Under Law, Inc. v. craigslist, inc.*, No. 07-1101 (7th Cir. 03/14/08).)

(See **PUBLISHER** on page 6)

Rules and Regulations

HUD proposes RESPA rule changes, seeks civil money penalty power

After several years of false starts, the Department of Housing and Urban Development has published long-anticipated proposed regulations for the Real Estate Settlement Procedures Act. If the proposed rule is adopted, HUD estimates that consumers will save on average \$518 to \$670 per transaction.

Meanwhile, the proposed rules portend some potentially expensive changes surrounding settlement services in the mortgage loan industry. The proposed rule, "RESPA: HUD's Proposed Rule to Simplify and Improve the Process of Obtaining Mortgages and Reduce Consumer Settlement Costs," appears primarily aimed at improving the disclosure of firm and accurate settlement costs on the first page of the Good Faith Estimate in all RESPA transactions.

Perhaps the most significant of the new rules is a requirement for a "GFE application," a standardized form that HUD expects will facilitate the required comparison between the GFE and the HUD-1 and HUD-1A forms at closing. The GFE currently is a suggested addition to settlement procedures, not a requirement. The intent of making the form mandatory, HUD says, is to better ensure compliance with newly created tolerance limitations restricting the differences between esti-

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HMDA-based report spurs Ill. AG to subpoena lenders' records

A magazine's study of the incidence of high-cost home loans made to African-American and Latino borrowers in Chicago spurred the Illinois attorney general to issue subpoenas to two major mortgage lenders. The subpoenas, served on Countrywide Home Loans Inc. and Wells Fargo Financial Illinois Inc., seek a range of information related to home loans that the companies have sold in Illinois.

The subpoenas followed a *Chicago Reporter* magazine study which found that the Chicago area led the country in high-cost home loans for the second year in a row. The study also found marked disparities in loan pricing between white and nonwhite borrowers, with African-American borrowers three times as likely as white borrowers to receive a high-cost home loan, and Latino borrowers twice as likely. The data in the study come from federal Home Mortgage Disclosure Act figures that tracked high-cost home purchase, home improvement, and home refinancing loans nationwide.

The information requested in the subpoenas includes the borrower's race or ethnicity, the cost and features of

the loan, and the location of the residential property. The subpoenas also seek information related to each borrower's creditworthiness, including the borrower's FICO score and debt-to-income ratio. The subpoenas appear as an extension of Attorney General Lisa Madigan's probe into Countrywide's lending practices. In September 2007, Madigan subpoenaed Countrywide to determine whether the company had fraudulently or deceptively placed Illinois homeowners into unaffordable loans.

"The aim of these investigations is to find out the reasons for these pricing disparities and, if those reasons are not based on valid underwriting criteria and creditworthiness, to hold the lenders responsible for their actions," said Madigan. The attorney general explained in a press release that the subpoenas are intended to see whether Countrywide and Wells Fargo "unfairly steered African-American and Latino borrowers into higher cost or otherwise inappropriate home loans in violation of fair lending and civil rights laws."

For more on the *Chicago Reporter* study, go to www.chicagoreporter.com. □

RESPA (continued from page 1)

estimated and actual costs of settlement services. HUD also intends that failure to use the required form will bring substantial penalties.

"The changes are in part a recognition by the 'good guys' who remain in the mortgage business that the process has got to become more transparent to the consumer, or it will get worse," comments Grant Mitchell of Buckley Kolar LLP in Washington. The change to a mandated GFE will be costly in terms of printing new forms, developing new software, educating employees, getting advice from outside counsel, and simply doing the paperwork.

"There might be a challenge to the GFE form under the Federal Administrative Procedures Act," added Mitchell. "There's nothing in the RESPA saying that the GFE has to be a form, so I suspect it will be subject to a challenge."

Other notable changes in the new RESPA proposal are:

- Yield spread premiums will not be distinctly identified in the GFE. Instead, YSPs will be included on the GFE as part of the loan origination charge.

- A requirement that borrowers are given a copy of a "closing script" (the so-called RESPA 'Miranda' notice) that is first read to them. The script explains the final loan terms and settlement costs.

- Clarification of HUD-approved loan discount mechanisms, explaining when RESPA permits volume discounts and average cost pricing that benefit consumers.

- Changing the definition of "required use" to include incentives such as builder/home seller discounts when homebuyers use an affiliated lenders.

- Clarification and updating of escrow account requirements and mortgage servicing transfer provisions.

- Clarification that all RESPA disclosures may be

provided to consumers in electronic form. The proposed rule also will permit electronic storage of documents required to be retained under RESPA.

The proposal does not include the packaging or bundling stipulations that proved controversial in the 2002 and 2005 proposed rules that were not adopted, Mitchell noted. The 2008 HUD version allows a year's transition time for compliance.

The proposed rule includes plans for HUD to seek amendments to RESPA to obtain more enforcement authority. That authority would include civil money penalty authority for violations of RESPA §§ 4 through 10, and the power to further amend current disclosures. The HUD's civil money penalty authority would extend to the provision of a uniform settlement statement, the GFE, and several other areas.

HUD says it will also seek authority for HUD and state regulators to seek injunctive and equitable relief for RESPA violations. Other proposed legislative initiatives include requiring delivery of the HUD-1 settlement statement three days prior to closing, and creating a uniform and expanded statute of limitations applicable to governmental and private actions under RESPA.

"Back when the industry was writing \$3 trillion in loans, there was not a real push to change anything," notes Mitchell. But things have changed since the subprime mortgage meltdown, he adds. "Now that the industry will be writing perhaps \$1.5 trillion in business and everyone's attention is focused on the mortgage situation, there's a different atmosphere."

Comments are due by May 13, 2008.

Find the HUD proposal at edocket.access.gpo.gov/2008/pdf/08-1015.pdf and www.hud.gov/offices/hsg/sfh/res/respa_hm.cfm. □